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NOTE: An Erratum is attached to the end of this document

Federal Communications Commission (F.C.C.)  
Declaratory Ruling and Report and Order

IN THE MATTER OF REGULATION OF PREPAID CALLING CARD SERVICES

WC Docket No. 05-68

[FCC 06-79](#)

Adopted: June 1, 2006

Released: June 30, 2006

**\*\*1 \*7290** By the Commission: Commissioner Adelstein issuing a separate statement.

## I. INTRODUCTION

1. In this *Order*, we take steps necessary to protect the federal universal service program and promote stability in the market for prepaid calling cards. In particular, we will treat certain prepaid calling card service providers as telecommunications service providers.<sup>1</sup> As such, these providers must pay intrastate access charges for interexchange calls that originate and terminate in the same state and interstate access charges on interexchange calls that originate and terminate in different states. They also must contribute to the federal Universal Service Fund (USF) based on their interstate revenues, subject to the limitations set forth below.<sup>2</sup> We also address a petition for interim relief filed by AT&T and adopt interim rules to facilitate compliance with the universal service and access charge rules.<sup>3</sup> Specifically, on an interim and prospective basis, we require all prepaid calling card providers to comply with certain reporting and certification requirements.

## II. BACKGROUND

### A. Proceeding History

2. Prepaid calling cards provide consumers the ability to place long-distance toll calls without presubscribing to an interexchange carrier (IXC) or using a credit card. A calling card customer typically dials a number to reach the service provider's centralized switching platform and the platform then requests the unique personal identification number associated with the card for verification and billing purposes. When prompted, the consumer then dials the destination number and the platform routes the call to the intended recipient. The prepaid calling card is then debited based on the price of the completed call.

**\*7291** 3. On May 15, 2003, AT&T filed a petition for declaratory ruling that intrastate access charges did not apply to calls made using its "enhanced" prepaid calling cards when the calling card platform is located outside the state in which either the calling or the called party is located.<sup>4</sup> AT&T asserted that its cards were "enhanced" because they provided additional information to the calling party in the form of an advertising message provided by the retailer of the card.<sup>5</sup> Accordingly, AT&T contended that the cards provide an information service, rather than a telecommunications service. Because revenues from information services are not subject to universal service assessments under section 254,<sup>6</sup> AT&T did not include revenue from the cards for purposes of calculating its USF contribution. On November 22, 2004, AT&T submitted an *ex parte* letter requesting a declaratory ruling on two additional types of "enhanced" prepaid calling card offerings: one card that offers the

caller a menu of options to access non-call-related information, and a second card that utilizes Internet Protocol (IP) technology, accessed by 8YY dialing, to transport a portion of the calling card call.<sup>7</sup>

**\*\*2** 4. On February 16, 2005, the Commission denied AT&T's May 2003 Petition.<sup>8</sup> The Commission found that the service described in the original petition was a jurisdictionally-mixed telecommunications service and that intrastate access charges apply when a call originates and terminates in the same state.<sup>9</sup> The Commission also required AT&T to file revised Forms 499-A to report properly its prepaid calling card revenue so that the Universal Service Administrative Company (USAC) could accurately calculate AT&T's USF obligation and bill AT&T for the time period during which it offered its prepaid calling cards and did not contribute to the fund.<sup>10</sup>

5. The Commission also adopted a Notice of Proposed Rulemaking (NPRM) to address additional types of "enhanced" prepaid calling cards, including those described in AT&T's November 2004 letter. In the NPRM, the Commission solicited comment on how to apply the *Calling Card Order and NPRM's* analysis to AT&T's two new "enhanced" calling card variations.<sup>11</sup> It also solicited comment "on the extent to which the use of IP technology to deliver calls placed using prepaid calling cards is a relevant factor in determining [a card's] classification under the Act."<sup>12</sup> The Commission also sought comment on how best to regulate any new technologies or innovations in the prepaid calling card services market and whether or not to assert exclusive federal jurisdiction over prepaid calling card services.<sup>13</sup> Finally, the Commission sought comment on how best to ensure reasonable calling card rates **\*7292** for soldiers and their families.<sup>14</sup>

## **B. AT&T's Emergency Petition**

6. On May 3, 2005, AT&T filed a petition seeking the adoption of interim rules pending a final decision by the Commission in this docket.<sup>15</sup> AT&T's Emergency Petition seeks interim rules imposing federal universal service funding obligations on all prepaid calling card services regardless of whether the Commission ultimately decides they are telecommunications services or information services.<sup>16</sup> AT&T also requests that the Commission issue interim rules subjecting all prepaid calling card service providers to the same types of access charges.<sup>17</sup> AT&T proposes two means by which the Commission may ensure parity among all prepaid calling card service providers. First, AT&T proposes that the Commission rule that no prepaid calling card service provider is subject to intrastate access charges.<sup>18</sup> Alternatively, AT&T suggests that the Commission rule that all prepaid calling card service providers are subject to both intrastate and interstate access charges based on the location of the calling and called parties.<sup>19</sup>

7. AT&T states that it filed its Emergency Petition "because there decidedly is not a level playing field for prepaid calling services today."<sup>20</sup> AT&T contends that, rather than protecting universal service, the Commission's *Calling Card Order and NPRM* actually puts the USF at risk.<sup>21</sup> Moreover, AT&T asserts that the *Calling Card Order and NPRM* might cripple competition and greatly disrupt the prepaid calling card market.<sup>22</sup> AT&T argues that the Commission has created regulatory uncertainty and given prepaid calling card service providers "powerful incentives to employ any device that will reduce their exposure to charges, to find ways to evade charges they owe, to exploit regulatory asymmetries and to make any questionable activities in which they engage less visible and less susceptible to effective sanction."<sup>23</sup> AT&T believes that these unintended results highlight the need for the immediate adoption of interim rules.

## **\*7293 III. DISCUSSION**

**\*\*3** 8. We conclude that immediate action in this proceeding is necessary to preserve universal service and provide regulatory certainty while the Commission considers systemic reform in the *Contribution Methodology* and *Intercarrier Compensation* proceedings.<sup>24</sup> Any uncertainty regarding the regulatory requirements applicable to prepaid calling cards creates incentives for

providers to reduce exposure to charges they may owe or evade them altogether.<sup>25</sup> The actions we take in this *Order* will provide a level regulatory playing field for calling card providers, thereby reducing the potential for continued “gaming” of the system. In the absence of these actions, uncertainty regarding applicability of our rules could stifle continued market innovation and encourage providers to adapt their products solely to evade contribution to universal service funding mechanisms. By leveling the playing field for all providers, we hope to encourage efficient development and innovation in the prepaid calling services industry, which has played a vital role in providing telecommunications services to low-income consumers and members of the armed services.<sup>26</sup>

9. We disagree with AT&T's argument that any rules we adopt in response to its petition should be limited to the access charge and universal service contribution issues it raised, and that we should not rule on the classification of particular prepaid calling card services as telecommunications service or information services.<sup>27</sup> We reject AT&T's narrow approach because it would leave calling card providers substantial discretion to determine whether they are subject to numerous requirements outside the access charge and universal service context. Such an approach would not result in a level playing field among prepaid calling card providers, nor would it provide the type of regulatory certainty needed to prevent gaming. We conclude that the better approach is to resolve the classification issues based on the record before us so that there will be no doubt as to the requirements that apply to prepaid calling card providers.

### A. Declaratory Ruling

10. In this *Order*, we address the two prepaid calling card variants described in the *Calling Card Order and NPRM*: (1) menu-driven prepaid calling cards; and (2) prepaid calling cards that utilize IP transport to deliver all or a portion of the call.<sup>28</sup> As we explain below, we find that both types of prepaid calling cards are telecommunications services and that their providers are subject to regulation as telecommunications carriers. In conjunction with the Commission's prior rulings regarding basic prepaid calling cards and prepaid cards with advertising, all prepaid calling card providers will now be treated as telecommunications service providers. In the future, if prepaid calling card providers introduce new and \*7294 different card types that they believe should be classified as information services, they may seek a declaratory ruling, a waiver, or other relief from the requirements that we adopt in this *Order*.

#### 1. Menu-Driven Prepaid Calling Cards

\*\*4 11. As requested in the *Calling Card Order and NPRM*, several commenters described their menu-driven prepaid calling card offerings.<sup>29</sup> In its comments AT&T described its “newly augmented” prepaid calling card service accessed via toll-free, 8YY, dialing. Upon 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.<sup>30</sup> Similarly, MCI's “Golden Retriever” prepaid calling card greets cardholders with a message and the choice to make a telephone call or to access a live operator that can provide directory information, time, reverse directory assistance, hotel and restaurant information, weather forecasts, directions, movie and theater information, stock quotes, sports scores and schedules, and horoscope information.<sup>31</sup>

12. “Telecommunications” is defined as the “transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”<sup>32</sup> “Telecommunications” is thus the unaltered transmission of information. Building on the definition of “telecommunications,” the Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used.”<sup>33</sup> Thus, a “telecommunications service” involves more than the mere transmission of information; it requires the “offering” of pure transmission capability “for a fee directly to the public.”

