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

APR -4 2007

In the Matter of	)	
	)	
Regulation of Prepaid Calling Card Services	)	WC Docket No. 05-68
	)	

ORDER

Adopted: March 29,2007 Released: March 29,2007

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On August 23, 2006, iBasis, Inc. (iBasis) filed a petition for stay pending judicial review[1] of a portion of the Commission's ***Prepaid Calling Card Order,*** which found that certain prepaid calling card service providers are telecommunications service providers.[2] Specifically, iBasis requests that the Commission stay that portion of the ***Prepaid Calling Card Order*** that imposes retroactive liability on service providers that offer prepaid calling cards using Internet protocol (IP) transport.[3] For the reasons stated below, we deny iBasis's petition for stay.

II. BACKGROUND

2. On May 15,2003,AT&T filed a petition seeking a declaratory ruling that intrastate access charges did not apply to calls made using its "enhanced" prepaid calling cards, which provided additional information to the calling party in the form of an advertising message provided by the retailer of the card.[4] AT&T contended that the "enhanced" cards provided an information service, rather than a telecommunications service, and, therefore, revenues from these cards were subject to neither access charges nor universal service assessments under section 254 of the Communications Act of 1934, as amended (the Act)[5]. 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: (1) cards that offer the caller a menu of options to access non-call-related information; and (2) cards that utilize IP technology, accessed by 8YY dialing, to

[1] Regulation of Prepaid Calling Card Services, WC Docket No. 05-68, iBasis Petition for Stay Pending Judicial Review (tiled Aug. 23,2006) (Stay Petition).

[2] ***Regularion of Prepaid Calling Card Services,*** WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) ***(Prepaid Calling Card Order).***

[3] Stay Petition at 3

[4] AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services. WC Docket No. 03-133, 5-6 (filed May 15, 2007).

[5] 47 U.S.C.§ 254

transport a portion of the calling card call.[6]

3. On February 16,2005, the Commission denied AT&T's petition for declaratory ruling, and found that the service described in the original petition was ajurisdictionally-mixed telecommunications service subject to access charges and universal service requirements.' 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 universal service fund (USF) obligation and bill AT&T retroactively for the time period during which it offered its prepaid calling cards but did not contribute to the fund.' In the ***AT&T Culling Card Order and NPRM,*** the Commission also sought comment on the two additional types **of** "enhanced" prepaid calling cards described in the AT&T November 22nd *Ex Parte* Letter.[9]

4. AT&T subsequently sought court review of the retroactive application of the USF contribution obligation ordered in the ***AT&T Calling Card Order arid NPRM.***[10] The United States Court of Appeals for the D.C. Circuit found that the Commission acted in an adjudicatory manner and that retroactivity is the norm in agency adjudications." The court further found that the Commission treated the classification of "enhanced services" in a fact-specific, case-by-case manner, and that the Commission's decision in the ***AT&T Calling Card Order and NPRM*** was the "latest application of this approach."[12] The court concluded that the Commission's decision in the ***AT&T Calling Curd Order and NPRM*** represented a new policy applied to a new situation, rather than a departure from clear policy, and, as such, the decision to apply its findings retroactively was not manifestly unjust.[13]

5. On June 1, 2006, the Commission adopted the ***Prepaid Calling Curd Order,*** of which iBasis now seeks a stay.[14] In this more recent order, the Commission addressed the appropriate regulatory classification of menu-driven prepaid calling cards and prepaid calling cards that utilize IP-transport technology.[15] The Commission found that both types of prepaid calling cards are telecommunications services and, therefore, providers of such cards are subject to regulation as telecommunications carriers.[16] The Commission also declared that, as a result of the order, and in conjunction with prior rulings on prepaid calling cards, all prepaid calling card providers are subject to regulation as telecommunications carriers."

6. With respect to prepaid calling cards that utilize IP transport, the Commission found that

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[6] ***See*** Letter **from** Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch. Secretary, Federal Communications Commission, **WC** Docket **No.** 03-133 **(filed Nov.** 22, 2004).

