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

In the Matter of

AT&T Corp. Petition for Declaratory Ruling
Regarding Enhanced Prepaid Calling Card Service

Regulation of Prepaid Calling Card Services

WC Docket No. 03-133
WC Docket No. 05-68

COMMENTS OF GENERAL COMMUNICATION, INC.

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General Communication, Inc. (“GCI”), by its undersigned counsel, hereby submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Communications Commission (“FCC” or “Commission”) in the above captioned-proceeding.

I. INTRODUCTION AND SUMMARY

On February 23, 2005, the FCC released an Order in the above-captioned docket denying AT&T’s Petition for Declaratory Ruling (“Petition”) that intrastate access charges do not apply to calls made using its so-called “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.\(^1\) In the \textit{AT&T Order}, the FCC determined that AT&T’s prepaid calling card service is a telecommunications service as defined by the Act\(^2\) and that inserting an advertisement into the service does not transform that service into an information service because AT&T is not “offering” any “capability” with respect to the advertising message.\(^3\) Further, the Commission found that AT&T’s provision of an advertising message into its calling card service is incidental to the

\(^1\) In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation, Regulation of Prepaid Calling Card Services, Order and Notice of Proposed Rulemaking, WC Docket Nos. 03-133 and 05-68 (rel. Feb. 23, 2005) (“\textit{AT&T Order}”) at ¶ 1.

\(^2\) Id. at ¶ 14.

\(^3\) Id. at ¶ 15.
underlying telecommunications service and therefore is not an “enhanced service” under the FCC’s rules.\(^4\) Consistent with long-standing Commission precedent, the FCC appropriately reiterated that prepaid calling card calls provide both interstate and intrastate services, and the jurisdiction of any particular call may be identified pursuant to the FCC’s long-standing end-to-end analysis. As a result, calls made with such cards that originate and terminate in the same state are jurisdictionally intrastate, and intrastate access charges apply.\(^5\)

Because of AT&T’s unilateral decision to treat its prepaid calling card services as an information service, it has failed to make over $160 million in required USF contributions according to AT&T’s own account in its SEC filings. The FCC has directed AT&T to file with USAC revised Forms 499-A to report prepaid calling card intrastate revenue so that USAC may calculate and assess the additional USF contributions owed for the appropriate time period.\(^6\) AT&T must submit the revised filings with USAC by April 15, 2005.

In the AT&T Order, the FCC also issued an NPRM to establish a framework for analysis of all calling card offerings, including the so-called “new variants” of calling card services as described by AT&T late into the above-captioned proceeding to determine which future offerings may be “enhanced” and subject exclusively to the jurisdiction of the FCC.\(^7\) Such a finding would exempt interstate revenues generated via the prepaid cards from USF contribution assessments, interstate calls from interstate access charges, and intrastate calls from intrastate access charges.

As explained herein, the FCC should end this game by AT&T and other providers who add what they call “enhanced features” to their calling card services. Such actions are nothing

\(^4\) Id. at ¶ 16.
\(^5\) Id. at ¶ 22.
\(^6\) Id. at ¶¶ 30-31.
\(^7\) Id. at ¶ 38 (citing Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-133 (Nov. 22, 2004) (“AT&T Nov. 22, 2004 Letter”)).
more than a scheme to avoid existing legal obligations to pay intrastate access charges and make
USF contributions, securing an unfair competitive advantage against complying service
providers. Consistent with Commission precedent – as correctly applied throughout the AT&T
Order – the FCC cannot find that the “new variants” of AT&T’s prepaid calling card service are
“enhanced”. The prepaid calling card service remains a telecommunications service.

Critically, such tactics should be stopped because they undermine universal service at the
depense of consumers, threaten the intercarrier compensation regime before rational reform is
implemented,⁸ and place compliant carriers at a competitive disadvantage. This creates pressure
on other calling card providers to follow a similar course.⁹ Nor is there anything to prevent such
a scheme from applying only to calling card services. Under AT&T’s logic, a carrier would only
have to add time of day or restaurant suggestions to the front end of any traditional wireline or
wireless call (regardless of jurisdiction) as a justification for evading contributions and any
access charge payments. Without FCC action – including swift and firm enforcement – to
affirmatively stop this game, carriers will have little choice but to pursue such a course as a
competitive response to the so-called “enhanced” offerings of AT&T.

