BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

NOS. 06-1274, 06-1298 AND 06-1309

QWEST SERVICES CORP. AND IBASIS, INC.

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

All parties, intervenors, and amici appearing in this Court are listed in the Opening Brief of iBasis, Inc.

2. Ruling under review

The ruling under review is *In the Matter of Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order*, 21 FCC Rcd 7290 (2006) (J.A.15-39).

3. Related cases

This case has not previously been before this Court. We are not aware of any related case pending before this Court or any other court.

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GLOSSARY

APA	Administrative Procedure Act
EPPC	Enhanced prepaid card
ICA	Interstate Commerce Act
IP	Internet Protocol
IP-in-the-Middle Order	*In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004)
LEC(s)	Local exchange carrier(s)
MCI	MCI Telecommunications Corporation
NPRM	Notice of Proposed Rulemaking
VoIP	Voice over Internet Protocol

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Last year, this Court affirmed the Federal Communications Commission's retroactive application of an adjudicatory decision holding that an "enhanced" prepaid calling card service offered by AT&T was a telecommunications service, and that AT&T, in providing it, was subject to certain duties under Title II of the Communications Act. *AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006). After the *AT&T* opinion, the Commission in the declaratory order on review ruled that two additional prepaid calling card services — so-called menu-driven cards and cards that use Internet Protocol ("IP") transport — also are telecommunications services and that providers of such services are telecommunications providers subject to Title II duties. The

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Commission applied the classification of cards that use IP transport retroactively, but made its classification of menu-driven cards prospective only. *In the Matter of Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) ("*Order*") (J.A. 15).

Neither petitioner in this case challenges the Commission's substantive classification ruling. Instead, petitioners Qwest and iBasis challenge the *application* of that ruling — whether it should apply retroactively to the prepaid card services at issue. Thus, as in *AT&T*, this case involves a challenge to the FCC's choice of remedy. In addition, iBasis challenges the Commission's use of a declaratory ruling to classify the services.

The case presents the following central issues for the Court's review:

(1) Did the Commission properly exercise its discretion to decide the classification of menu-driven and IP transport prepaid calling card services by declaratory ruling rather than rulemaking?

(2) Assuming that the Commission properly engaged in adjudication, did the FCC choose reasonable remedies concerning retroactive application of its classification rulings to the two prepaid calling card services?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum to this brief.

COUNTERSTATEMENT

Prepaid calling cards, which are often used in conjunction with payphones such as those in hotels or airports, provide consumers with a way to make long distance telephone calls without presubscribing to a long distance telephone carrier or using a credit card. In recent years, service providers have added new features to prepaid calling cards and have employed

new transmission technologies to carry the calls made with such cards. Disputes over the regulatory treatment of these new variations of prepaid calling cards have precipitated proceedings before the Commission and litigation in the courts. To place this case in proper context, we review the statutory and regulatory framework relating to prepaid calling cards, as well as the administrative and judicial history that culminated in this Court's decision in *AT&T Corp. v FCC,* 454 F.3d 320, and the Commission's adoption of the *Order.*

A. Background

1. Statutory and Regulatory Background

The Communications Act of 1934, as amended, establishes a framework for the regulation of interstate common carrier communications services. 47 U.S.C. §§ 151, *et seq.* "Congress entrusted administration of the Communications Act to the [Commission],"[1] and gave the agency a variety of regulatory tools to perform that function. The Commission, for example, may "prescribe such rules and regulations as may be necessary in the public interest."[2] The Commission also may issue adjudicatory declaratory rulings "to terminate a controversy or remove uncertainty."[3] "The Commission has substantial discretion as to whether to proceed by rulemaking or adjudication." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 808 n.29 (1978).[4]

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[1] *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994).

[2] 47 U.S.C. § 201(b). *See also* 47 U.S.C. § 303(r).

[3] 5 U.S.C. § 554(e). *See also* 47 C.F.R. § 1.2 (authorizing the Commission to "issue a declaratory ruling terminating a controversy or removing uncertainty").

[4] *See, e.g., NLRB v. Bell Aerospace Co. Division of Textron,* 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1947). *See also* 47 U.S.C. §§ 154(i), 154(j).

The Telecommunications Act of 1996 (which amended the Communications Act of 1934) distinguishes between "telecommunications services" and "information services." A "telecommunications service" is "the offering of telecommunications," *i.e.*, of pure transmission capability, "for a fee directly to the public . . . regardless of the facilities used." 47 U.S.C. § 153(46).[5] An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

The Commission has interpreted the telecommunications service/information service dichotomy in the 1996 Act essentially as codifying the regulatory distinction that the agency had established in its 1980 *Computer II Order*[6] between "basic" common carrier communications services and "enhanced services."[7] The Commission in the *Computer II Order* described a basic service as a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."[8] It defined an

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[5] The Act defines "telecommunications" 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." 47 U.S.C. § 153(43).

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) ("*Computer II Order*"), *aff'd*, *CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[7] *See AT&T*, 454 F.3d at 333; *see also In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11830, 11516 (¶ 33) (1998), *quoting Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21955-56 (¶ 102) (1996) (*"Non-Accounting Safeguards Order"*) ("[T]he differently-worded definitions of 'information services' and 'enhanced services' can and should be interpreted to extend to the same functions.").

[8] *Computer II Order*, 77 FCC 2d at 420 (¶ 96).

enhanced service, by contrast, as "any offering over the telecommunications network which is more than a basic transmission service."[9]

Telecommunications services — but not information services — are subject to common-carrier regulation under Title II of the Communications Act,[10] and thus the classification of an offering as a telecommunications service has important consequences. For example, section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate *telecommunications services*" must "contribute, on an equitable and nondiscriminatory basis," to a fund that supports universal service mechanisms. 47 U.S.C. § 254(d) (emphasis added). By contrast, except in certain circumstances not relevant to this case, carriers generally are not required to make contributions on the basis of their information service receipts.

2. Access Charges

Incumbent local exchange carriers ("LECs"), such as the petitioner Qwest, provide local telephone service to customers in a given geographical calling area or "exchange." Long-distance (or "interexchange") calls connect callers in different local exchanges to one another. Interexchange telephone calls typically originate on the facilities of a LEC, which provides access to the facilities of a long-distance carrier ("IXC"), and terminate at the destination point on the facilities of another LEC. In beginning or completing such calls, the LEC provides "exchange access" (47 U.S.C. § 153(16)) to the long-distance telecommunications carrier and

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[9] 77 FCC 2d at 420 (¶ 97). The Commission's rules define enhanced services as services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

[10] 47 U.S.C. §§ 201 *et seq.* *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 973-75 (2005) ("*Brand X*").

assesses charges on that carrier known as "access charges" that are set forth in the LEC's tariffs.[11]

The Communications Act establishes a system of dual state and federal regulation for telecommunications services, including access services.[12] LECs, such as Qwest, thus file interstate access tariffs with the Commission and intrastate access tariffs with state regulatory commissions. In general, state or federal regulatory authority with respect to such services depends on whether the originating and terminating points of a call are in the same state or in different states. If the calling and called parties are in the same state, the call is subject to intrastate access charges, whereas if the two parties are in different states, the call is subject to interstate access charges.[13]

Since 1983, the Commission has maintained a detailed set of regulations governing the structure, composition, and applicability of interstate access charges. *See* 47 C.F.R. Part 69. Section 69.5(b) of the Commission's rules specifies that such charges "shall be computed and assessed" upon long-distance carriers in their provision of "telecommunication services." 47 C.F.R. § 69.5(b). In contrast, the Commission generally prohibits LECs from requiring information service providers to pay access charges.[14] However, individual information service providers may choose to purchase — and pay for — specific access services that are offered under tariff.