13. Menu-driven calling cards, such as those described above, are marketed to consumers, in large part, as a transmission service. Each card allows the user, by choosing the appropriate entry from the menu, to have the calling card provider transmit “between and among points specified by the user ... information of the user's choosing, without change in the form or content of the information as sent and received.”<sup>34</sup> These menu-driven prepaid calling cards also may provide the user with an option to access additional information, but the information service features and telecommunications service are not engaged or used simultaneously. Thus, we find that these services are only minimally linked to one another. As noted by Sprint, there is no doubt that these cards are marketed to consumers as a vehicle for making traditional telephone calls. For example, Sprint found that “the packaging materials, in-store \*7295 signage and point-of-purchase materials for AT&T's prepaid cards all explain that the cards enable the user to make telephone calls.”<sup>35</sup> Sprint also notes that AT&T's menu-driven prepaid calling card marketing materials, at that time, did not mention the user's ability to use the prepaid calling card to listen to information unrelated to placing a telephone call.<sup>36</sup>

\*\*5 14. Menu-driven prepaid calling cards are just one example of the recent proliferation of bundled services that offer both telecommunications and information service capabilities. The classification difficulty caused by bundled services was discussed in the Commission's 1998 Report to Congress on universal service.<sup>37</sup> In that report, the Commission observed that the relevant question is whether an entity is providing a “single information service with communications and computing components” or “two distinct services, one of which is a telecommunications service.”<sup>38</sup> In its recent *Brand X* decision, the Supreme Court made a similar distinction, stating that the key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications transmission capability is “sufficiently integrated” with the information service component “to make it reasonable to describe the two as a single, integrated offering.”<sup>39</sup> Both the Commission and the Court made clear that merely packaging two services together does not create a single integrated service. In the *Universal Service Report to Congress*, for example, the Commission found that a packaged offering of local telephone service and voice mail should be treated as separate services.<sup>40</sup> Expanding upon this reasoning, the Court in *Brand X* made clear that a telephone company that packages residential local exchange service with voice mail is offering a “transparent transmission path -- telephone service -- that transmits information independent of the information-storage capabilities provided by voice mail.... [W]hen a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability.”<sup>41</sup> Similarly, the Court stated that, “were a telephone company to add a time-of-day announcement that played every time the user picked up his telephone, the ‘transparent’ information transmitted in the ensuing call would be only trivially dependent on the information service the announcement provides.”<sup>42</sup>

15. Although it may be difficult at times to determine whether a service bundle is “sufficiently integrated” to merit treatment as a single service, that is not the case here. As with the packaged offerings described by the Commission in the *Universal Service Report to Congress* and the Court in *Brand X*, there simply is no functional integration between the information service features and the use of the telephone calling capability with menu-driven prepaid calling cards. The menu is a mechanism by which the customer can access the separate capabilities that are packaged together in a single prepaid calling card. The customer may use only one capability at a time and the use of the telecommunications \*7296 transmission capability is completely independent of the various other capabilities that the card makes available. For example, an individual may use MCI's Golden Retriever card to make a long distance call without obtaining restaurant information, sports scores, or stock quotes from the operator or otherwise accessing the information made available with the card. That card and other menu-driven prepaid calling cards are offered to consumers, in large part, as a separate and distinct telecommunications service that is packaged with additional capabilities. But even if those additional capabilities are classified as an information service, the packaging of these multiple services does not by itself transform the telecommunications component of these cards into an information service. The circumstances here thus are markedly different from those the Supreme Court considered in its finding that an offering of cable modem service does not include a separate telecommunications service offering because the telecommunications input used to provide that service “is not ‘separable from the data-processing capabilities of the service’ and is instead ‘part and parcel of [the information service] and is integral to [the information service's] other capabilities.’”<sup>43</sup>

**\*\*6** 16. Our finding here is consistent with the Commission's conclusions in the *Calling Card Order and NPRM*. The prepaid calling card services we address in this *Order* offer consumers the ability to make telephone calls, just like the AT&T card that the Commission addressed in the *Calling Card Order and NPRM*.<sup>44</sup> Just as the Commission found in that order that the addition of an advertising message does not convert a telecommunications service into an information service, we now find that the addition of an option to access other types of information does not convert the telecommunications service offered by these prepaid calling cards into an information service for regulatory purposes, even if standing alone the information processing capability would meet the statutory definition of an information service. In short, these menu-driven calling cards offer customers a telecommunications service that enables them to make telephone calls, and the ability to obtain sports scores, stock quotes, and other information through the same card does not alter that conclusion.

17. IDT argues that the services at issue here are different than the ones addressed by the Commission in the *Calling Card Order and NPRM* because they clearly include an element of subscriber interaction.<sup>45</sup> According to IDT, this makes these calling card services more like the service the Commission found to be an information service in the *Talking Yellow Pages* case.<sup>46</sup> We disagree. The service at issue in *Talking Yellow Pages* consisted of the ability to access various types of information via telecommunications and did not include the ability to make phone calls.<sup>47</sup> In contrast, the menu-driven prepaid calling cards discussed above offer telecommunications services.

#### **\*7297 2. Prepaid Calling Cards that Utilize IP Technology**

18. In the *IP-in-the-Middle Order*, the Commission addressed AT&T's use of IP technology to transport interexchange telephone calls dialed on a 1+ basis.<sup>48</sup> The Commission found that "an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology" is a telecommunications service.<sup>49</sup> The Commission limited its ruling in the *IP-in-the-Middle Order* to calls that meet all of the above criteria and are placed using 1+ dialing.

19. In its November 2004 filing, AT&T stated that it had developed a new prepaid calling card that uses IP technology to transport part or all of the call.<sup>50</sup> AT&T requested a ruling that this service was not a telecommunications service because it did not use 1+ dialing and therefore was not like the service addressed in the *IP-in-the-Middle Order*. In the *Calling Card Order and NPRM*, the Commission did not decide the appropriate classification of this new calling card variant, but instead requested comment on how such an offering should be classified.<sup>51</sup> AT&T reiterated its position that these cards should be treated as information services. Other parties, however, argue that the Commission's analysis in the *IP-in-the-Middle Order* applies equally to the card described by AT&T and other cards that use IP transport.<sup>52</sup> Other commenters state that the absence of 1+ dialing is inconsequential to the regulatory status of a prepaid calling card.<sup>53</sup>

**\*\*7** 20. Other than the use of 8YY dialing instead of 1+ dialing, prepaid calling cards that use IP transport appear to be identical to the services addressed by the Commission in the *IP-in-the-Middle Order*. We see no reason why the use of a different dialing pattern to make calls, without more, should result in a different regulatory classification. These cards are used to originate calls on the circuit-switched network using standard customer premises equipment, factors that the Commission previously has used to distinguish telecommunications services from information services.<sup>54</sup> Consequently, we find that the use of IP transport in the provision of a prepaid calling card service does not alone convert that service from a telecommunications service to an information service.

#### **\*7298 B. Report and Order**

21. As a result of our finding that providers of the two types of prepaid calling cards described in the previous section offer telecommunications services, these providers are now subject to all of the applicable requirements of the Communications Act

and the Commission's rules, including requirements to contribute to the federal USF and to pay access charges. In this section, we set forth some additional requirements that will apply, at least on an interim basis, to all prepaid calling card providers. We find that these interim requirements are necessary to provide regulatory certainty and ensure compliance with our existing access charge and USF contribution requirements while we consider broader reform of those rules.<sup>55</sup>

## 1. USF Contributions

22. As noted above, all prepaid calling card providers must contribute to the federal USF based on interstate and international telecommunications revenues.<sup>56</sup> IDT argues that it will be difficult to implement this USF contribution requirement because it is not possible to determine, at the time of purchase, the relative extent to which a card will be used to access enhanced services, as opposed to merely placing a telephone call.<sup>57</sup> The Commission's existing rules already address this type of situation however. The Commission has established two safe harbors for use by carriers that offer retail packages that bundle interstate telecommunications services with other services (e.g., basic phone service and voice mail).<sup>58</sup> A carrier may elect to treat all bundled revenues as telecommunications revenues or it may report revenues from the bundled offering based on the unbundled service offering prices, with no discount allocated to the telecommunications service.<sup>59</sup> Prepaid calling card providers may avail themselves of these safe harbors; should they choose to forego these safe harbors, they must be prepared to defend the allocation method they use in an audit or enforcement context.<sup>60</sup>