II. PREPAID CALLING CARDS ARE TELECOMMUNICATIONS SERVICES

AT&T has self-described two new “variants” of calling card service that it states are
interstate information services and as such, are not subject to USF assessments or intrastate
access charges.¹⁰ The FCC asks for comment relative to these services.¹¹

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⁸ On March 3, 2005, the FCC released its FNPRM to address an overall reform of the current intercarrier
compensation regime and examine several reform proposals by stakeholders from across all industry segments and
state regulatory commissions. See In the Matter of Developing a Unified Intercarrier Compensation Regime,

⁹ See, e.g., Letter from Larry Fenster, Senior Economist, MCI, to Marlene Dortch, Secretary, FCC, WC Docket No.
03-133 (Feb. 9, 2005, as an errata) and Attachment, “MCI Prepaid Information Services Featuring Golden
Retriever” (“MCI Feb. 9, 2005 Letter and Attachment”).

¹⁰ AT&T Nov. 22, 2005 Letter at 1. See also AT&T Order at ¶ 11. Though the focus in AT&T’s original Petition
was the evasion of Alaska intrastate access charges, GCI notes that under AT&T’s “enhanced” services theory, no
AT&T states that with its first variant of prepaid calling card, the cardholder hears a message that offers several options, such as “(i) additional information about the card distributor’s business, (ii) additional information about the card distributor’s website, and (iii) additional information about travel, photo processing or other services available from the card distributor.”\(^\text{12}\) AT&T provides an example of a typical message and menu of options that may include:

- “To learn more about your ABC Store benefits, press 1.”
- “To learn more about abcstore.com, press 2.”
- “To learn more about the amazing ABC Store travel services, press 3.”
- “To learn how to add more minutes to your card at any ABC store, press 4.”
- “To place a call, press the star (*) key.”\(^\text{13}\)

The FCC asks how its analysis in the *AT&T Order* applies to variant number one.\(^\text{14}\) As described below, the menu options provide no offering that distinguishes this “variant” from the prepaid calling card described in the original Petition. Pursuant to standing legal precedent and the FCC’s application of that precedent in the *AT&T Order*, “variant” number one is a telecommunications service and does not meet the definition of an “information service” or an “enhanced service”. The recorded message is still just an advertisement, now separated by prompts guised as “options”.

Indeed, it is difficult to conceive of any calling card “option” that would transform the nature of the service from a telecommunications service to an information service. As described

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\(^\text{11}\) *AT&T Order* at ¶¶ 39-40.
\(^\text{12}\) AT&T Nov. 22, 2004 Letter at 2.
\(^\text{13}\) *Id.* at 2-3.
\(^\text{14}\) *AT&T Order* at ¶ 39.
herein, any bell or whistle would be nothing more than “incidental” to the basic voice service functionality offered by the card. Moreover, as discussed below, to the extent that some yet-to-be-identified “option” magically transforms the service, even that would not change the fact that the minutes “used” on the card are for telecommunications service, whereby the user transmits information of his choosing without change in the form or content of the information sent or received, and that it is this service that the card provider offers for a fee directly to the public.

AT&T also describes a second variant of calling card service where transport is provided over AT&T’s Internet backbone network, using Internet Protocol (“IP”) technology.¹⁵ As a result, AT&T states that such a service should be treated as an interstate information service not subject to universal service assessments or intrastate access charges.¹⁶ As described below, this issue has already been decided in the AT&T IP Telephony case,¹⁷ in which the FCC denied a prior AT&T Petition for Declaratory Ruling, finding that a voice service utilizing 1+ dialing from a regular telephone that is converted into IP format for transport over AT&T’s network and converted back into analog format for delivery through local exchange carrier lines is a telecommunications service.¹⁸ The fact that a calling card holder uses 8YY dialing to originate the call provides no basis for distinction from the service described in the AT&T IP Telephony Order and, thus, does not transform AT&T’s variant number two of calling card service into an information service.

¹⁵ AT&T Nov. 22, 2004 Letter at 3-4; AT&T Order at ¶¶ 12 and 40.
¹⁷ Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (“AT&T IP Telephony Order”).
¹⁸ AT&T IP Telephony Order, 19 FCC Rcd at 7457, ¶ 1. See also AT&T Order at ¶40
A. AT&T’s First Variant Of Prepaid Calling Card Is A Telecommunications Service And Does Not Meet The Definition Of An Information Service

Section 3(20) of the Act defines an information service as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”. In the AT&T Order, the FCC noted that AT&T’s service does not meet the statutory definition of an information service because it is not “offering” any “capability” with respect to the advertising message. The FCC’s reasoning on this point leads to the same conclusion relative to AT&T’s first variant of prepaid calling card service. AT&T is still not “offering” any “capability” relevant to the additional information provided by ABC stores – or essentially what is now a longer advertisement message separated by voice prompts. The packaging materials for the card certainly do not mention the “offer” to use the card to listen to advertising information about the ABC store (including store benefits, travel specials and photo offers, and there are no fees for these options. The “offer” to the customer and the “capability” provided to the customer is still to buy and use the card in order to make telephone calls. AT&T offers its prepaid calling card as a telecommunications service.