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[11] *See generally National Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[12] 47 U.S.C. § 152. *See generally Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 360 (1986).

[13] *See AT&T*, 454 F.3d at 331 n.1.

[14] *See, e.g., In the Matter of Access Charge Reform*, 12 FCC Rcd 15982, 16003 (¶ 50) (1997), *aff'd, Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

3. Prepaid Calling Card Services

Prepaid calling cards offer consumers a fixed number of long-distance telephone service minutes at a fixed price. In order to use a card, a customer first dials a number to reach the service provider's calling card "platform" — essentially a computerized switch — and then inputs the unique identification number associated with the card for purposes of verification and billing, before dialing the telephone number of the party he or she wishes to call. The platform then routes the call accordingly. *See AT&T,* 454 F.3d at 330. The purpose of a conventional prepaid calling card arrangement is to give consumers an alternative means of paying for ordinary toll telephone calls. The Commission has regulated as basic services those prepaid calling card services that provide only the capacity to make ordinary toll telephone calls. *See In the Matter of the Time Machine*, 11 FCC Rcd 1186, 1192 (¶ 39) (Com.Car.Bur. 1995). *See AT&T*, 454 F.3d at 333. The providers of such services thus must make USF contributions and pay access charges.

As noted above, service providers in recent years have begun to offer consumers a variety of prepaid calling cards. Although many prepaid calling card services are routed entirely over the public switched network, some use IP transport for all or a portion of the transport of such calls. *See Order*, 21 FCC Rcd at 7297 (¶¶ 18-20) (J.A. 22). Petitioner iBasis, for example, began in 2003 to provide prepaid calling cards that utilize its international VoIP ("Voice over Internet Protocol") network. iBasis Brief at 3. The calling card example reflects a broader industry trend of carriers offering services that utilize an IP network to transport all or a portion of telephone calls. In a 2004 declaratory ruling, for example, the Commission classified AT&T's phone-to-phone IP telephony service — a service in which AT&T converts an ordinary long-distance telephone call from its existing format into an IP format, transports the call over

AT&T's Internet backbone, converts the call back to its original format, and then delivers the call through local telephone facilities — as a telecommunications service. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges,* 19 FCC Rcd 7457 (2004) ("*IP-In-The-Middle Order*"). Because AT&T's IP telephony service "merely uses the Internet as a transmission medium" without "provid[ing] any enhanced functionality," the Commission determined that the use of IP transport in itself did not warrant classification of that service as an information service. *Id.* at 7468, 7469 (¶¶ 17, 18).

Menu-driven prepaid calling cards have capabilities apart from enabling the user to make ordinary telephone calls. They allow the user, by selecting from a menu, either to make a telephone call or to access, for example, data about the card distributor, or information about sports, weather, restaurants, or entertainment. *See Order*, 21 FCC Rcd at 7294-95 (¶¶ 11-14) (J.A. 19-20). The record reflects that menu-driven cards are provided by a number of different prepaid card providers, including IDT,[15] intervenor AT&T,[16] MCI,[17] and ekit.com.[18]

B. The EPPC Service Adjudication and the Proceedings Leading to the *Order*

On May 15, 2003, AT&T Corp. filed a petition for declaratory ruling asking the Commission to classify its so-called enhanced prepaid card ("EPPC") service — a prepaid calling card service that required the customer to hear an advertisement from the retailer that sold the card before dialing the destination telephone number — as jurisdictionally interstate, and thus

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[15] *See* Comments of IDT Telecom, Inc. (filed Apr. 15, 2005) at 3-5 (J.A. 242-244).

[16] Comments of AT&T Corp. (filed Apr. 15, 2005) at 4 (J.A. 168).

[17] Comments of MCI, Inc. (filed Apr. 15, 2005) at 5, 12 (J.A. 263, 270).

[18] Comments of ekit.com (filed Apr. 15, 2005) at 4 (J.A. 230).

"subject to interstate, rather than intrastate, access charges," except in the rare instances when both parties to a call were located within the same state as the calling card platform.[19] AT&T asserted that an EPPC call was not a single end-to-end call from the cardholder to the called party, but rather two distinct calls — "one from the subscriber to the enhanced service platform," and a second call from the platform to the called party.[20] AT&T also claimed that its EPPC service was an information service, not a telecommunications service, because "each time the cardholder uses the card, the AT&T enhanced platform engages in its own communications with the cardholder by sending stored third-party messages and other information."[21] On November 22, 2004 — more than a year after parties had filed comments and reply comments in response to AT&T's petition — AT&T in an *ex parte* letter amended its petition to request the Commission also to classify as interstate information services two other types of prepaid calling card services: menu-driven prepaid calling cards and prepaid calling cards that use IP transport.[22]

In February 2005, the Commission issued an adjudicatory ruling declaring AT&T's EPPC service to be a telecommunications service, rather than an information service as AT&T had contended.[23] The Commission explained that the service that AT&T offered to customers was the ability to make an ordinary telephone call. The advertising message did not change the

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[19] AT&T Corp. Petition for Declaratory Ruling, WC Docket No. 03-133 at 1, 9-17 (filed May 15, 2003).

[20] *Id.* at 2.

[21] *Id.* at 18.

[22] Letter from Judy Sello, Senior Attorney, AT&T, to Marlene Dortch, Secretary of the FCC, WC Docket No. 03-133 (filed Nov. 22, 2004).

[23] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4830-33 (¶¶ 14-21) (2005) (J.A. 45, 49-52) ("*AT&T Order and NPRM*"), *aff'd, AT&T Co. v. FCC*, 454 F.3d 329.

classification of that service into an information service, because it was "provided automatically, without the advance knowledge or consent of the customer," and thus "there is no offer to the customer of anything other than telephone service." *AT&T Order and NPRM*, 20 FCC Rcd at 4830 (¶ 15) (internal quotation omitted) (J.A. 49). In addition, the Commission held that AT&T was retroactively liable for unpaid universal service fees generated by the interstate telecommunications services it had provided pursuant to the cards. The Commission pointed out that its "prior decisions had always treated prepaid calling cards as telecommunications services" and that "AT&T had no reasonable basis to expect to avoid [its] obligation[]" to contribute to the universal service fund.[24] The Commission also rejected AT&T's jurisdictional argument, explaining that when the calling and called parties were located in the same state, calls made with EPPC service were intrastate (and subject to any applicable intrastate access charges) even if the central switching platform was located in a different state. 20 FCC Rcd at 4833 (¶¶ 22-23) (J.A. 52).