23. In the *Calling Card Order and NPRM*, the Commission noted that military personnel rely heavily on prepaid calling cards and asked what steps, if any, it should take to ensure that such cards remain reasonably priced.<sup>61</sup> The Department of Defense (DoD) filed comments in this proceeding explaining that any increase in the cost of calls would negatively affect soldiers and their families.<sup>62</sup> In its Emergency Petition, AT&T suggests that we exempt prepaid calling cards "sold by, to, or on behalf of \*7299 military exchanges or the Department of Defense" from USF contribution requirements.<sup>63</sup> Several commenters oppose any military exemption, contending that an exemption is unnecessary because some prepaid calling card service providers that make USF contributions are nevertheless able to offer their cards at competitive prices.<sup>64</sup>

**\*\*8** 24. Based on the record in this proceeding, we find that an exemption from the contribution requirement for calling cards sold by, to, or pursuant to contract with DoD or a DoD entity will serve the public interest. While the effect of the USF contribution requirement on the price of a calling card is a decision that is properly left to each provider and its individual business strategy, the military exemption proposed by AT&T should help ensure that our soldiers are able to obtain calling cards at reduced prices. Accordingly, we forbear from applying section 254(d) to the extent necessary to implement the exemption from USF contribution obligations for prepaid calling cards sold by, to, or pursuant to contract with DoD or a DoD entity, on an interim basis while the Commission decides other USF contribution issues in its *Contribution Methodology* proceeding.<sup>65</sup>

25. We find that this exemption easily meets the three-pronged forbearance standard contained in section 10(a). First, mandatory USF contribution, with respect to these cards, is not necessary to ensure that rates for any service are reasonable and nondiscriminatory.<sup>66</sup> While the benefit of this narrow exemption may be significant for soldiers and their families, the consequence for all other consumers in terms of increased USF contributions should be minimal. Second, such enforcement is not necessary for the protection of consumers.<sup>67</sup> The exemption is available only to prepaid calling cards sold by, to, or pursuant to contract with DoD or a DoD entity and does not directly affect retail rates. As noted above, the only effect on consumers generally might be a minimal increase in the USF contribution associated with other retail services. Third, forbearance clearly serves the public interest.<sup>68</sup> The potential benefits of this exemption (such as maintaining affordable long distance calling options for members of the U.S. military) far outweigh any potential costs. Moreover, because the exemption will be available to any prepaid calling card provider that sells cards by, to, or pursuant to contract with DoD or a DoD entity, the exemption will promote competitive market conditions pursuant to section 10(b) of the Act.<sup>69</sup> As such, we find that this exemption meets the three-prong test under section 10(a) and that forbearance is appropriate.



26. Commenters have raised questions about how to implement this exemption. For example, GCI questions how to separate and track the cards sold by, to, or pursuant to contract with DoD or a DoD entity, and points out that AT&T, in its Emergency Petition, has not provided any suggestions for doing so.<sup>70</sup> GCI also questions how anyone can be certain that the exempt cards will be used only by military \*7300 personnel and their families.<sup>71</sup> We do not think implementation of the military exemption will be as difficult as GCI suggests. The exemption covers only cards sold by, to, or pursuant to contract with DoD or a DoD entity, not cards sold to soldiers at non-military retail outlets. The revenue attributable to these military contracts should be relatively easy for carriers to identify and exclude from the calculation of their USF contribution. This approach is both administratively feasible and sufficiently refined to produce the intended benefits for members of the armed forces.

## 2. Access Charges

\*\*9 27. As a result of this *Order*, 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.<sup>72</sup> As noted above, the Commission previously has found that these same access charge obligations apply to basic prepaid calling cards and prepaid calling cards with unsolicited advertising.<sup>73</sup> AT&T has expressed concern about how to distinguish the interstate and intrastate uses of calling cards for access charge purposes.<sup>74</sup> Other parties also have questioned the logistics of requiring all prepaid calling card service providers to pay intrastate and interstate access charges. For example, IDT suggests that providers would have to require users to call different telephone numbers to place intrastate and interstate calling card calls, a solution IDT believes is impractical.<sup>75</sup>

28. As with other services that require the caller to dial an access number, the assessment of interstate and intrastate access charges based on the location of the called and calling parties can be complicated with respect to prepaid calling card traffic because the caller initially dials the 8YY number associated with the calling card platform and only later dials the number of the called party. As a result, 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. Moreover, unless the calling party number (CPN) is passed, the terminating carrier will face a similar problem.

29. We believe that these complications can be addressed through certification and reporting requirements that compel the prepaid calling card provider to share the necessary information with the carriers that it uses to transport traffic to and from the platform. In its Emergency Petition, AT&T proposes that any interim rules include “(1) reporting requirements that will require prepaid calling card providers to disclose the total number of long distance minutes provided each month, and the total number of interstate long-distance minutes provided each month; and (2) certification requirements that confirm that providers are complying with the Commission’s interim rules.”<sup>76</sup> In subsequent *ex parte* \*7301 filings, AT&T provided additional detail about its suggested certification and reporting requirements.<sup>77</sup> AT&T suggests, for example, that every prepaid calling card provider submit to the Commission, on a quarterly basis, a certification signed by a company officer under penalty of perjury.<sup>78</sup> AT&T also suggests the Commission require each prepaid calling card provider to certify its interstate, intrastate and international calling card minutes and revenues, that it is passing CPN, that it is paying the appropriate USF obligations (except on revenue from cards sold by, to, or pursuant to contract with DoD or a DoD entity), and that it is correctly reporting PIU.<sup>79</sup>

\*\*10 30. Some parties also state that AT&T’s request is not in the public interest due to the burden on carriers associated with the additional financial and compliance obligations that AT&T seeks.<sup>80</sup> For example, IDT takes issue with AT&T’s proposed certification and reporting interim rules.<sup>81</sup> It contends that the proposed requirements will prove costly to the industry and, in turn, costly to consumers.<sup>82</sup> IDT also states that it is irresponsible of AT&T to suggest such requirements without providing

information on potential consequences.<sup>83</sup> Conversely, GCI supports the imposition of certification and reporting requirements, although it argues that the specific requirements proposed by AT&T are not stringent enough to deter misconduct.<sup>84</sup>

31. We find that certain certification and reporting requirements are necessary to ensure compliance with our existing access charge rules. We agree with AT&T that such requirements will promote transparency in the prepaid calling card market and that, absent such requirements, calling card providers and their underlying carriers would have the incentive and the ability to avoid intrastate access charges.<sup>85</sup> Although IDT is correct that similar issues have been raised in connection with other types of traffic in the intercarrier compensation rulemaking proceeding,<sup>86</sup> the record in this proceeding supports the imposition of requirements on calling card providers on an interim basis.<sup>87</sup> We share IDT's concern, however, that such requirements not be unduly burdensome. Consequently, we will adopt a more limited set of requirements than proposed by AT&T. In particular, while AT&T's proposal would require calling card providers to make certifications regarding actions of other carriers, the requirements we **\*7302** adopt here require calling card providers to certify only with respect to their own activities. As with any other service subject to the Commission's rules, if prepaid calling card providers do not comply with these rules they will be subject to the Commission's enforcement authority, including complaints and forfeitures.<sup>88</sup>

#### **a. Reporting to Other Carriers**

32. In a standard interexchange call, the CPN will be passed as part of the SS7 signaling message, and the carriers involved in the call should be able to determine the jurisdiction based on a comparison of the calling and called party telephone numbers.<sup>89</sup> In situations when traffic is exchanged with missing or inaccurate CPN information, carriers generally rely on the use of percentage of interstate usage (PIU) factors to determine the percentage of interstate versus intrastate minutes. The Commission has long endorsed the use of PIUs to determine the jurisdictional nature of traffic for access charge purposes.<sup>90</sup> For example, in their tariffs, LECs require IXCs to report PIUs to identify the percentage of interstate traffic on interconnection trunks.<sup>91</sup>

33. We conclude that these same basic tools -- CPN and PIU factors -- should be used for calling card traffic. Prepaid calling card providers are subject to the Commission's rules on the passing of CPN.<sup>92</sup> Under these rules, carriers that use SS7 are required to transmit the CPN associated with an interstate call to interconnecting carriers. In the context of prepaid calling card calls, we interpret this to mean that carriers must pass the CPN of the calling party (i.e., the number associated with the telephone used by the cardholder) and not replace that number with the number associated with the platform.

**\*\*11** 34. For similar reasons, we prohibit carriers that serve prepaid calling card providers from passing the telephone number associated with the platform in the charge number (CN) parameter of the SS7 stream. In response to AT&T's proposal, Verizon explains that industry standards provide for the use of CN, when it is signaled, rather than CPN in the creation of intercarrier billing records and that use **\*7303** of the CN associated with the platform provider, rather than the caller, would lead to inaccurate billing records.<sup>93</sup> AT&T argues, however, that the carrier serving the platform provider needs the platform provider's CN for retail billing purposes.<sup>94</sup> AT&T also argues that CN is not a reliable indicator of the originating location of the call and that it should not be used by the terminating carrier.<sup>95</sup> Because industry standards allow for the use of CN to populate carrier billing records, we agree with Verizon that passing the number of the calling card platform in the CN parameters of the SS7 stream to carriers involved in terminating a call may lead to incorrect treatment of the call for billing purposes.<sup>96</sup> We conclude, therefore, that carriers that serve prepaid calling card providers may not pass information regarding the calling card platform in the CN parameters in the SS7 stream. This approach properly balances the need for accurate intercarrier billing records with the need of some carriers to use CN for their own retail billing purposes. Compliance with the above rules should solve many of the current issues related to the jurisdiction of calling card calls, at least on the terminating end of such calls.