Additionally, in the context of the definition of “information services”, AT&T has failed to provide any credible argument to suggest that the ability to hear advertising on its prepaid calling card service constitutes retrieval of information as used in prior FCC cases. For instance, in the context of BOC provisioning of services pursuant to section 272 of the Act, the FCC described a BOC’s directory assistance information and storage retrieval service as “the ability to retrieve stored information from, or file information for storage in, information storage

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20 AT&T Order at ¶ 15.
21 See id.
22 See id.
23 Id. at ¶ 20.
facilities of such company….”25 This service is distinct from AT&T’s prepaid calling card service for two reasons. First, unlike the ability to query and retrieve information from a directory assistance database, the retrieval of information with respect to AT&T’s prepaid calling card – advertising – is not the service being offered relevant to the calling card. Second, unlike the act of pressing a number to hear about photo processing specials from a pre-recorded message (akin to an outgoing message on an answering machine) where the content is selected and controlled by the retailer is a far different service than the active query by a subscriber into a database where the actions of the caller direct the result of the query and the information received, with the result changing for almost every call. Hence, AT&T cannot credibly assert that the ability to press a number and hear a recorded advertisement is a service for the retrieval of information.

Finally, as a practical matter, AT&T’s prepaid calling card is no more an information service (or an enhanced service) than any other 800 services that offer a menu of options. For instance, calls to an 800 number to place a catalog order, check the status of a flight, or bank by phone are not information (or enhanced) services, nor does AT&T’s assumption of that function for its retail clients make these calls information (or enhanced) services.26

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26 GCI notes that as a technical matter, if an 800 prepaid calling card service were deemed an information or enhanced service, it is not practical that access billing systems have the ability to identify which 800 numbers incur access charges and which do not. See AT&T Order at ¶ 43.
B. AT&T’s First Variant of Prepaid Calling Card Is An Adjunct-to- Basic Service and Not an “Enhanced Service”

In the AT&T Order, the FCC found that AT&T’s prepaid calling card service was an adjunct-to-basic service and therefore not an “enhanced service” under the FCC’s rules. Adjunct-to-basic services are telecommunications services, not information services. The FCC’s reasoning is no less applicable to the services offered in AT&T’s first variant of prepaid calling card services.

**Fundamental Character of the Call is Unchanged.** The FCC has long held that where enhanced or information service functions are “incidental” to an underlying telecommunications service and do not alter their “fundamental character”, the inclusion of such functions does not transform an otherwise basic service into an enhanced or information service.

Following the same reasoning, AT&T’s first variant of the prepaid calling card is also an adjunct-to-basic service because it is incidental to the underlying telecommunications service (the telephone call) and does not “alter [] their fundamental character” of the service. AT&T has provided nothing to suggest that the fundamental character of the completion of a calling card

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27 *AT&T Order* at ¶ 16. The Commission rules provide that an enhanced service: (1) acts on subscriber-provided information; (2) provides the subscriber additional, different or restructured information; or (3) involves subscriber interaction with stored information. 47 C.F.R. § 64.702(a).

28 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd at 21905, 21958, ¶ 107 (1996) (“Non-Accounting Safeguards Order”). The FCC has determined that the terms telecommunications service and information service used in the 1996 Act are similar to the terms basic service and enhanced service that were used by the Commission prior to 1996. *Id.* at 21955-58.

29 See e.g., *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3531 at 19 (1992) (validation and screening services are “incidental” to the provision of local exchange service and therefore subject to Title II regulation); North American Telecommunications Association Petition for Declaratory Ruling Under §64.702;of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, ENF 84-2 Memorandum Opinion and Order, 101 FCC 2d 349, 359-361 (NATA Order) (services that facilitate the provision of basic services without altering their fundamental character are not considered enhanced services); AT&T Order at ¶ 16.
call is altered by the inclusion of advertising information at the beginning of the call.30 Indeed, the cardholder is still able to reach the destination telephone number whether or not the cardholder listens to all, some or none of the pre-recorded advertising messages.