The Commission in the *AT&T Order and NPRM* limited its ruling to the EPPC service that AT&T described in its original petition. The Commission did not resolve at that time the regulatory classification of other types of prepaid calling cards, including the two that were described in AT&T's November 2004 *ex parte* letter and are at issue in this case. Instead, the Commission issued a notice of proposed rulemaking ("NPRM") to gather information about all types of calling card services and to consider the appropriate regulatory regime. 20 FCC Rcd at 4826, 4839-41 (¶¶ 1, 38-43) (J.A. 45, 58-60). The Commission invited comments on a wide

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[24] 20 FCC Rcd at 4836 (¶ 32), *citing The Time Machine*, 11 FCC Rcd at 1192-93 (¶ 40) (J.A. 55).

range of matters, including the regulatory classification of menu-driven prepaid calling cards and prepaid calling cards that use IP transport. 20 FCC Rcd at 4840 (¶¶ 39, 40) (J.A. 58, 59).

AT&T filed a petition for judicial review of the *AT&T Order and NPRM* and, after narrowing the scope of its petition at oral argument, attacked only the Commission's decision to impose universal service contribution obligations retroactively on its EPPC service. On review, this Court upheld the Commission's imposition of retroactive liability upon AT&T, finding that the agency's classification of EPPC as a telecommunications service did not change regulatory policy and that requiring USF payments retroactively was not manifestly unjust. *AT&T*, 454 F.3d at 332. The Court pointed out that AT&T had been "on notice" that the Commission might require it to pay universal service fees on EPPC service because "prepaid calling cards are ordinarily considered telecommunications services and that the revenues derived from those services must be included when calculating universal service support." 454 F.3d at 333. The Court also relied on the "long-standing principle" that "'the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of . . . remedies and sanctions.'" *AT&T*, 454 F.3d at 334, *quoting Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

C. The Order on Review

In an order released on June 30, 2006, the Commission declared that the providers of menu-driven prepaid calling cards and prepaid calling cards that use IP transport — like providers of EPPC service — offer telecommunications services and thus must contribute to the universal service fund and pay access charges. *Order*, 21 FCC Rcd at 7290, 7293-97 (¶¶ 1, 10-20) (J.A. 15, 18-22). The Commission further adopted prospective interim rules that it found to

be "necessary" to assure that access charges can be assessed on all providers of prepaid card services in the future. *Id.* at 7301 (¶ 31) (J.A. 26); *see id.* at 7302-04 (¶¶ 32-40) (J.A. 27-29).[25] The Commission found that "immediate action in this proceeding" was necessary to preserve universal service and to "create a level playing field for prepaid card providers." 21 FCC Rcd at 7293 (¶ 8) (J.A. 18). The Commission hoped that its actions would "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." *Id.*[26]

Consistent with the Commission's prior rulings concerning basic prepaid calling cards and EPPC service, the Commission, in a section of the *Order* entitled "Declaratory Ruling," declared that "all prepaid calling card providers will now be treated as telecommunications service providers."[27] 21 FCC Rcd at 7293-94 (¶ 10) (J.A. 18-19). The Commission stated that prepaid calling card providers could seek a declaratory ruling, a waiver or other form of relief if

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[25] While the further FCC proceeding initiated by the NPRM portion of the Commission's declaratory ruling order was pending, AT&T filed an emergency petition asking the Commission to adopt immediate interim measures that it said were necessary to safeguard universal service and produce a level regulatory playing field for all providers of prepaid services. AT&T Emergency Petition for Immediate Interim Relief at 2 (May 3, 2005) (J.A. 272). AT&T asked the Commission to require "all prepaid calling card providers to pay USF support and interstate access charges on all their services." *Id.* at 2 (J.A. 275). In the alternative, AT&T asked the Commission to require all prepaid calling card service providers to pay intrastate access charges for calls between persons located in the same state and federal USF and access charges on other calls. *Id.*

[26] The Commission exempted prepaid calling cards sold by, to, or pursuant to contract with, the military from universal service fund requirements. 21 FCC Rcd at 7299 (¶ 24) (J.A. 24). That exemption is not challenged on review.

[27] The Commission declined to adopt AT&T's request for an immediate interim order without deciding whether particular prepaid calling cards are telecommunications services or information services. 21 FCC Rcd at 7293 (¶ 9) (J.A. 18).

they were to offer in the future new types of prepaid calling cards that they believed should be classified as information services. *Id.*

Menu-driven card providers had contended that these services should be classified as interstate information services because, they claimed, the services offered informational capabilities that were integrated with telecommunications.[28] However, while the Commission recognized that menu-driven prepaid calling cards package together transmission and information retrieval capabilities, it determined that the telephone calling capability was a distinct service offering that was separate from the information service. The Commission pointed out that the information service features (*e.g.*, access to sports or stock market information) and the telephone transmission capability are not engaged or used simultaneously. Because these two functions are "only minimally linked to one another," the Commission concluded that they did not constitute a single integrated offering. 21 FCC Rcd at 7294 (¶ 13) (J.A. 19). Thus, to the extent that menu-driven prepaid calling cards are used to make ordinary telephone calls, the Commission declared that such cards offer telecommunications services. 21 FCC Rcd at 7294-97 (¶¶ 11-18) (J.A. 19-22).

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[28] For example, IDT argued that under the statutory definition of information services and the FCC's precedents, it was irrelevant that its cards could also be used to place intrastate telephone calls. Because information service is defined as the offering of the "capacity" to retrieve information and because subscribers were offered this capacity each time they accessed the platform, it contended that the service is an information service, regardless of the fact that callers can also choose to use other capabilities of the service. IDT further contended that it is impossible to separate menu-driven card services into separate prepaid calling interstate and intrastate components, for it did not know whether or when cards are used to retrieve information, place interstate calls, or do all these. IDT Comments, at 9-10, 12-14, 17 (J.A. 248-249, 251-253, 256). Other providers of menu-driven cards also took the position that such cards should be classified as interstate information services. *See* AT&T Comments at 4 (J.A. 168); MCI Comments at 5, 12 (J.A. 263, 270); eKit.com Comments at 4 (J.A. 230).

In classifying as telecommunications services prepaid calling cards that use IP transport to make ordinary telephone calls, the Commission pointed out that it previously had held in the *IP-In-The-Middle Order*, 19 FCC Rcd 7457, that the use of IP transport does not itself transform a telecommunications service into an information service. *Order*, 21 FCC Rcd at 7297, 7306 (¶¶ 18, 43) (J.A. 22, 31). Apart from the use of toll-free (8YY) dialing instead of 1+ dialing, the Commission found that prepaid calling card services using IP transport appeared identical to the services that it had classified as telecommunications services in the *IP-In-The-Middle Order.* The Commission explained that "the use of a different dialing pattern to make calls, without more, should [not] result in a different regulatory classification." 21 FCC Rcd at 7297 (¶ 20) (J.A. 22).