35. We also require prepaid calling card providers to report PIU factors to those carriers from which they purchase transport services.<sup>97</sup> Specifically, a prepaid calling card provider must report prepaid calling card PIU factors, and call volumes on



which these factors were calculated, based on not less than a one-day representative sample. These factors must be computed separately for originating and terminating traffic on a state-specific basis. This information must be provided to the transport provider no later than the 45th day of each calendar quarter. The transport provider may use the reported PIU in calculating any PIU factors it reports to LECs, and it may disclose the reported PIU upon request of such LECs.

36. If the prepaid calling card provider fails to provide the appropriate PIU information to the transport provider in a timely manner, the transport provider may treat the prepaid calling card provider's traffic as subject to a 50 percent default PIU. Notwithstanding evidence presented by IDT showing a lower percentage of intrastate traffic,<sup>98</sup> we believe a 50 percent default factor will provide the necessary incentive for carriers to comply with the PIU reporting requirements. At the same time, given the likelihood that prepaid calling cards will be used primarily for interstate and international calls, we find that a default presumption that 50 percent of traffic is jurisdictionally intrastate is more reasonable than GCI's proposal that transport providers be permitted to assume that 80 percent of traffic is jurisdictionally intrastate.<sup>99</sup> The transport provider may notify any originating or terminating LEC that it has applied the default PIU to the prepaid calling card provider's traffic for that reporting period. A transport provider also may audit the PIU reports it receives from a calling card provider if it has a reasonable basis to believe that such reports contain inaccurate or misleading data. We find that the use of a default PIU and the ability to audit are reasonable means by which to protect underlying transport \*7304 providers (who themselves may be subject to comparable requirements under LEC access tariffs) and encourage the timely submission of accurate information by prepaid calling card providers.

\*\*12 37. Commenters disagree over whether the jurisdiction of calls that end at a calling card platform should be determined based on PIU factors or based on a comparison of the CPN and the platform number.<sup>100</sup> We agree with AT&T and IDT that the platform number should be considered the called party number if the caller does not attempt to make a call to a third party. In this scenario, the caller is completing a call to the platform and there would seem to be no reason to resort to a PIU factor.<sup>101</sup>

#### **b. Certification to the Commission**

38. We believe that the exchange of information among carriers, as described above, should be sufficient to resolve most issues related to the assessment of access charges with respect to prepaid calling card traffic. To reduce further the incentive for carriers to report false or misleading information, however, we also require prepaid calling card providers to file certifications with the Commission. On a quarterly basis, every prepaid calling card provider must submit a certification, signed by an officer of the company under penalty of perjury, stating that it is in compliance with the reporting requirements described above. The certification also should include the percentage of interstate, intrastate, and international calling card minutes for that reporting period.

39. Each prepaid calling card provider also must certify the percentages of total prepaid calling card service revenues (excluding revenue that is exempt under the military exemption adopted above) that are interstate and international and therefore subject to federal universal service assessments for the reporting period.<sup>102</sup> Finally, the certification must include a statement that the company is making the required contribution based on the reported information.

40. Certifications will be due on a quarterly basis and may be filed in this docket (WC Docket No. 05-68) using the Commission's Electronic Comment Filing System. The first provider certifications are due the last day of the first full calendar quarter after OMB approval of this requirement.

#### **C. Effect of this Order**

41. In contrast to the new reporting and certification rules we adopt in this *Order*, which we will apply to all prepaid calling card providers on a prospective basis,<sup>103</sup> our decision to classify prepaid calling cards that use IP transport and menu-driven prepaid calling cards as telecommunications services is a declaratory ruling, which is a form of adjudication.<sup>104</sup> Generally,

adjudicatory decisions are applied \*7305 retroactively when they involve “new applications of existing law, clarifications, and additions.”<sup>105</sup> Retroactivity will be denied, however, when applying the decision to past conduct or to prior events would work a “manifest injustice.”<sup>106</sup> The classification decisions that we are making here fall into the category of new applications of existing law, clarifications, and additions. Consequently, in deciding whether to apply our decisions retroactively, we must determine whether retroactive application would result in a manifest injustice. As we explain below, we see no reason to depart from the general rule with respect to calling cards using IP transport, but we decline to give retroactive effect to our ruling on menu-driven cards to avoid a manifest injustice.

**\*\*13** 42. The D.C. Circuit has enunciated a non-exhaustive list of five factors to consider when determining whether retroactive application of an adjudicatory decision is appropriate. Those factors are:

- (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.<sup>107</sup>

Ultimately, these factors “boil down ... to a question of concerns grounded in notions of equity and fairness.”<sup>108</sup> In the paragraphs that follow, we consider these factors with respect to our classification of calling cards that use IP transport and menu-driven calling cards.

43. Applying these factors to prepaid calling cards that use IP transport functionality but are not menu-driven, we conclude that the retroactive application of our classification decision to these cards is appropriate. These calling cards offer the customer no capability to do anything other than make a telephone call, and therefore they are just like basic prepaid calling cards that the Commission always has treated as telecommunications services.<sup>109</sup> Just as the Commission found in the *Calling Card Order and NPRM* that the addition of unsolicited advertising was insufficient to justify an expectation that the service would be treated as an information service and that, therefore, retroactive application was \*7306 warranted,<sup>110</sup> in this *Order* we make a similar finding with respect to calling cards that use IP transport but provide the caller with no additional capabilities. Moreover, the Commission previously found, in the *IP-in-the-Middle Order*, that the use of IP transport, without more, did not change the regulatory classification of the service at issue.<sup>111</sup> That decision provided ample notice that merely converting a calling card call to IP format and back does not transform the service from a telecommunications service to an information service, and, consequently, it undermines any alleged reliance by prepaid card providers on any contrary interpretation of our rules.<sup>112</sup> Thus, our decision in this *Order* is not a “departure from well established practice,” and retroactive application does not result in a “manifest injustice.”

44. We disagree with the suggestion of some commenters that, because the Commission issued an NPRM, any rulings in this proceeding should have prospective effect only.<sup>113</sup> AT&T first sought guidance from the Commission regarding menu-driven and IP-in-the-middle calling cards in a letter request for declaratory ruling it submitted prior to issuance of the NPRM.<sup>114</sup> The fact that the Commission subsequently solicited comment on the proper classification of these cards in an NPRM, rather than a public notice regarding the AT&T *ex parte* letter, does not change the adjudicatory nature of the statutory interpretation decisions we reach, nor does it somehow transform these classification decisions into rulemaking decisions.<sup>115</sup> Our approach here is similar to the approach the Commission took in its decision classifying cable modem service as an information service, which was a declaratory ruling based on a record developed in response to a Notice of Inquiry.<sup>116</sup>

**\*\*14** 45. We reach a different conclusion, however, with respect to menu-driven prepaid calling card services. In the NPRM section of the *Calling Card Order and NPRM*, the Commission sought comment on the proper treatment of menu-driven prepaid

calling cards because of the complexities raised by calling card providers that bundle both telecommunications and information services and make them \*7307 accessible through a computer-based menu.<sup>117</sup> Unlike the case of cards using IP transport, the Commission's prior decisions did not clearly point in the direction of treating providers of menu-driven prepaid calling cards as telecommunications carriers.<sup>118</sup> Indeed, during the pendency of this proceeding, the Supreme Court released the *Brand X* decision, which informs the Commission's analysis in this *Order*.<sup>119</sup> Given the lack of clarity in the law on this issue, both before and as a result of the NPRM, we are concerned that retroactive application of this *Order* to menu-driven prepaid calling cards would be so unfair to providers of such cards as to work a "manifest injustice." For example, we recognize that retroactive application of our decision would be burdensome for menu-driven prepaid calling card providers, in that the decision subjects them to access charges, Universal Service Fund contribution obligations, and the full panoply of Title II obligations.<sup>120</sup> We also recognize that, given the state of the law at the time, parties may have relied on the assumption that they would not be subject to these burdens. For these reasons, we conclude that our decision that menu-driven calling cards offer telecommunications services and that their providers are subject to regulation as telecommunications carriers shall have prospective effect only.<sup>121</sup>

46. To give prepaid calling card providers sufficient time to implement this new regulatory regime, this *Order* will take effect 90 days after it is published in the Federal Register. The certification requirements set forth in paragraphs 38 and 39 are effective according to the timeframe outlined in paragraph 40.