[7] ***AT&T Carp. Petitionfar Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services,*** WC Docket **Nos** 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826,4835, para. *28* (2005) (***AT&T Calling Card Order and NPRM).***

[8] ***Id.*** at 4836, para. 31.

[9] ***Id.*** at 4839-40, paras. 39-40.

[10] ***AT&T*** v. ***FCC***, 454 F.3d 329, 331 (D.C. Cir. 2006) (***AT&T*** v. ***FCC***)

[11] ***Id.*** at 332

[12] ***Id.*** at 333

[13] ***Id.*** at 334

[14] ***Supra*** n.2

[15] ***Prepaid Calling Card Order,*** 21 FCC Rcd **at** 7293-94, **para.** 10

[16] *Id.*

[17] ***Id.***

providers of these cards were providing services similar to the telecommunications service at issue in the *IP-in-&-Middle Order,''* and, therefore, the issuance of that order in 2004 "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."[19] Since this determination involved a new application of existing law, the Commission found it appropriate to apply the telecommunications classification retroactively to cards that use IP transport.[20] The Commission also found that the issuance of a notice of proposed rulemaking seeking comment on the regulatory classification of cards using IP transport did not prevent the Commission subsequently from issuing an adjudicatory order on the classification issue with retroactive effect." As previously noted, iBasis seeks a stay, pending judicial review, of the portion of the *Prepaid Calling Curd Order* that imposes retroactive liability on prepaid calling cards that utilize IP transport.[22]

III. DISCUSSION

7. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four factor test established in *Virginia Perroleurn Jobbers Associarion v. FPC,*[23] as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*[24] Under this test, a petitioner must demonstrate that: (1) it will suffer irreparable harm in the absence of a stay; *(2)* it is likely to prevail on the merits of its petition for review; **(3)** a stay will not injure other parties; and **(4)** a stay is in the public interest. As discussed below, we conclude that iBasis does not satisfy this test.

A. iBasis Fails to Demonstrate Irreparable Injury

8. iBasis has failed to demonstrate that it will suffer irreparable harm in the absence of a stay. In claiming irreparable harm, iBasis asserts that it will have to make a substantial USF payment under the *Prepaid Calling Card Order,* and that it may not be able to recover this payment in full. should it succeed on appeal.[25] iBasis acknowledges in the next paragraph of its petition, however, that the Commission's rules allow the Commission to refund universal service contributions if refunds are warranted.[26] Additionally, if the court later overturns the portion of the *Prepaid Calling Card Order* that requires iBasis to make a retroactive **USF** payment, the court could require the Commission to order USAC to issue a refund, thus making iBasis whole?' iBasis's claim of irreparable harm is thus not "both certain and great."[28] Its speculative monetary harm does not rise to the level of irreparable under the injunctive relief standard, and, in

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[18] *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) (*IP-in-the-Middle Order).*

[19] *Prepaid Calling Card Order,* 21 FCC Rcd at 7305-06, para. 43.

[20] *Id.* at 7304-05, paras. 41, 43.

[21] *Id.* at *7306,* para. *44*

[22] Stay Petition at **3.** iBasis provides wholesale voice over Internet Protocol (VoIP) services, and retail traditional and virtual prepaid calling cards. *Id.* at 13.

[23] *Virginia Perroleurn Jobbers Association v. FPC,* 259 F.2d 921,925 (D.C. Cir. 1958)

[24] *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)

"Stay Petition at 34

[26] *Id.* at 35. *See also* 47 C.F.R. § 1.3 (Agency rules "may he waived by the Commission on its own motion or on petition if good cause therefore is shown."); *United Gas Improvement Co. v. Caller Properties, Inc.*, 382 U.S. 223. 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order.").

[27] *See Boston Edisan Co. v. FPC,* 557 F.2d 845, 849 (D.C. Cir. 1977) (ordering agency to allow rate increase to take effect retroactive to the date on which it should have been allowed).