The Commission issued its regulatory classification decision as a declaratory ruling, which is "a form of adjudication." 21 FCC Rcd at 7304 (¶ 41) (J.A. 29). The Commission pointed out that adjudications involving "'new applications of existing law, clarifications, and additions'" — including the adjudication at issue in this case — may be applied retroactively unless such application would work a "'manifest injustice.'" 21 FCC Rcd at 7305 (¶ 41) (J.A. 30), *quoting Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

The Commission considered, and rejected, the argument that its prior issuance of the NPRM to address the regulatory classification of all prepaid calling cards precluded it from addressing these regulatory classifications in a declaratory ruling. 21 FCC Rcd at 7306 (¶ 44) (J.A. 31). The Commission pointed out that AT&T had first sought an adjudicatory ruling as to the regulatory classification of these cards and found that the Commission's subsequent decision to elicit comments in a rulemaking "does not change the adjudicatory nature of the statutory interpretation." *Id.* The Commission noted that it had used a "similar" procedural approach in

prior adjudicatory declaratory rulings. *Id.* In particular, the Commission pointed out that it had issued an adjudicatory declaratory ruling in classifying cable modem service as an information service on the basis of a record developed in response to a notice of inquiry. *Id., citing In re Inquiry Concerning High-Speed Access to Internet*, 17 FCC Rcd 4798, 4818 (¶ 31) (2002), *aff'd in part and vacated in part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd, National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2004).

The Commission found that there would be no manifest injustice in giving retroactive effect to its declaration that prepaid calling card services using IP transport are telecommunications services. 21 FCC Rcd at 7305-06 (¶ 43) (J.A. 30-31). The Commission pointed out that these cards are used solely to make traditional telephone calls and thus are functionally equivalent to the basic prepaid calling card services that the agency long had classified as telecommunications services. The Commission also noted that its *IP-In-The-Middle Order* in particular had "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." *Id.*

The Commission did not give retroactive effect to its regulatory classification of menu-driven prepaid calling cards. 21 FCC Rcd at 7306-07 (¶ 45) (J.A. 31-32). The Commission pointed out that its precedent with respect to those cards — unlike prepaid calling card providers using IP transport — "did not clearly point in the direction of treating providers of menu-driven prepaid calling cards as telecommunications carriers." *Id.* It was only after this proceeding had

begun that the Supreme Court in *Brand X*[29] had eliminated uncertainty regarding the legal principles relevant to the regulatory classification of services that include both transmission and information retrieval capabilities, the Commission explained. *Id.* Given the lack of pre-existing clarity on this question, the Commission reasoned that providers of menu-driven prepaid calling cards may have relied reasonably on the assumption that they would not be classified as telecommunications providers subject to access charges and universal service obligations. *Id.* The Commission thus concluded that the retroactive application of these regulatory burdens on providers of menu-driven cards would be manifestly unjust. *Id.*

As noted above, the Commission also adopted a number of rules — including reporting and certification requirements — relating to the obligation of prepaid calling card providers to pay access charges and to contribute to the federal universal service fund. 21 FCC Rcd at 7298-304 (¶¶ 22-40) (J.A. 23-29). These certification and reporting rules, which are not before the Court on review, became effective in February 2007.[30]

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[29] 545 U.S. 967. In that case, the Supreme Court reversed the Ninth Circuit and upheld the Commission's classification of cable modem service — a service involving the transmission of data between the Internet and users' computers via the network of cable television lines — as an information service. Although cable modem service includes a transmission component, the Court explained that this component is not a discrete offering of telecommunications but is instead a functionally integrated part of a single service that includes both communications and information processing features. The Court distinguished this type of integrated service from one in which the transmission component is functionally separate from the information service capability and thus properly classified as a separate telecommunications offering. 545 U.S. at 990-91.

[30] *See* Public Notice, "OMB Approves Prepaid Calling Card Order Reporting and Certification Rules: All Requirements Now Effective," DA 07-601 (released Feb. 8, 2007). Because the Commission adopted new rules governing reporting and certification for all carriers, the Commission was required to publish a summary of the rules and a Final Regulatory Flexibility Analysis in the Federal Register, which it did on August 2, 2006. 71 Fed. Reg. 43667. Although that summary also included discussion of the Commission's classification determinations, it makes clear that the classification decisions are a part of the FCC's "Declaratory Ruling," *id.*, which is an adjudication. The rule changes appear separately in the summary.

D. Subsequent Developments

On June 14, 2006 —13 days after the Commission adopted its *Order* — Qwest submitted documents to the Commission that it had obtained from AT&T in Qwest's Colorado collection suit for access charges. Qwest claimed that the documents showed that AT&T believed there was a substantial risk that the Commission would classify its menu-driven prepaid calling cards as telecommunications services.[31] After the Commission released its *Order*, Arizona Dialtone and IDT Telecom, Inc. each petitioned the Commission to reconsider aspects of the *Order* that are not challenged on review in this case.[32] Neither Qwest nor iBasis filed a petition for agency reconsideration. On August 23, 2006, iBasis petitioned the Commission for an administrative stay, pending judicial review, of the portion of the *Order* that accorded retroactive effect to its classification of prepaid calling cards using IP transport.[33] On March 29, 2007, the Commission's staff on delegated authority denied iBasis's petition for an administrative stay.[34] The Commission has not yet ruled on the pending petitions for agency reconsideration.

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[31] Letter from Robert McKenna, Associate General Counsel, Qwest, to Marlene Dortch, Secretary, FCC (June 14, 2006). This letter was filed with the Commission before the agency released the text of the *Order*.

[32] Arizona Dialtone Inc. Petition for Reconsideration (Aug. 31, 2006); Petition for Clarification or, in the Alternative, for Reconsideration of IDT Telecom, Inc. (Sept. 1, 2006). Arizona Dialtone's petition addresses the certification and reporting rules adopted in the *Order*. IDT Telecom's petition involves dial-around payphone compensation.

[33] Petition for Stay Pending Judicial Review, filed by iBasis, Inc. (Aug. 23, 2006).

[34] *Regulation of Prepaid Calling Card Services*, DA 07-1504 (released Mar. 29, 2007) (Wireline Comp. Bur.), 2007 WL 952102 (F.C.C.). In November 2006, this Court deferred consideration of iBasis's motion for a judicial stay, pending the resolution of iBasis's motion for an administrative stay before the Commission. *See Order*, No. 06-1274 (D.C. Cir. Nov. 1, 2006).

STANDARD OF REVIEW

To prevail, Qwest and iBasis must establish that the *Order* on review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this 'highly deferential' standard of review, the court presumes the validity of agency action."[35] The Commission need only articulate a "rational connection between the facts found and the choice made."[36] The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g., Earthlink, Inc. v. FCC*, 462 F.3d at 9; *Mobile Relay Associates v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006). The courts give substantial deference to an agency's choice of proceeding by rulemaking or adjudication.[37] Moreover, because agency discretion is at its "zenith" when the challenge is not "'to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of . . . remedies and sanctions,'" the Court is particularly deferential in reviewing an agency's decision to give — or not to give — retroactive effect to an adjudicatory ruling.[38]

INTRODUCTION TO AND SUMMARY OF ARGUMENT

In the order on review, the Commission declared that prepaid calling card services that use IP transport and menu-driven calling card services are telecommunications services and that the providers of such services are telecommunications carriers subject to Title II regulation.