#### IV. PROCEDURAL MATTERS

##### A. Certification Filing Procedures

47. Pursuant to section 64.5001 of the Commission's rules, all prepaid calling card providers shall file the quarterly reports described above in WC Docket No. 05-68. The first certification reports are due the last day of the first full calendar quarter after the effective date of this item and OMB approval of this requirement. Certification reports may be filed using the Commission's Electronic \*7308 Comment Filing System (ECFS) or by filing paper copies.<sup>122</sup> Certification reports filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. Only one copy of an electronic submission must be filed in a single docket. On completing each transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case, WC Docket No. 05-68. Parties may also submit an electronic report by Internet e-mail. To get filing instructions for e-mail reports, reporters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form." A sample form and instructions will be sent in reply. Parties are strongly encouraged to file their certification reports electronically using the Commission's ECFS.

\*\*15 48. Parties who choose to file by paper must file an original and four copies of each filing. Paper filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners, and any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

49. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send one copy of their filings to the Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 12th Street, SW, Washington, D.C. 20554. In addition, parties should send one copy to the Commission's copy contractor, Best Copy and

Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554 (202) 488-5300, or via e-mail to [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

50. Documents in WC Docket No. 05-68 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com). Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau, at (202) 418-0531, TTY (202) 418-7365, or at [fcc504@fcc.gov](mailto:fcc504@fcc.gov).

## B. Final Regulatory Flexibility Analysis

51. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>123</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Order and Notice of Proposed Rulemaking* in WC Docket Nos. 03-133 and 05-68.<sup>124</sup> The Commission sought written public comment **\*7309** on the proposals in the *Order and Notice of Proposed Rulemaking*, including comment on the IRFA.<sup>125</sup> We received no comments specifically directed to the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>126</sup>

### a. Need for, and Objectives of, the Report and Order

**\*\*16** 52. On May 15, 2003, AT&T filed a petition for declaratory ruling that intrastate access charges did not apply to calls made using its “enhanced” prepaid calling cards when the calling card platform is located outside the state in which either the calling or the called party is located.<sup>127</sup> On November 22, 2004, AT&T submitted an *ex parte* letter requesting a declaratory ruling on two additional types of “enhanced” prepaid calling card offerings: one card that offers the caller a menu of options to access non-call-related information, and a second card that utilizes Internet Protocol (IP) technology, accessed by 8YY dialing, to transport a portion of the calling card call.<sup>128</sup>

53. On February 16, 2005, the Commission released a *Report and Order and Notice of Proposed Rulemaking* denying AT&T's petition and requiring it to contribute to the federal Universal Service Fund based on its interstate prepaid calling card revenue.<sup>129</sup> The *NPRM* portion of that item sought comment on the appropriate regulatory treatment of AT&T's additional prepaid calling card types and any other current or planned prepaid calling card offerings.<sup>130</sup> On May 3, 2005, AT&T filed an Emergency Petition for Interim Relief asking the Commission to impose federal universal service funding obligations on all prepaid calling card providers regardless of whether the cards offer telecommunications or information services.<sup>131</sup> AT&T's Emergency Petition also requested that the Commission issue interim rules subjecting all prepaid calling card providers to the same types of access charges.<sup>132</sup>

54. In this *Order*, we find that providers of the types of cards upon which the Commission sought comment in the *NPRM* offer telecommunications services. Consequently, providers of these types of prepaid calling cards will be treated as telecommunications carriers and therefore must pay access charges, contribute to the Universal Service Fund, and comply with all the other applicable obligations under the Communications Act and the Commission's rules.<sup>133</sup> Prepaid calling card providers that use SS7 must pass the CPN of the calling party (the cardholder), and the CN where appropriate, and not pass the telephone number associated with the calling card platform in the CPN or CN parameter of the SS7 stream.<sup>134</sup>

**\*7310** 55. We also adopt interim rules requiring that prepaid calling card providers report prepaid calling card PIU factors, and call volumes from which these factors were calculated, based on not less than a one-day representative sample, to those carriers from which they purchase transport services.<sup>135</sup> We also require that prepaid calling card providers certify to the Commission

that they are providing PIU and CPN information to other carriers as required above and that they report their total intrastate, interstate, and international calling card minutes and revenues.<sup>136</sup>

**\*\*17** 56. The requirements imposed on prepaid calling card providers in this *Order* are necessary to preserve and advance the Universal Service Fund, provide regulatory certainty and prevent “gaming” of the system. The Commission believes the public interest will best be served by eliminating any uncertainty and promoting stability in the prepaid calling card market through the adoption of this *Order*.

57. In the *Calling Card Order and NPRM*, the Commission noted that military personnel rely heavily on prepaid calling cards and asked what steps, if any, it should take to ensure that such cards remain reasonably priced.<sup>137</sup> In this *Order* we decide that the public interest will be served by exempting revenue from prepaid calling cards sold by, to, or pursuant to contract with DoD or a DoD entity from the above-described universal service contribution obligations.<sup>138</sup> As such, on an interim basis, prepaid calling card providers are not required to pay USF contributions on revenue generated from prepaid calling cards sold by, to, or pursuant to contract with DoD or a DoD entity.<sup>139</sup>

#### **b. Significant Issues Raised by Public Comments in Response to the IRFA**

58. No comments were received regarding the IRFA.

#### **c. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply**

59. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.<sup>140</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>141</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>142</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) **\*7311** satisfies any additional criteria established by the SBA.<sup>143</sup>

60. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.<sup>144</sup> The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,<sup>145</sup> Paging,<sup>146</sup> and Cellular and Other Wireless Telecommunications.<sup>147</sup> Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

**\*\*18** 61. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees) and “is not dominant in its field of operation.”<sup>148</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>149</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

62. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>150</sup> According to Census Bureau data for 1997, there were a total of 2,225 firms in this category that operated for the entire year.<sup>151</sup> Of this total, 2,201 firms had



employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.<sup>152</sup> Thus, under this **\*7312** size standard, the majority of firms can be considered small.

63. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>153</sup> According to Commission data, 1,303 carriers reported that they were incumbent local exchange service providers.<sup>154</sup> In addition, according to Commission data, 769 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.<sup>155</sup> Of these 769 companies, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees.<sup>156</sup> In addition, 39 carriers reported that they were “Other Local Service Providers.”<sup>157</sup> Of the 39 “Other Local Service Providers,” an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees.<sup>158</sup> Consequently, the Commission estimates that most providers of local exchange service, competitive local exchange service, competitive access providers, and “Other Local Service Providers” are small entities that may be affected by the rules and policies proposed herein.

64. *Telecommunications Resellers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>159</sup> According to Commission data, 89 companies reported that they were engaged in the provision of prepaid calling cards.<sup>160</sup> Of these 89 companies, an estimated 88 have 1,500 or fewer employees and one has more than 1,500 employees.<sup>161</sup> Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies proposed herein.

#### **d. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

**\*\*19** 65. In this *Order*, we hold that providers of the types of cards upon which the Commission sought comment in the *NPRM* offer telecommunications services. As a result of this finding, these prepaid calling card providers are now treated as telecommunications carriers and therefore are subject to the Communications Act and the Commission's rules, including all applicable reporting and recordkeeping requirements.<sup>162</sup> For example, they now must submit to USAC the reports required in connection with contributions to the federal USF.

**\*7313** 66. In this *Order*, we also adopt new interim rules applicable to all prepaid calling card providers. Prepaid calling card providers must report prepaid calling card PIU factors, and call volumes on which these factors were calculated, based on not less than a one-day representative sample, to those carriers from whom they purchase transport services. They also must certify to the Commission that they are complying with this PIU reporting requirement. This certification also must include information on total intrastate, interstate, and international calling card minutes and revenue, and a statement that they are contributing to the federal USF based on all interstate and international revenues, except for revenue from the sale of prepaid calling cards by, to, or pursuant to contract with DoD or a DoD entity.

#### **e. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

67. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>163</sup>

68. In this *Order*, the Commission finds that certain types of prepaid calling card providers are telecommunications carriers and therefore subject to applicable requirements of the Communications Act and the Commission's rules, including the obligation to pay access charges and contribute to the Universal Service Fund. We apply these existing rules for the purpose of preserving and advancing universal service and providing regulatory certainty. A strong, well-funded USF is one of the Commission's regulatory mandates and is in the public interest. The clear application of regulations to the prepaid calling card industry also will promote regulatory certainty, foster innovation and competition, and avoid market disruption during the pendency of this and other rulemaking proceedings. We rejected AT&T's suggestion to address a more limited set of issues on the ground that such an approach would not provide the necessary certainty and stability. After reviewing the record, we conclude that the best way to meet our goals of preserving and advancing universal service and providing certainty to the prepaid calling card market is to subject all prepaid calling card providers to the same requirements.