[28] *Wisconsin Cas Co. v. F.E.R.C.*, 758 F.2d 669. 674 (D.C.Cir. 1985) (*Wisconsin Gas*).

any event, economic loss in and of itself cannot support a claim of irreparable harm.[29]

9. iBasis also argues that the ***Prepaid Calling Card Order*** subjects it to the "full panoply" of federal, Title II regulation and the costs associated with that regulation.[30] iBasis further suggests it now may be subject to retroactive imposition of "state licensing or related filing requirements for intrastate traffic."[31] iBasis does not identify with specificity any federal or state regulation that would impose substantial and unrecoverable costs, however. iBasis's vague speculation does not support its argument that it will suffer irreparable harm as a result of the ***Prepaid Calling Card Order.***

10. Finally, iBasis expresses concern over its possible exposure to the "risk and attendant cost of litigation from local exchange carriers to collect interstate or intrastate access charges."[32] iBasis does not claim that any local exchange carrier has initiated such litigation, and, therefore, iBasis does not show that this asserted injury is "actual and not theoretical."[33] Even if iBasis were to incur such litigation expenses, the Supreme Court has held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."[34] iBasis's concerns over possible litigation risk and expense do not support a grant of its petition for stay.

B. iBasis is Unlikely to Succeed on the Merits of its Petition for Stay

11. iBasis also fails to demonstrate that it is likely to prevail on the merits of its challenge to the ***Prepaid Calling Curd Order.*** First, iBasis argues that the Commission in the ***Prepaid Culling Card Order*** was conducting a rulemaking and, therefore, any rules adopted in the order may not be applied retroactively?' The existence of a rulemaking proceeding does not preclude the Commission from adopting an adjudicatory declaratory ruling "terminating a controversy or removing uncertainty," which is precisely what the Commission did in the ***Prepaid Calling Card Order.***[36] Although the Commission did adopt some new rules in the rulemaking portion of the ***Prepaid Calling Card Order,*** it also applied existing rules to certain services in the declaratory ruling portion of the decision, stating, "[t]he classification decisions that we are making here fall into the category of new applications of existing law, clarifications, and additions."[37] Thus, it was well within the Commission's discretion to apply retroactively portions of the ***Prepaid Culling Curd Order*** that were issued in an adjudicatory proceeding.

12. We are not persuaded by iBasis's argument that, even if the Commission were acting in an adjudicatory manner, it was impermissible for the Commission to impose retroactive liability on service providers that offer prepaid calling cards with IP transport functionality.[38] iBasis contends that the Commission, in the ***Prepaid Calling Curd Order,*** addressed an issue of first impression, i.e., the appropriate regulatory classification and jurisdiction of services using Internet technology, and, therefore, the

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[29] ***Id.***

[30] Stay Petition at 35-36.

[31] ***Id.*** at ***36.***

[32] ***Id.***

[33] ***Wisconsin Gas,*** 758 F.2d at 674.

[34] ***FTC v. Siandard Oil Co. of Cal.***, 449 U.S. **232,** 244 (1980) (quoting ***Renegotiation Bd. v. Bannercraft Clothing Co.***, 410 U.S. 1, 24 (1974)).

[35] Stay Petition at 21-28.

[36] 47 C.F.R. § 1.2; *see* 5 U.S.C. § 554(e).

[37] ***Prepaid Calling Card Order***, 21 FCC Rcd at 7304-05, pare. **41** (internal citations omitted).

[38] Stay Petition at 28-34.

Commission's decision cannot be applied retroactively.[39] iBasis's characterization of the Commission's ruling is incorrect. Although the Commission prior to the ***Prepaid Culling Curd Order*** had not issued a ruling pertaining specifically to the regulatory classification of prepaid calling card services using IP transport, the Commission's decision was foreshadowed by the ***IP-in-the-Middle Order,*** which established that "the use of IF' transport, without more, [does] not change the regulatory classification of the service at issue.'" In any event, the court, in *AT&T* **v.** ***FCC,*** upheld the Commission's decision to give its regulatory classification retroactive effect in part because the classification ***was*** a matter of first impression.[41] iBasis's assertion that the Commission lacks authority to give retroactive effect to adjudications involving matters of first impression thus is incorrect as a matter of law.