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[35] *LaRouche's Committee for a New Bretton Woods v. FCC*, 439 F.3d 733, 737 (D.C. Cir. 2006), *quoting Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004).

[36] *E.g., Motor Vehicle Manufacturers Association of United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *See Earthlink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006).

[37] *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 808; *NLRB v. Bell Aerospace Co. Division of Textron*, 416 U.S. at 294; *SEC v. Chenery Corp.*, 332 U.S. 194.

[38] *AT&T*, 454 F.3d at 334, *quoting Niagara Mohawk Power Corp. v. FPC*, 379 F.2d at 159.

Neither petitioner challenges that substantive determination, and thus the classification issue is not before the Court. Rather, petitioners challenge the *application* of that classification decision (*i.e.*, whether the decision should apply retroactively to the card services at issue). Stated differently, petitioners challenge *only* the FCC's choice of remedy as to each card service. It is well established that judicial deference is at zenith in this area, and petitioners have not shown that the FCC abused its broad discretion when selecting a remedy for each card tailored to the facts in the record. To the contrary, these remedial choices were reasonable in light of the differing state of the law as to the classification of IP transport versus menu-driven cards.

I.a. The Commission has broad discretion to decide a specific matter by rulemaking or adjudication. The Commission lawfully exercised that discretion by choosing to resolve the regulatory classification of these prepaid calling cards by issuing an adjudicatory declaratory ruling. Contrary to iBasis's claim, the procedures the Commission used in issuing its declaratory ruling do not require the Court to disregard the agency's choice to adjudicate. As long as the agency uses procedures that are consistent with constitutional and statutory requirements, the Commission has discretion to determine how to conduct its own adjudications, including the discretion to make an adjudication after using procedures that are required only in legislative rulemaking.

b. The fact that the Commission issued the NPRM does not divest the agency of its authority to adjudicate the regulatory classification of prepaid calling cards. The Commission's authority to issue an adjudicatory declaratory ruling is independent of its power to initiate a rulemaking. Although the Commission issued the NPRM to consider whether to adopt a rule on the regulatory classification of prepaid calling cards, it did not renounce its authority to adjudicate the regulatory classification of any specific card.

II.a. The Commission reasonably gave retroactive effect to its regulatory classification of prepaid calling cards that use IP transport. These services offer the user no information retrieval functions and clearly fit within the statutory definition of telecommunications services, rather than the definition of information services. In addition, the Commission's *IP-In-The-Middle Order* provided ample notice that the use of IP transport by itself does not transform a telecommunications service into an information service. This key principle was thus clearly established at the time the Commission decided the question of the classification of IP transport calling cards. Because the statutory language and the administrative precedent clearly presaged the Commission's classification of these services as telecommunications services, the Commission reasonably determined that retroactive application of that regulatory classification was not manifestly unjust.

b. The Commission reasonably exercised its discretion to deny retroactive effect with respect to its classification of menu-driven prepaid calling cards. In contrast to prepaid calling cards that use IP transport to make ordinary telephone calls, menu-driven cards offer both telecommunications and information service capabilities on a bundled basis. Because these services include an information retrieval capability, and because the statutory language and pre-existing case law were somewhat ambiguous on the classification of such cards, providers reasonably could have relied upon an expectation that these cards would not be classified as telecommunications services. In contrast to IP transport calling cards, there was no Commission precedent that clearly indicated what the proper classification of menu-driven cards was, and the record shows that all providers of menu-driven cards in fact did treat them as information services. The Commission therefore reasonably determined, given the particular circumstances

here, that applying the regulatory classification retroactively to menu-driven cards would be unfair.

III.A.1. The Commission lawfully took account of equitable considerations in determining whether to apply its classification decisions retroactively. Where, as here, an adjudication involves a new application of existing law, an agency has authority to deny retroactive effect to an adjudicatory ruling to prevent manifest injustice. Qwest's assertion that the Commission lacks authority to adjudicate a carrier's claim against its customer for unpaid charges is unavailing, because the Commission did not adjudicate any such action.

2. There is no merit to Qwest's argument that the Commission violated its duty as an adjudicator by deciding that AT&T was required to pay Qwest's access charges and then mitigating the impact of that ruling by not giving it retroactive effect. The Commission in its declaratory ruling interpreted the meaning of telecommunications services as applied to menu-driven cards; it did not address Qwest's private access charge dispute with AT&T, which remains in litigation before a district court.

3. Contrary to Qwest's claim, the Commission did not violate the filed rate doctrine by denying retroactive effect to its regulatory classification of menu-driven cards. The filed rate doctrine does not divest the Commission of its regulatory authority to classify a service as a telecommunications service under the Act and its own rules and to only apply that classification prospectively, merely because the agency's action might affect the application or interpretation of tariffs.

B. The Court lacks jurisdiction to consider iBasis's claim that, because iBasis allegedly was not a party to the adjudicatory proceeding below, the Commission lacks authority to apply its regulatory classification retroactively to iBasis. iBasis failed to present that issue to the

Commission before the *Order* was released and thus 47 U.S.C. § 405 bars iBasis from raising it on review. In any event, the argument lacks merit because iBasis in fact was a party below. Finally, even if it had not been a party, the Commission has authority to issue a declaratory ruling with binding effect on those who are not parties to the agency proceeding giving rise to the ruling.

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION TO DECIDE THE REGULATORY CLASSIFICATION OF THE CALLING CARD SERVICES AT ISSUE BY DECLARATORY RULING RATHER THAN BY RULEMAKING.

A. The Commission Has Adjudicatory Power To Resolve The Regulatory Classification Of Prepaid Calling Cards.

Section 5(d) of the Administrative Procedure Act ("APA") authorizes the Commission "to issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e).[39] The Commission acts in an adjudicatory capacity when it exercises its section 5(d) authority to issue a declaratory ruling.[40] Section 5(d) is contained in the section of the APA entitled "Adjudications," and this Court has held repeatedly that declaratory rulings issued by the Commission under section 5(d) are adjudicatory orders.[41] The Commission's section 5(d)

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[39] An FCC rule implementing section 5(d) similarly authorizes the Commission "on motion or on its own motion [to] issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 373 n.3 (1969).

[40] *Chisholm v. FCC*, 538 F.2d 349, 365 n.30 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) ("The declaratory ruling belongs to the genre of adjudicatory rulings.").