**\*\*20** 69. In this *Order*, we also adopt interim rules requiring all prepaid calling card providers to meet certain reporting requirements. Specifically, they must report prepaid calling card PIU factors, and call volumes from which these factors were calculated, based on not less than a one-day representative sample, to those carriers from which they purchase transport services. The interim rules also require that prepaid calling card providers make quarterly certifications to the Commission. Specifically, they must certify that they have complied with the reporting requirements discussed above. In addition, they must provide information on total intrastate, interstate, and international calling card minutes and revenues, and include a statement that they are contributing to the federal USF based on the reported information.<sup>164</sup> AT&T proposed that prepaid calling card providers comply with a much more extensive set of reporting and certification requirements.<sup>165</sup> We rejected these additional reporting and certification requirements because they would prove too burdensome to small prepaid calling card providers.

**\*7314** 70. As described above, the Commission has considered a variety of alternative approaches for regulating prepaid calling card providers. In weighing these alternatives we tried to balance our desire not to unduly burden small entities (small prepaid card providers, as well as small LECs and small IXCs) with our goals of ensuring regulatory certainty, preserving and advancing universal service, and avoiding market disruption during the pendency of other rulemakings. The *Order* we adopt achieves this balance by applying the same rules to all prepaid calling card providers, while at the same time rejecting proposals that would place excessive burdens on small companies.

#### **f. Report to Congress**

71. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>166</sup> In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>167</sup>

#### **C. Paperwork Reduction Act Analysis**

72. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), [Public Law 104-13](#). It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.

#### **V. ORDERING CLAUSES**

**\*\*21** 73. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 201, 202 and 254 of the Communications Act of 1934, as amended, [47 U.S.C. §§ 151, 152, 154\(i\), 201, 202, and 254](#), this Declaratory Ruling and Report and Order in WC Docket No. 05-68 ARE ADOPTED, and that Parts 54 and 64 of the Commission's Rules, [47 C.F.R. Parts 54 and 64](#), ARE AMENDED as set forth in Appendix A.

74. IT IS FURTHER ORDERED that AT&T's Emergency Petition for Immediate Interim Relief IS GRANTED IN PART and DENIED IN PART as set forth herein.

75. IT IS FURTHER ORDERED that the final rules and rule revisions adopted in this Declaratory Ruling and Report and Order SHALL BECOME EFFECTIVE ninety (90) days after publication in the Federal Register.

76. IT IS FURTHER ORDERED that all prepaid calling card providers SHALL FILE an initial certification as required herein no later than the last day of the first full calendar quarter after OMB approval of this requirement.

77. IT IS FURTHER ORDERED that the Frontier Petition for Declaratory Ruling IS GRANTED as set forth herein and otherwise IS DENIED.

**\*7315** 78. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

#### ERRATUM

Erratum Released: July 26, 2006

By the Chief, Pricing Policy Division:

1. On June 30, 2006, the Commission released a Declaratory Ruling and Report and Order ([FCC 06-79](#)) in the above-captioned proceeding. This Erratum corrects that document as indicated below:
2. In Appendix A, page 28 of the document, we replace “Interpret or apply [47 U.S.C. 201, 218, 225, 226, 228, and 254\(k\)](#) unless otherwise noted” with “Interpret or apply [47 U.S.C. 201, 218, 222, 225, 226, 228, and 254\(k\)](#) unless otherwise noted.”
3. In Appendix A, pages 28-29 of the document, we replace “A statement that it is making the required Universal Service Fund contribution based on the reported information;” with “A statement that it is making the required Universal Service Fund contribution based on the reported information; and.”
4. In Appendix A, page 29 of the document, we replace “A statement that it has complied with the reporting requirements described in section 64.5001(a) above” with “A statement that it has complied with the reporting requirements described in paragraph (a) of this section.”
5. In Appendix A, page 29 of the document, we replace “[Section 54.706](#) is amended by adding new paragraph (a)(18) . . .” with “[Section 54.706](#) is amended by adding new paragraph (a)(19) . . . .”
6. In Appendix A, page 29 of the document, we replace “(18) Prepaid calling card providers” with “(19) Prepaid calling card providers.”

FEDERAL COMMUNICATIONS COMMISSION

Tamara L. Preiss  
Chief  
Pricing Policy Division  
Wireline Competition Bureau

**\*7316 APPENDIX A**

**FINAL RULES**

**\*\*22** A. Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

Authority: [47 U.S.C. 154, 254\(k\)](#); secs. 403(b)(2)(B), (c), [Public Law 104-104, 110 Stat. 56](#). Interpret or apply [47 U.S.C. 201, 218, 225, 226, 228](#), and [254\(k\)](#) unless otherwise noted.

2. A new Subpart DD is added to read as follows:

**Subpart DD -- Prepaid Calling Card Providers**

64.5000 Definitions

64.5001 Reporting and Certification Requirements

**§ 64.5000 Definitions**

(a) *Prepaid Calling Card*. The term “prepaid calling card” means a card or similar device that allows users to pay in advance for a specified amount of calling, without regard to additional features, functions, or capabilities available in conjunction with the calling service.

(b) *Prepaid Calling Card Provider*. The term “prepaid calling card provider” means any entity that provides telecommunications service to consumers through the use of a prepaid calling card.

**§ 64.5001 Reporting and Certification Requirements**

(a) All prepaid calling card providers must report prepaid calling card percentage of interstate use (PIU) factors, and call volumes from which these factors were calculated, based on not less than a one-day representative sample, to those carriers from which they purchase transport services. Such reports must be provided no later than the 45th day of each calendar quarter for the previous quarter.

(b) If a prepaid calling card provider fails to provide the appropriate PIU information to a transport provider in the time allowed, the transport provider may apply a 50 percent default PIU factor to the prepaid calling card provider's traffic.

(c) On a quarterly basis, every prepaid calling card provider must submit to the Commission a certification, signed by an officer of the company under penalty of perjury, providing the following information with respect to the prior quarter:

(1) The percentage of intrastate, interstate, and international calling card minutes for that reporting period;

(2) The percentage of total prepaid calling card service revenue (excluding revenue from prepaid calling cards sold by, to, or pursuant to contract with the Department of Defense (DoD) or a DoD entity) attributable to interstate and international calls for that reporting period;

**\*\*23** (3) A statement that it is making the required Universal Service Fund contribution based on the reported information;

**\*7317** (4) A statement that it has complied with the reporting requirements described in section 64.5001(a) above.

B. Part 54 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 54 continues to read as follows:

Authority: [47 U.S.C. 1](#), [4\(i\)](#), [201](#), [205](#), [214](#), and [254](#) unless otherwise noted.

2. [Section 54.706](#) is amended by adding new paragraph (a)(18) and by adding a new sentence in subsection (d) to be placed after the section's first sentence to read as follows:

**54.706 Contributions.**

\*\*\*\*\*

(a)

(18) Prepaid calling card providers.

\*\*\*\*\*

(d) Prepaid calling card providers are not required to contribute on the basis of revenues derived from prepaid calling cards sold by, to, or pursuant to contract with the Department of Defense (DoD) or a DoD entity.

**\*7318 APPENDIX B**

Comments regarding the Calling Card NPRM and Order filed April 15, 2005:

AT&T Corporation (AT&T)

American Public Communications Council (APCC)

DJE Teleconsulting, LLC (DJE)

Department of Defense, Defense Information Systems Agency (DoD) eKit.com, Inc.

General Communication, Inc. (GCI)

IDT Telecom, Inc. (IDT)

Independent Telephone and Telecommunications Alliance (ITTA)

MCI, Inc.



National Association of State Utility Consumer Advocates (NASUCA)

National Exchange Carrier Association, Inc. (NECA)

National Telecommunications Cooperative Association (NTCA)

Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)

SBC Communications, Inc.

Sprint Corporation

State of New York Department of Public Service (NY DPS)

The United States Telecom Association (USTA)

VeriSign, Inc.

Verizon Communications, Inc.

Western Telecommunications Alliance (WTA)

WilTel Communications, LLC (WilTel)

Reply comments regarding the Calling Card NPRM and Order filed May 16, 2005:

AT&T

APCC

BellSouth Corporation

GCI

iBasis, Inc.

IDT

MCI, Inc.

Qwest Services Corporation

SBC Communications, Inc.

Sprint Corporation

USTA

The Voice on the Net Coalition (VON Coalition)

Verizon Communications, Inc.

Comments regarding AT&T's Emergency Petition for Immediate Interim Relief:

GCI

IDT

Qwest Services Corporation

Verizon Communications, Inc.

**\*7319 STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN**

***Re: Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order, FCC 06-79, WC Docket No. 05-68 (June 1, 2006).***

**\*\*24** I support this Order, which further clarifies the Commission's rules for prepaid calling card services and takes another step to solidify the base of contributions to the universal service fund. Universal service is one of the bedrocks of telecommunications policy, and the Commission is charged with ensuring that it is on solid footing.