Nor does the information that AT&T provides regarding adding minutes to the card or identifying the retailer’s website address change the fundamental character of the service.31 The user of the card is still able to complete the call – the service being offered to the end-user – even if the cardholder first listens (whether by force or by choice) to instructions on how to add additional minutes to the card. Consistent with this argument, the FCC has previously held that information regarding the time remaining on a card is not an enhanced service.32 Similarly, the insertion of this type of information into AT&T’s card does not transform AT&T’s service into an enhanced service.

Advertising is Incidental and Not the Essential Service Provided. Additionally, as the FCC points out, a service is an enhanced service if the information provided is “not incidental” to the basic telecommunications service, but rather is “the essential service provided”.

There can be no dispute that listening to ABC store travel offers or other pre-recorded commercials from ABC stores is not the “essential service provided” in this scenario. It is clear that the

30 Id. (The FCC similarly held that the advertising message in AT&T’s prepaid calling card service was incidental to the underlying service offered.)

31 Similarly, the FCC has determined that “[c]ommunications between a subscriber and the network itself (e.g. for call setup, call routing, and call cessation) are not considered enhanced services.” In the Matter of Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service Is a Basic Service, and AT&T Petition for Declaratory Ruling That All IXCs be Subject to the Commission’s Decision on the IDMCA Petition, 10 FCC Rcd. 13,717 (1995) at ¶ 14. As such, to the extent that the commercial information and information on how to add minutes to the card or the website address in the first variant of AT&T calling card service occurs in the call set-up portion of the call, this is not an enhanced service. This conclusion regarding call set-up information is follows from the FCC’s general principle that a (service) that does not alter the fundamental character of the essential service is incidental, even if standing alone, it could be considered an information service.

32 See Time Machine, 11 FCC Rcd 1192-93, ¶ 40. See also AT&T Order n. 30.

33 AT&T 900 Dial-It Services and Third Party Billing and Collection Services, File No. ENF-88-05, Memorandum and Opinion and Order, 4 FCC Red 3429, ¶ 20 (CCB 1989); AT&T Order at ¶ 16.
essential service provided through the use of a prepaid calling card is the ability to make a call. It is telling that, AT&T does not bill its customers for the time they spend listening to the advertisements.\(^{34}\) The cardholder is charged for the essential service of the prepaid calling card – the minutes used to place a voice call. Moreover, even AT&T concedes that the advertising is not the essential service provided, by allowing the cardholder to press * and escape all the commercial messaging and make its call.

As the FCC found in the \textit{AT&T Order}, from the customer’s perspective, the advertising message is merely a “necessary precondition” to placing the call.\(^{35}\) As such, the advertising is incidental to the essential service being provided, and the call should be classified as a telecommunications service.\(^{36}\) This is exactly the case with respect to the first variant of calling card. The customer must listen to a recorded message listing a menu of options to hear still more pre-recorded advertising as a necessary step before the cardholder can place their call.

This is a key distinction from the FCC’s decision in \textit{Talking Yellow Pages} where the FCC found that the electronic yellow pages service was an information service. Unlike AT&T’s prepaid calling card service, where the access to stored advertising messages is incidental to the call, the essential service provided by the \textit{Talking Yellow Pages} service was the access to the stored commercial information. Moreover, pursuant to the statutory definition of information services, in the case of \textit{Talking Yellow Pages}, the service being “offered” was to look up business information for the caller. The “capability” being offered in \textit{Talking Yellow Pages} was the ability of the caller to use the \textit{Talking Yellow Pages} service for the purpose of finding

\(^{34}\) \textit{AT&T Order} at n. 43 (citing Comments of Sprint).

\(^{35}\) \textit{AT&T Order} at ¶ 16.

\(^{36}\) GCI also notes that AT&T’s more recent announcement to add an option to its first variant of prepaid calling card to donate calling card minutes to the troops serving overseas – while a worthwhile cause, and certainly not an “advertisement” — is nevertheless incidental to the essential service being provided – the ability to make a calling card call. \textit{See AT&T Order} at ¶ 11. It is nothing more than allowing the user to buy minutes of telecommunications for someone else to use.
information. Certainly that is how Talking Yellow Pages represented its service to consumers.\footnote{Similarly, in AT&T Dial-It 900 Services, the FCC found that AT&T’s Call Count service was enhanced because the substantive information delivered from AT&T to its subscribers through that service was not incidental to the service being offered, it was the service being offered. AT&T Dial It 900 Services and Third Party Billing and Collection Services, File No. ENF-88-05, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3431, ¶ 20 (CCB 1989).} These key factual components are not present in AT&T’s calling card scenario – for any variant.