[41] *See, e.g., AT&T*, 454 F.3d at 332; *Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985).

authority to issue adjudicatory declaratory rulings is separate from and independent of its authority to promulgate rules.[42]

The Commission has "very broad discretion whether to proceed by way of adjudication or rulemaking." *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir.), *cert. denied*, 534 U.S. 1054 (2001).[43] *See* 47 U.S.C. §§ 154(i), 154(j). And the Commission on many occasions has exercised that discretion by issuing adjudicatory declaratory rulings that determine the regulatory classification of specific types of services or providers, including rulings specifically resolving whether an offering is a "telecommunications service" or "information service" under the Communications Act and/or the Commission's rules.[44] This Court has held this type of clarifying declaratory ruling to be a permissible exercise of an agency's section 5(d) authority.[45] Indeed, just last year, this Court in *AT&T* specifically upheld the Commission's retroactive application of the regulatory classification of the "enhanced" prepaid calling card as a lawful exercise of its adjudicatory authority.

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[42] *Compare* 47 U.S.C. § 303(r) *with* 5 U.S.C. § 554(e).

[43] *See National Citizens Committee for Broadcasting,* 436 U.S. at 808. *See also NLRB v. Bell Aerospace Co. Division of Textron*, 416 U.S. at 294 ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."); *Chenery Corp.*, 332 U.S. at 203 ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[44] *E.g.*, *Appropriate Treatment for Broadband Access to the Internet Over Wireless Networks*, FCC 07-30 (released Mar. 23, 2007); *In the Matter of United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as An Information Service*, 21 FCC Rcd 13281 (2006); *AT&T Order and NPRM*, 20 FCC Rcd 4826 (J.A. 45); *IP-In-The-Middle Order,* 19 FCC Rcd 7457; *In re Inquiry Concerning High-Speed Access to Internet,* 17 FCC Rcd 4798.

[45] *See generally British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 993 (D.C. Cir. 1978).

Consistent with established administrative practice, the Commission lawfully exercised its discretion by resolving the regulatory classification of the prepaid calling cards at issue in this case in an adjudicatory declaratory ruling. The *Order* unambiguously states that the Commission's "decision to classify prepaid calling cards that use IP transport . . . as telecommunications services is a declaratory ruling, which is a form of adjudication." *Order*, 21 FCC Rcd at 7304 (¶ 41) (J.A. 29). The Commission titled its decision "Declaratory Ruling and Report and Order" to reflect that the decision included discrete adjudicatory and rulemaking components. And the Commission cited section 1.2, the rule that empowers the Commission to issue a declaratory ruling "in accordance with section 5(d)," 47 C.F.R. § 1.2, as the regulatory vehicle for its classification decision. *See Order*, 21 FCC Rcd at 7304 n.104 (J.A. 29).

iBasis's claim that the Commission's expressed intent to exercise its adjudicatory authority is "inconsequential," *see* iBasis Brief at 14, is erroneous as a matter of law. The courts have held that an agency's characterization of its decision as an adjudicatory declaratory ruling "in itself is entitled to a significant degree of credence."[46] That holding is a corollary of the well-established principle that courts must give "deference" to an agency's "choice" between proceeding by rulemaking or adjudication.[47] To give deference to an agency's choice to proceed by rulemaking or adjudication, by necessity, means that deference must be given to an agency's characterization of its course of action. Put simply, a court cannot defer to the agency's decision

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[46] *British Caledonian Airways,* 584 F.2d at 992. *Accord Viacom International, Inc. v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982). *See also American Airlines, Inc. v. DOT*, 202 F.3d 788, 797 (5th Cir.), *cert. denied*, 530 U.S. 1274 (2000) (court "accord[s] significant deference to the agency's characterization of its own action").

[47] *Chenery*, 332 U.S. at 203. *See, e.g., National Citizens Committee for Broadcasting,* 436 U.S. at 808.

to exercise its adjudicative authority if it treats the agency's characterization of its own action as "inconsequential."

Equally without merit is iBasis's claim that the Court should not defer to the agency's choice to adjudicate the classification issue because the Commission used procedures that are required by the APA for the promulgation of legislative rules. iBasis Brief at 14-17. *See generally* 5 U.S.C. § 553. Because the Commission in its *Order* both adopted substantive rules (which are not challenged on review) and adjudicated the regulatory classification of prepaid calling cards, it is hardly surprising that the agency "follow[ed] the steps for a rulemaking set forth in" the APA. iBasis Brief at 14, *citing* 5 U.S.C. § 553.[48] The agency's use of these procedures, however, does not require the Court to disregard the agency's choice and find that the declaratory ruling portion of the *Order* is a product of rulemaking as a matter of law. Section 4(j) of the Communications Act gives the Commission authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). The Supreme Court has held that section 4(j) gives the Commission "broad delegation"[49] to formulate the procedures it uses in its own adjudicatory proceedings.[50]

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[48] It is a common practice for the Commission to adopt rules and to issue an adjudicatory declaratory ruling in the same agency order. *See, e.g., In the Matter of Truth-In-Billing and Billing Format*, 20 FCC Rcd 6448 (2005), *rev'd on other grounds National Ass'n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006), *petition for cert. filed Sprint Nextel Corp. v. National Ass'n of State Utility Consumer Advocates*, 75 USLW 3483 (U.S., Feb 27, 2007) (No. 06-1184); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4855 (2005).

[49] *FCC v. Schreiber*, 381 U.S. 279, 290 (1965). *See City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664-65 (D.C. Cir. 1984).

[50] As a separate source of authority, section 4(i) empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent [with the express provisions of the Act], as may be necessary in the execution of its functions." This Court has described section 4(i) as a "necessary and proper clause" that empowers the

Although Congress has not required the Commission to adhere to rulemaking procedures when it issues a declaratory ruling, its "delegation of broad procedural authority" to the Commission permits the agency in its discretion to use those procedures — or other adequate procedures of its choice — in issuing such rulings.[51]

Indeed, in *Radiofone, Inc. v. FCC*, then-Judge Scalia stated that there was "no doubt" that an order the Commission had captioned as a "declaratory ruling" was an adjudication even though the agency had given notice, provided parties with an opportunity to comment, and "ordered its Secretary to cause a copy of the ruling to be published in the Federal Register." 759 F.2d at 938.[52] In short, it is not error for the Commission to afford more extensive procedures than the law requires, and it does not convert the nature of its decision when such procedures have been followed. *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523-25

Commission to take "appropriate and reasonable" actions in furtherance of its regulatory responsibilities. *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989). Section 4(i) also gives the Commission the authority to decide the procedures to use in its own adjudications.

[51] *Schreiber*, 381 U.S. at 290. *See Global Crossing Telecommunications, Inc. v. FCC*, 259 F.3d 740, 748 (D.C. Cir. 2001); *New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1219 (D.C. Cir. 1993).

[52] *See also New York State Commission on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) ("[t]he Commission's decision to issue a declaratory ruling, . . . following notice and opportunity for comment, did not amount to an abuse of discretion."). *Accord New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 62 n.9 (2d Cir. 1982) ("The FCC's choice of a declaratory ruling in this case, after notice and an opportunity for comments by interested parties, was not an abuse of discretion.").