This is the Commission's second Order addressing the regulatory status and universal service obligations of calling card providers. When we adopted the original calling card order, last spring, I called on the Commission to act quickly to determine the regulatory treatment for the two remaining calling card variants: menu-driven cards and cards that utilize IP transport. So, I'm pleased that we clarify today that all prepaid calling cards will be subject to a level regulatory playing field.

This Order finds that these additional calling card services are telecommunications services, a decision that was widely supported in the record. I do have concern about the Commission's decision to limit retroactive application of our decision for menu-driven services. Commenters made strong arguments that the Commission should have taken a more fact-specific approach for these services, given the equitable nature of our finding and the Commission's history with this issue. I approve this Order, however, because I support our effort to clarify going-forward the regulatory status and obligations for calling cards. With this Order, we eliminate any lingering uncertainties, which should redound to the benefit all providers.

Footnotes

- 1 *See infra* para. 10 (describing two categories of prepaid calling cards: menu-driven calling cards and prepaid calling cards that utilize IP transport).
- 2 *See infra* paras. 23-25.
- 3 *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Emergency Petition of AT&T for Immediate Interim Relief (filed May 3, 2005) (AT&T Emergency Petition).
- 4 AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133, Petition of AT&T (filed May 15, 2003) (AT&T's May 2003 Petition).
- 5 *See id.* at 5-6.
- 6 *See* [47 U.S.C. § 254](#).
- 7 *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004) (AT&T Nov. 22, 2004 Letter).
- 8 *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, para. 1 \(2005\)](#) (*Calling Card Order and NPRM*), *pet. for rev. pending*.

- 9 *See id.* at 4835, para. 28.
- 10 *See id.* at 4836, para. 31.
- 11 *See id.* at 4839-40, para. 39.
- 12 *Id.* at 4840, para. 40.
- 13 *See id.* at 4840-41, paras. 41-42.
- 14 *See id.* at 4841, para. 43.
- 15 AT&T Emergency Petition at 1.
- 16 *See id.* at 7.
- 17 *See id.*
- 18 *See id.*
- 19 *See id.* at 8.
- 20 *Id.* at 2.
- 21 *See id.*
- 22 *See id.* Parties commenting on the *Calling Card Order and NPRM* noted similar concerns. *See, e.g.*, GCI NPRM Comments at 19; Sprint NPRM Comments at 16-17; Verizon NPRM Comments at 7; WilTel NPRM Comments at 2. Appendix B lists all the pleadings filed in response to the NPRM and the Emergency Petition.
- 23 AT&T Emergency Petition at 4.
- 24 *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking and Report and Order, [17 FCC Rcd 3752 \(2002\)](#) (*Universal Service FNPRM*); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, [20 FCC Rcd 4685 \(2005\)](#) (*Intercarrier Compensation FNPRM*).
- 25 *See* AT&T Emergency Petition at 2, 4. There is no question, however, that all providers offering cards similar to the card described in AT&T's original petition are subject to the requirements set forth in the *Calling Card Order and NPRM*. *See Calling Card Order and NPRM*, [20 FCC Rcd at 4835-36](#), paras. 28, 31.
- 26 AT&T's May 2003 Petition at 4.
- 27 Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 25, 2005) at 2.
- 28 These two variations may be offered separately from one another or in combination (e.g., a menu-driven card that uses IP transport for a portion of the call).
- 29 *See Calling Card Order and NPRM*, [20 FCC Rcd at 4840](#), para. 41.
- 30 *See* AT&T NPRM Comments at 5-6.
- 31 *See* MCI NPRM Comments at 4. *See also* Letter from Larry Fenster, Senior Economist, MCI, to Marlene Dortch, Secretary, Federal Communications Commission (Feb. 2, 2005) (MCI Feb. 2, 2005 letter).
- 32 [47 U.S.C. § 153\(43\)](#).
- 33 [47 U.S.C. § 153\(46\)](#).
- 34 [47 U.S.C. § 153\(43\)](#) (defining "telecommunications").
- 35 Sprint NPRM Comments at 8.
- 36 *Id.*
- 37 *See In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, [13 FCC Rcd 11501 \(1998\)](#) (*Universal Service Report to Congress*).
- 38 *Id.* at 11530, para. 60.
- 39 *National Cable & Telecomm. Ass'n. v. Brand X Internet Services*, 125 S. Ct. 2688, 2704 (2005) (*Brand X*).
- 40 "It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail." *Universal Service Report to Congress*, [13 FCC Rcd at 11530](#), para. 60.
- 41 *Brand X*, 125 S. Ct. at 2709.
- 42 *Id.*
- 43 *Id.* (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, [17 FCC Rcd 4798, 4823 \(2002\)](#) (*Cable Modem Declaratory Ruling*)).
- 44 *Calling Card Order and NPRM*, [20 FCC Rcd at 4830](#), para. 14.
- 45 IDT NPRM Comments at 4-5.
- 46 *Id.* (citing *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, [2 FCC Rcd 5986 \(1987\)](#) (*Talking Yellow Pages*)).

- 47 *Talking Yellow Pages*, 2 FCC Rcd at 5986, para. 2 (“This service enables customers in Omaha, Nebraska to dial a local number and hear recorded advertisements.”).
- 48 See *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, para. 1 (2004) (*IP-in-the-Middle Order*).
- 49 *Id.*
- 50 See AT&T Nov. 22, 2004 Letter at 1.
- 51 *Calling Card Order and NPRM*, 20 FCC Rcd at 4826, para. 2.
- 52 APCC NPRM Comments at 20.
- 53 “In addition, AT&T’s attempt to treat ‘1+’ and toll-free service dialing by consumers as materially important in ascertaining the regulatory status of a service is overreaching and amounts to little more than a distinction without a difference. Regulatory status should not be determined by whether a service is accessed and used via one form of dialing versus another.” DJE Teleconsulting NPRM Comments at 3-4.
- 54 See *IP-in-the-Middle Order*, 19 FCC Rcd at 7457, para. 1.
- 55 “Avoidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule.” *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing *MCI v. FCC*, 750 F.2d at 141; *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)).
- 56 See 47 U.S.C. § 254; 47 C.F.R. § 54.706.
- 57 IDT NPRM Comments at 14-15.
- 58 See *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61 and 98-183, Report and Order, 16 FCC Rcd 7418, 7446-48, paras. 47-54 (2001).
- 59 *Id.* at 7447-48, paras. 50-51.
- 60 *Id.* at 7448, para. 53.
- 61 *Calling Card Order and NPRM*, 20 FCC Rcd at 4841, para. 43.
- 62 See DoD NPRM Comments at 1.
- 63 AT&T Emergency Petition at 7.
- 64 GCI NPRM Reply Comments at 4; GCI NPRM Comments at 20; NASUCA NPRM Comments at 5; Qwest NPRM Reply Comments at 20-22; Sprint NPRM Comments at 15-16.
- 65 See 47 U.S.C. §§ 160(a), 254(d); *Universal Service FNPRM* 17 FCC Rcd 3752 (2002).
- 66 See 47 U.S.C. § 160(a)(1).
- 67 See 47 U.S.C. § 160(a)(2).
- 68 See 47 U.S.C. § 160(a)(3).
- 69 See 47 U.S.C. § 160(b).
- 70 GCI Emergency Petition Comments at 10-11.
- 71 *Id.*
- 72 See 47 C.F.R. § 69.1 *et seq.*
- 73 In addition to access charge obligations, we agree with APCC that providers of calling cards are obligated to pay dial-around compensation to payphone service providers pursuant to section 276 of the Act when the cards are used in the provision of telecommunications services. See APCC Comments at 11-12.
- 74 AT&T NPRM Reply Comments at 9-10.
- 75 IDT NPRM Comments at 15-17.
- 76 AT&T Emergency Petition at 18.
- 77 Letter from Amy Alvarez, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 6, 2005); Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 15, 2005) (AT&T July 15, 2005 Letter).
- 78 AT&T July 15, 2005 Letter, Attachment A, at 1.
- 79 See *id.* at 2-4.
- 80 GCI Emergency Petition Comments at 8-9; IDT Emergency Petition Comments at 5.
- 81 See IDT Emergency Petition Comments at 6.
- 82 *Id.*