Additionally, with respect to AT&T’s first variant of calling card, the service AT&T is offering, via the retailer ads, is really a service to the retailer, thus making the store, not the cardholder, the customer for the advertising. AT&T admits this in its recently filed Motion for Stay of the AT&T Order stating that its prepaid calling card gives “retail providers of the cards the capability to provide messages to their end user customers”.\footnote{In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Motion for Stay Pending Appeal, Subject to Posting of Security, WC Docket No. 03-133 (filed Mar. 28, 2005) at 5.} Hence, AT&T admits it is not offering any “capability” to the cardholder via the advertising. This is an advertising service AT&T is offering – for some fee – to the retailer.

**No Meaningful Subscriber Interaction.** In distinguishing Talking Yellow Pages, the FCC also found that AT&T’s prepaid calling card service did not meet the definition of an enhanced service because “there is no meaningful interaction with the information provided by AT&T’s service; customers must let the recorded advertising message play -- whether or not they listen to it – because that is the only way they can actually place a call. This automatic imposition of an advertising message does not rise to the level of a subscriber interaction.”\footnote{AT&T Order at ¶ 17. (citing 47 C.F.R. § 64.702(a)).} Similarly, the advertising information provided by AT&T in the first variant does not provide meaningful interaction with stored information. The caller still must listen to some portion of the automatically-imposed commercial messages (even the menu) before a call may be placed. As such, the pre-recorded advertising message – even in its longer form now separated by prompts –
also does not rise to the level of “subscriber interaction”. Moreover, even if the cardholder selects one of the options before placing a calling card call, it is incidental to the service being provided and such selection does not change the fundamental character of the service – the calling card call.

By contrast, a call to the Internet involves meaningful subscriber interaction where the access to information is clearly defined by the sites the user chooses to visit or applications the user chooses to run. These choices define the kind of access that the user has while changing the fundamental character of that access, whether the call to the Internet is for shopping, research or telecommuting. Similarly, in *Talking Yellow Pages*, the subscriber defined the information access received via the call as determined by the interaction with the service and the specific choices the caller made at the initiation of the call. With AT&T’s prepaid calling card, the subscriber’s information access is limited to a pre-recorded set of messages (interrupted by prompts) chosen by someone else and never changes the character of the service to make a call. Such actions cannot rise to the level of “interaction” within the meaning of enhanced services.

GCI also notes that some of the information provided in AT&T’s first variant is the very information that is readily available elsewhere and is the type of information already provided by other prepaid card providers. For instance, information regarding how to add minutes to the card is almost always provided during any provider’s calling card set-up and is the type of information readily found on the plastic calling card itself, on the packaging surrounding the card, at the checkout register, or by calling the carrier’s customer service number. Information regarding the retailer’s website address may also be included in another card provider’s set-up of a call and is often found on every product the retailer sells and virtually all advertising for the
retailer. Hence, this type of information does not rise to the level of meaningful interaction with information.

Nor can the interaction be meaningful when, as AT&T has conceded from the outset of this case, the ad is not of the user’s choosing, but of the service provider’s and card distributor’s choosing, to the cardholder.\(^{40}\) This is another critical distinction from the *Talking Yellow Pages* case. Unlike *Talking Yellow Pages* or other interactive offerings, the advertising information in the first variant is merely the delivery of an ad, now broken-up by alleged “options”. The content of the advertising message is selected by AT&T’s retailer, who is in no way, shape, or form a party to the communication underway between the calling card subscriber and the called party. Thus, consistent with the *AT&T Order*, AT&T’s claim that “providing stored advertisements to a caller is an enhanced service” is negated by the fact that mandatory or voluntary receipt of information from AT&T’s calling card retailer is not “subscriber interaction”. The interaction with the pre-recorded advertising is not meaningful in the manner required to call the service “enhanced”.

In sum, AT&T’s imposition of its retailer’s advertising information – no matter how many steps it requires for dialing – no more transforms the calling card service into an enhanced service or an information service than would printing this same information onto the face of the card. As a result, a provider’s inclusion of such information that is incidental to the essential service being offered – the ability to make a call – is not sufficient to make a calling card service into an “enhanced” service or information service.