(1978); *Radiophone, Inc.*, 759 F.2d at 938.[53] Nor is it contrary to law for the Commission to issue an adjudicative decision that is based on a record compiled under rulemaking procedures, so long as any procedural requirements that apply to adjudication are satisfied.

iBasis's reliance on *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154 (D.C. Cir. 1992), and *City of Chicago v. FPC*, 458 F.2d 731 (D.C. Cir. 1972), *cert. denied*, 405 U.S. 1074 (1972), to support its argument that the regulatory classification must be deemed a product of rulemaking is unavailing. Both of these cases stand for the unremarkable proposition that an agency engages in rulemaking where the administrative proceeding "was both intended by the [agency] to be and was conducted as a rulemaking." *City of Chicago*, 458 F.2d at 739. *See Motion Picture Ass'n of America*, 969 F.2d at 1157, 1158 (agency engages in rulemaking where the agency both "chose to proceed by rulemaking" and the administrative proceeding "had all the characteristics of a rulemaking"). Critically for present purposes, the Court in those cases did not disregard an unambiguously expressed choice by the agency to engage in adjudication. To the contrary, the Court in *Motion Picture Ass'n of America* recognized the agency's choice to "proceed by rulemaking or adjudication in its sound discretion under the Supreme Court's second *Chenery* decision," 969 F.2d at 1158, and affirmed the agency's choice in that case to issue a rule without retroactive effect, holding that the agency had correctly found that "no valid

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[53] The Commission did not codify its ruling declaring that all prepaid calling card providers are telecommunications carriers and thus subject to "access charges, Universal Fund contribution obligations, and the full panoply of Title II obligations." *See Order*, 21 FCC Rcd at 7307 (¶ 45) (J.A. 32). While the Commission added "prepaid calling card providers" to the non-exclusive list of entities required to contribute to the universal service support mechanisms in 47 C.F.R. § 54.706(19), it took this action to prevent possible confusion and to provide an additional source of notice that prepaid calling card providers must contribute to the USF fund, not to comply with APA rulemaking requirements. The fact that the Commission gave this additional notice does not establish that it engaged in rulemaking when classifying the services at issue.

rule" was in existence during the period for which the petitioner had sought retroactive application. 969 F.2d at 1156.

In support of its claim that this Court should disregard the agency's choice to exercise its adjudicatory authority here, iBasis asserts that the "nature and purpose" of the challenged action show that it emanated from rulemaking. iBasis Brief at 17. According to iBasis, the regulatory classification decision must be deemed to be a product of rulemaking because it allegedly "applies prospectively to broad classes and implements . . . general policy objectives." iBasis Brief at 11. Contrary to iBasis's implication, however, "[o]rders handed down in adjudications [also] may establish broad legal principles"[54] and apply prospectively.[55] Indeed, this Court has stated repeatedly that "[t]he decision whether to proceed by rulemaking or adjudication" is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application.[56]

In any event, the agency action that iBasis challenges on review clearly is adjudicatory in nature. iBasis's sole challenge on review is the Commission's determination that the providers of prepaid calling cards that use IP transport, as telecommunications carriers, were subject to the statutory and regulatory obligations that had been placed upon telecommunications carriers during the period of time before the *Order* was issued. In giving its classification declaration retroactive effect, the Commission was not engaging in a rulemaking-type activity, *i.e.*, adopting "new normative standards" for future application. *See, e.g., American Telephone & Telegraph*

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[54] *Central Texas Telephone Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005).

[55] *See, e.g., New York State Commission on Cable Television*, 749 F.2d at 815; *Chisholm*, 538 F.2d at 365.

[56] *Chisholm*, 538 F.2d at 365. *Accord British Caledonian Airways, Ltd*, 584 F.2d at 994. *See Bell Aerospace*, 416 U.S. at 291-95; *Viacom International, Inc.*, 672 F.2d at 1042.

Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992). The agency instead was performing its adjudicatory function to determine the classification of a specific class of providers by "apply[ing] existing law." 978 F.2d at 762.

B. The Issuance of the NPRM Did Not Divest the Commission of Its Authority to Adjudicate the Regulatory Classification of Prepaid Calling Cards with Retroactive Effect.

iBasis suggests that even if the Commission in the first instance had discretion to proceed by adjudication, it forfeited that discretion when it initiated a rulemaking proceeding to consider the adoption of rules on that same subject.[57] That argument is foreclosed by *Busse Broadcasting Corp. v. FCC*, 87 F.3d 1456 (D.C. Cir. 1996), in which this Court rejected as "plainly without merit" the argument that the Commission lacked authority to adjudicate a matter "because the Commission ha[d] proposed, but not yet approved, a new regulation governing [the same subject]." *Id.* at 1463. The Court in *Busse* held that the Commission's broad discretion to choose between rulemaking and adjudication includes the agency's discretion to adjudicate a matter that is the subject of a pending notice of proposed rulemaking. *Id.*

The Commission's section 5(d) authority to issue adjudicatory declaratory rulings is separate from and independent of its authority to initiate rulemakings.[58] Nothing in the Communications Act or the APA limits the Commission's authority to issue adjudicatory declaratory rulings to subjects that the agency has not raised in a pending notice of proposed rulemaking. And nothing in the Communications Act or the APA denies the Commission

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[57] Contrary to iBasis's repeated assertion, the Commission never has denied that it instituted a rulemaking addressing, among other things, the regulatory classification of prepaid calling cards using IP transport and menu-driven calling cards. *See* iBasis Brief at 10, 19.

[58] *Compare* 47 U.S.C. § 303(r) *with* 5 U.S.C. § 554(e).

authority to issue adjudicatory rulings under existing law because the agency has given notice that it might adopt new rules. Indeed, it is not uncommon for the Commission to issue an adjudicatory declaratory order on a matter that is the subject of a pending rulemaking.[59]

In *Verizon Telephone Companies v. FCC*, 453 F.3d 487 (D.C. Cir. 2006), this Court upheld the Commission's authority in a tariff investigation to determine the lawfulness of certain access charge rates under the law that was in effect at the time the rates were filed even though the Commission during the period covered by the tariff investigation was considering the adoption of an accounting rule that would address the issue that was central to the rate case. Although the Commission had completed the rulemaking proceeding and had adopted the accounting rule with prospective effect before it resolved the individual rate proceeding, the agency based its resolution of the rate case not on the new accounting rule itself, but on statutory rate principles that also constituted the basis for the rule.

In affirming the Commission's ratemaking decision over objections that it amounted to a retroactive application of the accounting rule, the Court in *Verizon* held that the initiation of the rulemaking proceeding in itself had not divested the Commission of its authority to investigate the rates in question — including an investigation into the lawfulness of those rates during the period before the new rule was adopted and became effective. The Court rejected the retroactivity argument as a "red herring," finding that the Commission retained its authority to determine the lawfulness of the rates even though the rate investigation and the rulemaking proceeding addressed the same principal issue. So long as the Commission reasonably applied

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[59] *See, e.g., IP-In-The-Middle Order*, 19 FCC Rcd at 7466-67 (¶ 15) (Commission issues a declaratory ruling clarifying that an AT&T telephony service that uses IP transport as a transmission medium is a telecommunications service notwithstanding the existence of a pending rulemaking addressing the classification of IP-enabled services).

existing statutory principles and policies in resolving the ratemaking, its decision was not procedurally defective or an unlawful retroactive application of a new rule. *Verizon*, 453 F.3d at 496-97.[60] So too, the only issue here should be whether the Commission reasonably applied existing statutory principles and policies in its decision to classify prepaid calling cards that use IP transport as telecommunications services, and iBasis does not challenge the Commission's reasoning on this score.