- 83 *Id.*
- 84 Letter from Tina Pidgeon, General Communication Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (June 29, 2005) at 1-2.
- 85 *See* AT&T Emergency Petition at 18-19.
- 86 *See* Letter from Russell M. Blau and Tamar E. Finn, Attorneys for IDT Corporation, Swidler Berlin, LLP, to Michelle Carey, Legal Advisor, Office of the Chairman, Federal Communications Commission, WC Docket Nos. 05-68, 01-92 (Jan. 6, 2006) at 1-3 (IDT Jan. 6, 2006 Letter).
- 87 *See supra* paras. 8-9.
- 88 *See, e.g.,* 47 U.S.C. §§ 208, 501. To the extent that prepaid calling card providers are “common carriers” under section 208 of the Act, a violation of these rules would constitute an actionable violation of section 201(b) of the Act, because the requirements imposed on calling card providers by these rules are necessary to preserve and advance the Universal Service Fund, provide regulatory certainty, and prevent “gaming” of the system, as described above.
- 89 47 C.F.R. § 64.1601. As noted in the *Intercarrier Compensation FNPRM*, the emergence of wireless and IP-based calling options makes it less likely that a comparison of telephone numbers will provide meaningful information on the geographic end points of a call. Nevertheless, for now carriers continue to rely on telephone numbers as a proxy for geographic location. *See Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4696-97, paras. 20-22.
- 90 *See, e.g., Expanded Interconnection with Local Telephone Company Facilities; Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 91-141 Transport Phase I and 80-286, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7442-43, para. 137 (1993) (requiring IXCs to report PIUs for switched access traffic); *Telephone Number Portability*, CC Docket No. 95-116, RM 8535, Fourth Memorandum Opinion and Order on Reconsideration, FCC 99-151, 1999 WL 503613 (F.C.C.), para. 80 (July 16, 1999) (allowing carriers to use PIU rather than revising their billing systems to implement terminating access revenue sharing in meet-point billing arrangements).
- 91 *See, e.g., Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Memorandum Opinion and Order, 17 FCC Rcd 17595, 17719, para. 222 (2002).
- 92 47 C.F.R. § 64.1601.
- 93 *See* Letter from Donna Epps, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Sept. 9, 2005) (Verizon Sept. 9, 2005 Letter).
- 94 *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Sept. 21, 2005) at 2.
- 95 *See id.*
- 96 *See* Verizon Sept. 9, 2005 Letter at 3.
- 97 Prepaid calling card providers that purchase access service directly from LECs will continue to be subject to any PIU provisions in the LECs' access tariffs.
- 98 *See* IDT Jan. 6, 2006 Letter at 3-4.
- 99 *See* Letter from Tina Pidgeon, Vice President, Federal Regulatory Affairs, General Communication, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Oct. 19, 2005).
- 100 *See id.* at 3; Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC (Oct. 28, 2005) at 2; IDT Jan. 6, 2006 Letter at 3.
- 101 For similar reasons, we agree with APCC that our rules require the payment of dial-around compensation to a payphone service provider when the cardholder completes a call to the platform without attempting to call a third party. *See* APCC Comments at 13, n.12.
- 102 The certification we require in this *Order* is not a replacement for the Form 499 -- Telecommunications Reporting Worksheet. As such, prepaid calling card providers are responsible for filing both the certification required in this *Order* and a Form 499.
- 103 *See supra* paras. 32-40.
- 104 *See In the Matter of Petitions of Sprint PCS and AT&T Corp for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13200 n.51 (2002) (“The Commission rule that authorizes us to issue declaratory rulings specifically cites the adjudications provision of the APA as its source of authority.”); 47 C.F.R. § 1.2 (citing 5 U.S.C. § 554).
- 105 *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (*Verizon*). *See also PSC of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996); *Health Ins. Ass'n of America v. Shalala*, 23 F.3d 412, 424 (D.C. Cir. 1994); *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).



- 106 *Verizon*, 269 F.3d at 1109. See also *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (Clark-Cowlitz); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989). Cf. 47 U.S.C. § 154(j) (“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”).
- 107 See *Clark-Cowlitz*, 826 F.2d at 1081 (citing *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)).
- 108 *Clark-Cowlitz*, 826 F.2d at 1082 n.6. See also *Verizon*, 269 F.3d at 1110 (noting that the D.C. Circuit has not always considered each of the factors).
- 109 See *The Time Machine Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 1186 (CCB 1995).
- 110 See *Calling Card Order and NPRM*, 20 FCC Rcd at 4836-37, para. 32.
- 111 See *IP-in-the-Middle Order*, 19 FCC Rcd at 7457, para. 1.
- 112 The fact that the *IP-in-the-Middle Order* only addressed services that use 1+ dialing does not change this conclusion. See *id.* at 7466, n.58. As the Commission explained, the scope of that order was limited to the service at issue. Nothing in that order suggests that the Commission intended to foreclose the application of the same reasoning to similar services that use a different dialing pattern, such as the calling card services we address in this *Order*.
- 113 See, e.g., Letter from Kathleen Grillo, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Apr. 26, 2006); Letter from Jack Zinman, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Apr. 27, 2006).
- 114 See AT&T Nov. 22, 2004 Letter.
- 115 See, e.g., Letter from Vonya B. McCann, Vice President, Government Affairs, Sprint Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Apr. 18, 2006) (initiation of NPRM does not preclude retroactivity); see also *Viacom Int’l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (Commission has discretion to proceed by declaratory ruling rather than rulemaking); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (Commission may adopt new statutory interpretation through declaratory ruling rather than rulemaking); *North American Telecommunications Association*, ENF File No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349, 365, paras. 1, 54 (1985) (classification of services under existing rule may be accomplished through declaratory ruling, but rule changes are more appropriately handled in rulemaking).
- 116 See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4818, para. 31 (“In the Notice, we raised questions about the appropriate legal and policy framework for cable modem service.”).
- 117 *Calling Card Order and NPRM*, 20 FCC Rcd at 4839-40, para. 39.
- 118 Consequently, we disagree with Qwest’s argument that “the law is (and has been) clear” that tariffed access charges applied to providers of these cards. See, e.g., Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (May 18, 2006) at 3.
- 119 See *supra* para. 14.
- 120 While we acknowledge that retroactive application of our decision with respect to prepaid calling cards that use IP transport will impose similar burdens on the providers of those cards, that factor is not decisive in our analysis of those cards because of our conclusion that providers had “ample notice that merely converting a calling card call to IP format and back does not transform the service from a telecommunications service to an information service.” See *supra* para. 43.
- 121 During the pendency of this proceeding, Frontier Telephone of Rochester, Inc. (Frontier) filed a petition for declaratory ruling that MCI’s menu-driven Golden Retriever calling card service is a telecommunications service and therefore subject to interstate and intrastate access charges. As noted above, we agree that MCI’s service is a telecommunications service, and MCI will be subject to access charges upon the effective date of this *Order*. With respect to the period prior to the effective date of this *Order*, however, we deny Frontier’s Petition for Declaratory Ruling. As explained in paragraph 45, it would be inequitable to require retroactive compliance with the obligations imposed by this *Order* in light of the uncertain and unsettled state of the law with respect to menu-driven calling cards.
- 122 See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).
- 123 See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 100 Stat. 857 (1996).
- 124 *Calling Card Order and NPRM*, 20 FCC Rcd at 4826, 4843-47, paras. 49-61.
- 125 *Id.*
- 126 See 5 U.S.C. § 604.
- 127 See *supra* para. 3.
- 128 See *id.*

- 129 *See supra* para. 4.
- 130 *See supra* para. 5.
- 131 AT&T Emergency Petition at 2.
- 132 *Id.*
- 133 *See supra* para. 10.
- 134 *See supra* paras. 33-34.
- 135 *See supra* para. 35.
- 136 *See supra* paras. 38-40.
- 137 *See Calling Card Order and NPRM*, 20 FCC Rcd. at 4826, 4841, para. 43.
- 138 *See supra* para. 24.
- 139 *See supra* para. 25.
- 140 5 U.S.C. §§ 603(b)(3), 604(a)(3).
- 141 5 U.S.C. § 601(6).
- 142 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632.) Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”
- 143 15 U.S.C. § 632.
- 144 *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division (April 2005) (*Trends in Telephone Service*).
- 145 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (NAICS code 513310 was changed to 517110 in October 2002).
- 146 13 C.F.R. § 121.201, NAICS code 517211.
- 147 13 C.F.R. § 121.201, NAICS code 517212.
- 148 15 U.S.C. § 632.
- 149 Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).
- 150 13 C.F.R. § 121.201, NAICS code 517110.
- 151 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 513310.
- 152 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”
- 153 13 C.F.R. § 121.201, NAICS code 517110.
- 154 *Trends in Telephone Service*, Table 5.3.
- 155 *Id.*
- 156 *Id.*
- 157 *Id.*
- 158 *Id.*
- 159 13 C.F.R. § 121.201, NAICS code 517310.
- 160 *Trends in Telephone Service*, Table 5.3.
- 161 *Id.*
- 162 *See supra* para. 10.
- 163 5 U.S.C. §§ 603(c)(1)-(c)(4).
- 164 *See supra* paras. 38-40.
- 165 *See* AT&T July 15, 2005 Letter, Appendix A.
- 166 *See* 5 U.S.C. § 801(a)(1)(A).

167 See 5 U.S.C. § 604(b).

21 F.C.C.R. 7290, 21 FCC Rcd. 7290, 38 Communications Reg. (P&F) 1218, 2006 WL 1826190

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