\(^{40}\) *AT&T Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, (filed May 15, 2003) (“Petition”) at 6. Similarly in the first variant of prepaid calling card call, AT&T and the retailer will still select what advertising messages (which travel offers, what photo processing information, what store benefits etc.) are specifically heard by the cardholder.
III. AT&T’S USE OF IP-IN-THE-MIDDLE FOR ITS SECOND VARIANT OF PREPAID CALLING CARD DOES NOT CHANGE THE JURISDICTION OF THE CALL

AT&T attempts to re-litigate its IP-in-the-middle case that the FCC already struck down. In that order, the FCC denied AT&T’s request to find that a phone-to-phone voice call is an information service merely because some part of the transport may have occurred using IP technology. The IP transport does nothing to change the jurisdiction of that call. In an attempt to get a second bite at the apple, AT&T asks the FCC to change that ruling in the AT&T IP Telephony Order and find that it is not applicable if the caller is using a prepaid calling card.

The only reason AT&T provides for asking the FCC to modify this ruling is its claim that 8YY dialing is used to originate the call rather than 1+ dialing, thereby attempting to differentiate 8YY calls from the service subject to the ruling. This is a distinction without a difference and ignores the basic rationale of the AT&T IP Telephony Order. The FCC found that AT&T’s transmission of a call using IP-in-the-middle was still nothing more than transport of a voice call, which constituted a telecommunications service. Similarly, AT&T’s prepaid calling card service is also a voice call constituting a telecommunications service. In the AT&T IP Telephony Order, the FCC stated that its ruling only addressed AT&T’s specific service (that happens to use 1+ dialing) and not all of the other possible services by other VoIP providers which were beyond the scope of the proceeding. But this does not mean that, conversely, the

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41 AT&T IP Telephony Order at ¶ 12.
42 See id. at ¶ 13.
43 This underscores the difficulty and downside created by regulating by technology. How can it be that AT&T renders a telecommunication service into an information service by changing only the distribution methodology? Under the AT&T IP Telephony Order, it cannot.
44 AT&T Order at ¶ 40; AT&T Nov. 22, 2004 Letter at 4.
45 AT&T IP Telephony Order, 19 FCC Rcd at 7465, ¶ 12
46 See AT&T Order at ¶ 14.
47 AT&T IP Telephony Order, 19 FCC Rcd at 7465, ¶ 13, n. 58.
FCC’s core determinations regarding IP-in-the-middle do not apply when an 8YY number is used to originate the call. This defies logic.

AT&T’s prepaid calling card service meets all of the criteria enunciated in the *AT&T IP Telephony Order*. Specifically, the FCC stated that its conclusion applies to all services that (1) use ordinary customer premises equipment with no enhanced functionality, (2) originate and terminate on the public switched telephone network, and (3) undergo no net protocol conversion and provide no enhanced functionality to end users due to the provider’s use of IP technology.\(^48\) Prepaid calling card calls make use of ordinary customer premises equipment and originate on the public switched telephone network. There have been no suggestions to the contrary.

Additionally, just as in the case of the calls at issue in the *AT&T IP Telephony Order*, prepaid calling card calls do not undergo any net protocol conversion or enhanced functionality because of the use of IP technology for the transport of the call.\(^49\) Consistent with long-standing FCC precedent and as correctly applied in the *AT&T Order*, prepaid calling card calls originate and terminate on the PSTN.\(^50\) Pursuant to the FCC’s traditional end-to-end analysis, the FCC correctly rejected AT&T’s argument that the communication with the advertising message creates an end-point at the platform.\(^51\) As a result, AT&T’s two-call theory also does not work here and cannot support an argument to show there has been a net protocol conversion between any two points. AT&T has failed to provide any arguments to support a different conclusion. Nor has AT&T demonstrated that its ad service on behalf of the retail vendors depends in any way on the use of IP technology.

\(^{48}\) *Id.* at 7457-58, ¶ 1.

\(^{49}\) *See AT&T IP Telephony Order* at ¶ 12.

\(^{50}\) *AT&T Order* at ¶ 22.

\(^{51}\) *Id.* at ¶ 23.
In sum, the criteria from the *AT&T IP Telephony Order* finding that IP transport does not transform a wireline voice call into an enhanced service apply equally in the case of prepaid calling card calls. AT&T’s argument regarding IP-in-the-middle still does not hold water in the case of AT&T’s second variant of prepaid calling card and, as such, should be rejected.

**IV. THE PUBLIC INTEREST REQUIRES AN END TO THE CALLING CARD GAME**

The issues raised in the NPRM and AT&T’s new variants of calling card services are not matters just relevant to calling cards, but implicate questions central to the current intercarrier compensation and universal service debates. AT&T’s new variants of prepaid calling cards are nothing more than an end-run around its legal obligations to pay intrastate access charges and universal service by self-characterizing its calls as “enhanced” interstate information services. As such, the FCC must act expeditiously to enforce all obligations attached to AT&T’s new variants of calling cards, as telecommunications services.