13. In its petition for stay, iBasis reiterates the arguments that the Commission already addressed and rejected in the ***Prepaid Calling Card Order.*** For example, iBasis argues that retroactive application of the telecommunications classification for cards using IP transport would result in unfair or inequitable treatment because the company was not provided sufficient notice that it might be subject to retroactive liability.[42] The Commission addressed iBasis's arguments in the ***Prepaid Calling Card Order*** when it found that prepaid calling cards that use IF' transport do not provide customers the ability to do anything other than make a telephone call, and thus are no different from basic prepaid calling cards that have always been treated as telecommunications services.[43] The Commission applied the factors identified by the court in *Clark-Cowlitz* v. ***FERC*** to determine that its decision to classify prepaid calling cards that utilize IP transport as telecommunications service was not a "departure from well established practice," and retroactive application **of** that decision did not result in a "manifest injustice.'* Additionally, the Commission found that its earlier decision in the ***If-in-the-Middle Order*** provided notice that calling card services using IP transport, without providing any additional capabilities, were telecommunications services.[45] Moreover, in *AT&T v. FCC*, the court noted that, absent a clear rule of law exempting a prepaid calling card provider from USF obligations, the provider was on notice that the Commission might require it to make **USF** contributions and the provider assumed the risk of an adverse decision.[46] Retroactive application of the ***Prepaid Calling Curd Order*** is, therefore, within the Commission's discretion and iBasis has not demonstrated a likelihood of success on the merits.

C. Granting ***iBasis's*** Petition ***for*** Stay May ***Harm*** Other **Parties** and ***is*** not in ***the*** Public Interest

14. Finally, we are not persuaded by iBasis's contention that grant of a stay is consistent with the public interest and will not harm other parties." In section 254(d) of the Act, Congress required the Commission to establish a mechanism "to preserve and advance universal service."[48] Congress **also** mandated that "*[e]very* telecommunications carrier that provides interstate telecommunications services ***shall***

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[39] ***Id.*** at **28-29.**

[40] ***Prepaid Calling Card Order,*** 21 FCC Rcd at 7305-06, para. 43.

[41] ***AT&T v. FCC,*** **454** F.3d at 332.

[42] **Stay** Petition at 29.

[43] ***See Prepaid Calling Card Order,*** **21** FCC Rcd **at** 7305-06, para. 43.

[44] ***Id.*** (quoting *Clark-Cowlitz Joint Operating Agency* **v.** ***FERC***, **826** F.2d 1074, **1081-82** (D.C. Cir. 1987)

[45] ***See Prepaid Calling Curd Order*** 21 FCC Rcd at 7306, para. 43.

[46] *AT&T* **v.** ***FCC,*** 454 F.3d at 333-34.

[47] Stay Petition at **36-38.**

[48] 47 U.S.C. § 254(d).

contribute, on an equitable and nondiscriminatory basis" to universal service.[49] Staying iBasis's obligation to pay universal service conflicts with the public interest in protecting the universal service fund and ensuring that all telecommunications carriers pay their equitable share of universal service contributions. Moreover, iBasis admits that its failure to contribute to the USF has increased the amounts paid by other carriers, and these carriers will not be made whole until iBasis makes its payment.[50] Thus, iBasis has demonstrated that other carriers will be harmed, through their inability to recover past overpayments to the USF, **if** iBasis's stay **request is** granted. We do **not** agree with iBasis, therefore, that grant of its stay **request** is in the public interest. **As** such, we deny iBasis's stay petition.

IV. CONCLUSION

15. Accordingly, IT IS ORDERED pursuant to section 4(i) of the Communications Act of 1934, as amended, **47 U.S.C.** § 154(i), and the authority delegated **under** sections 0.91 and **0.291** of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that iBasis's Petition for Stay Pending Judicial Review of the ***Prepaid Calling Card Order*** **IS** DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief, Wireline Competition Bureau

[49] *Id.* (emphases added). iBasis is thus wrong when it argues that there **is no** "sufficiently countervailing statutory interest" to offset the ill effects of imposing retroactive liability. Stay Petition at **33. On** the contrary, the Commission clearly has an interest – indeed, a statutory obligation – in ensuring that iBasis pays its equitable share of USF contributions as required by section 254(d) of the Act. 41 U.S.C. § 254(d)

[50] Stay Petition at 36-37