**Intercarrier Compensation.** The harm caused by AT&T’s practices is real. By self-describing its traffic as enhanced, interstate information services, AT&T has withheld payment of intrastate access charges. For GCI this is an on-going harmful practice and serves as a competitive unfairness and disadvantage to the carriers who play by the rules. For example, by mischaracterizing its in-state prepaid calling card traffic as interstate in Alaska, AT&T has shifted the portions of intrastate access charges that it rightfully owed through the Alaska Exchange Carrier Association (“AECA”) pool (but avoided) onto GCI and other IXCs. The

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charges were not simply withheld from the local exchange carrier; they were billed to and paid for by AT&T’s long distance competitors. And to date, this harm has not been fully remedied.

From GCI’s perspective, the amount of payments owed is not insignificant. As described in GCI’s Opposition to AT&T’s Motion for Stay in the instant docket, the effect of AT&T Alascom underreporting intrastate minutes by excluding 907-to-907 calling card calls has a dual effect. The access minute demand will be set too low for the following year, and the rate per minute that IXCs pay will be too high.\(^{53}\) If the minutes are later corrected, AT&T Alascom will pay the LECs the higher intrastate rate for the under-reported minutes, and GCI will not receive a refund, even if the LECs over-recover. For intrastate bulk bill (Alaska’s version of carrier common line recovery), GCI pays the amount that AT&T Alascom “avoids”, because it is a “keep-whole” pool—whatever revenue requirement the LECs report have to paid by someone, and the payment obligation is divvied up by relative market share assessed by the IXCs’ respective reported intrastate minutes.\(^ {54}\) Indeed, in recent filings with the Regulatory Commission of Alaska, AT&T Alascom estimated its obligation for unpaid intrastate access charges relevant to debit calling cards in Alaska alone had increased to $13,264,754 plus interest, for the period from July 1, 2002 through March 31, 2004.\(^ {55}\) The FCC should take swift action in this docket to prevent the perpetuation of this type of harm.

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53 In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Opposition of GCI to AT&T Motion for Stay Pending Appeal, Subject to Posting of Security, WC Docket No. 03-133 (filed Apr. 4, 2005) (Attachment 1 at 2-3 and 8).

54 Id. at 9.

55 In the Matter of the Investigation into Unauthorized Telecommunication Intrastate Debit Card Marketing by AT&T Corp. apart from AT&T Alascom, Docket No.U-97-120, Notice of Filing of AT&T’s Corporate Guarantee Renewal and Attachment (Letter from Tomas W. Horton, Senior Executive Vice President and Chief Financial Officer, to the Regulatory Commission of Alaska) (October 5, 2004).
The FCC is addressing intercarrier compensation reform in a recently released NPRM,\(^{56}\) but self-help in the manner perpetuated by AT&T here must not be tolerated. The FCC should not cede its regulatory prerogative to implement rational reform by standing idle while AT&T (and potentially others) continue to erode the system.

**The Universal Service Fund.** Of additional concern is AT&T’s continuing efforts to avoid its legal obligations to make the appropriate USF payments through the introduction of its new variants of calling card services that it self-describes as “enhanced”. Such tactics are a threat to the Universal Service Fund itself and place a disproportionate burden for the fund on all of the other carriers playing by the rules. By its own admission, AT&T avoided paying at least $160 million into the USF through its practices of mischaracterizing its calling card traffic in the original Petition.\(^{57}\) Chairman Powell best characterized this harm in his Separate Statement to the *AT&T Order*, observing that the same amount of USF payments that AT&T inappropriately avoided – $160 million – by mischaracterizing its traffic as interstate is enough to “subsidize over 6 million low income consumers for an entire quarter or provide resources for the first four years of a rural telemedicine program.”\(^{58}\) Such reckless disregard for clear and existing legal obligations at the expense of telecommunications consumers should not be tolerated.

The on-going harm to USF will be exacerbated by any delay arising from the failure to quickly resolve this proceeding or any failure to swiftly enforce existing obligations. The time in the interim allows AT&T (and other providers) the opportunity to engage in a scheme to avoid its USF obligations and later argue, incredibly, that they did not know the rules would apply to them. Specifically, as Senator Inouye noted upon release of the *AT&T Order*, the FCC’s NPRM

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\(^{57}\) *AT&T Order* at ¶ 30.

\(^{58}\) *AT&T Order*, Separate Statement of Chairman Michael K. Powell.
may lead to a “‘loophole’ that will allow future communication service providers to avoid their USF obligations. … The obligation to contribute to Universal Service should not hinge on whether the customer presses or does not press certain buttons to hear an advertisement.”

59 USF reform efforts should occur in the proper venues at the FCC or the federal and state legislative processes not through self-initiated tactics of the sort AT&T has engineered throughout this docket to evade its legal obligations and mischaracterize its services. The FCC must act quickly in the instant matter to stop any further harm to the USF.

**Copycat Services, Copycat Providers.** Nor is there anything to stop an AT&T-like scheme – undermining USF and the access charge systems – from being adopted by not only other prepaid calling card providers, 60 but all service providers. This should be of great concern to the FCC. Following AT&T’s lead for example, what would stop a wireless or wireline provider from selling recorded message space in the call set-up portion of the call (similar to broadcast ad space) to inform the caller that “this call is brought to you by your favorite fast food restaurant”? As AT&T has done in its first variant, any other provider could easily divide up that ad message with prompts (press one to hear the specials, press two to hear the dates/times of operation, press three to hear the website address) in an attempt to pass off the service as enhanced or an information service. But it is still just an ad – not an “enhanced” service – placed in front of the call the cardholder intends to make. If such practices are allowed to continue

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59 Joint Press Statement of Senators Stevens and Inouye (attached). See also AT&T Order, Statement of Commissioner Jonathan S. Adelstein (By issuing an NPRM and leaving calling card issues for another day, “we perpetuate a marketplace dynamic where success is significantly affected by tolerance for regulatory risk….As policymakers, and as stewards of universal service, we should move to address these issues quickly and comprehensively.”). Separate Statement of Commissioner Michael J. Copps (Noting that by issuing an NPRM “the Commission suggests that going forward the boundary between calling cards subject to universal service and those that are not is whether they feature an automated voice that coos on the line ‘press 1 for more information.’” There may be a bright line out there between services subject to regulatory authority and those that are not. But I doubt this is it.”).

60 See e.g., MCI Feb. 9, 2005 Letter and Attachment introducing MCI’s Prepaid Information Services Featuring “Golden Retriever”.

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unchecked, all interstate telecommunications revenues and access minutes will be gone overnight.

V. CALLING CARDS FOR THE MILITARY

The FCC has asked for comment on several issues related to calling cards for military personnel recognizing the importance of these services to members of the armed services and their families.\(^6\) As an initial matter, relative to military calling cards, only USF contributions are at issue. Intrastate access charges are not due on international calls – the most likely use for military calling cards.\(^2\) In any event, as the FCC found in the *AT&T Order* there has been no showing that the intrastate calling patterns are so high that the average rate would be affected if AT&T were required to comply with its obligations to pay intrastate access charges.\(^3\) The fact that other carriers comply with their legal obligations to pay appropriate access charges and make USF contributions and still manage to compete to provide calls demonstrates that no calling card rates (including military) would have to be increased. Alternatively, even if the application of USF contributions to calling cards, as the law requires, was enough to cause anything more than a de minimus increase to rates (for those providers that have not been complying), then the FCC could consider a change to its contribution rules and their application to international calling.\(^4\) Relatedly, it is important to note that this discussion underscores the need for fundamental contribution reform to broaden the base of USF contributions and cut out the incentives to avoid contribution.

\(^6\) *AT&T Order* at ¶ 43.

\(^2\) Similarly, the FCC stated that it was not convinced that relevant to AT&T’s prepaid calling card service “subjecting intrastate calls to intrastate access charges, as existing law requires, will have a material impact on AT&T’s rates”. *AT&T Order* at ¶ 36.

\(^3\) *AT&T Order* at ¶ 34.

\(^4\) See 47 C.F.R. § 54.706(c) and (d).
VI. CONCLUSION

For the foregoing reasons, GCI urges the FCC to affirm that AT&T’s two variants of calling card services are not enhanced and are, in fact, telecommunications services. The FCC should also determine that the inclusion of information incidental to the essential service being provided – the ability to make a calling card call – does not transform the prepaid calling card service into an enhanced or information service and clarify that any calling card service is presumptively classified as a telecommunications service. The FCC must act expeditiously in this matter to stop any provider’s efforts to avoid its legal obligations as to intrastate access charges and USF contributions, at the expense of other carriers and consumers. Moreover, prompt FCC action is critical to ensure that providers do not apply such tactics not only to calling card services, but to other types of services including wireline and wireless calling.

Respectfully submitted,

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