In *American Telephone & Telegraph Co.*, 978 F.2d 727, this Court struck down a Commission adjudicatory order in which the agency had *declined* to rule on the merits of an issue because it had resolved to consider the adoption of a new regulation addressing that issue in a rulemaking. The Court held that the Commission in an adjudication makes a ruling under currently applicable law whereas the Commission in a rulemaking "considers whether to issue new normative standards." 978 F.2d at 732. The Court reasoned that the Commission's adjudicative functions were separate from its rulemaking activities, and topics to be considered in a rulemaking may also be adjudicated. In that case, it was error for the Commission to *refuse* to adjudicate the question because, under the applicable complaint statute, 47 U.S.C. § 208, the agency had an obligation to resolve the complaint under existing law notwithstanding its determination to consider possible changes or interpretations of that law in a rulemaking.

iBasis alleges that the Commission is bound in this case by its statement in the *AT&T Order and NPRM* that it would "not address the regulatory classification issue as part of an

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[60] The Commission considered and disposed of the rate case pursuant to its authority under section 204 of the Act, 47 U.S.C. § 204, to investigate rates, which can be regarded as a quasi-rulemaking function rather than as a routine adjudication. *Verizon*, 453 F.3d at 497-98. But this does not distinguish that decision. In evaluating rates, the Commission applies existing law to the facts of a particular rate filing — just as it applied existing law to the facts of a particular prepaid card in this case. The retroactivity argument is the same in both cases.

adjudication." iBasis Brief at 20. That claim mischaracterizes the NPRM portion of the Commission's previous order. Although the Commission instituted a rulemaking to address in a comprehensive manner the regulatory classification of all prepaid calling cards so that it would not have to "address each possible type of calling card offering" in successive adjudications, 20 FCC Rcd at 4826 (¶ 2) (J.A. 45), the agency did not surrender its discretion to issue an adjudicatory ruling on the regulatory classification of any specific card. Nor could the Commission lawfully have made such a blanket disavowal of the use of adjudication. If the Commission were to receive a complaint alleging, for example, that iBasis had violated section 254(d) by failing to contribute to the universal service fund for its prepaid calling card service, the Commission would have had the duty to adjudicate that matter and resolve the regulatory classification of iBasis's service in accordance with existing law and, unless unfairness would result, with retroactive effect. 47 U.S.C. § 208. That duty would exist regardless of whether the regulatory classification of prepaid calling cards was a topic in a pending rulemaking. *See American Telephone & Telegraph Co. v. FCC*, 978 F.2d 727.

iBasis is also wrong in suggesting that the Commission's *AT&T Order and NPRM* meant that any decision it made as to whether prepaid calling cards using IP transport fit within the category of telecommunications service "would only have prospective effect." iBasis Brief at 25. Although the Commission issued an NPRM to consider whether to adopt a rule, it did not forswear the option of adjudicating the past liability of providers of prepaid calling cards for universal service contributions and access charges. In fact, the NPRM was silent on the question of the Commission's continuing authority to adjudicate this issue.

As iBasis acknowledges, a rulemaking would not have resolved whether its prepaid calling cards were telecommunications services or information services under the law in effect

prior to the Commission's decision. That question is properly resolved in an adjudication. Thus, in order to prevail, iBasis has to show that the Commission's decision to issue an NPRM somehow prejudged the appropriate classification of its calling cards under existing law (*i.e.*, the decision to issue an NPRM was an implicit acknowledgement by the Commission that the prepaid calling cards at issue were an information service under existing law). Otherwise, the question of how the cards would be classified under existing law would have been left open by the NPRM, and the NPRM could not have precluded the Commission from determining that prepaid calling cards using IP transport were telecommunications services under existing law. Particularly since the NPRM did not voice any conclusion as to whether prepaid calling cards using IP transport were telecommunications services or information services under existing law, there is no basis to find that the Commission had foreclosed the option of determining that its calling cards were telecommunications services under existing law.

iBasis does not challenge the Commission's determination that prepaid calling card services that use IP transport are telecommunications services within the meaning of the Communications Act, the Commission's rules, and relevant precedent. *See Order*, 21 FCC Rcd at 7297 (¶¶ 18-20) (J.A. 22). Nor does iBasis deny that section 254(d) of the Act — a statute enacted 11 years ago — imposes a duty on the providers of interstate telecommunications services to contribute on an equitable basis to the universal service fund. 47 U.S.C. § 254(d). Under iBasis's view, however, the Commission discarded its discretion to adjudicate the obligation of prepaid calling card providers using IP transport, such as iBasis, to pay universal service support under section 254(d) when it gave notice that it might adopt a rule. iBasis's interpretation would make it difficult for the Commission to perform effectively its statutory

responsibility to "protect the universal service program." *Order*, 21 FCC Rcd at 7290 (¶ 1) (J.A. 15).

II. THE COMMISSION CHOSE REASONABLE REMEDIES CONCERNING RETROACTIVE APPLICATION OF ITS CLASSIFICATION RULINGS.

As shown above, the Commission properly engaged in adjudication when classifying the prepaid calling cards at issue in this proceeding. The Commission next considered what *effect* to give to those adjudicatory rulings — *i.e.*, whether each classification should apply with retroactive effect, or prospectively only. Stated differently, the Commission had to choose a proper remedy with respect to each type of prepaid calling card service. The Commission's remedial decisions in this area are entitled to substantial judicial deference. Indeed, this Court emphasized just last year the "long-standing principle" that "the breadth of the [Commission's] discretion is, if anything, at zenith" when fashioning a remedy. *AT&T*, 454 F.3d at 334. The Court in that case affirmed the Commission's decision to give retroactive effect to a declaratory order classifying a specific prepaid calling card service. In asking this Court to disturb the Commission's remedial decisions here, petitioners therefore have a tall mountain to climb.

When, as here, the Commission issues an adjudicatory ruling involving a "'new application[] of existing law," the ruling carries a presumption of retroactivity that may be overcome in order to prevent "'manifest injustice.'" *AT&T*, 454 F.3d at 332, *citing Verizon Telephone Cos.*, 269 F.3d at 1109. The Commission's decision "whether to permit retroactive application of [its] decision 'boil[s] down to . . . a question grounded in notions of equity and

fairness.'"[61] *See Order*, 21 FCC Rcd at 7305 (¶ 42) (J.A. 30). In this case, the Commission considered the retroactive application of its regulatory classification of two very different kinds of prepaid calling cards: cards using IP transport that enable the user to make telephone calls only, and interactive menu-driven cards that enable the user to make telephone calls *and* to retrieve information. After considering the equities, which the Commission is uniquely situated to assess, in light of the relative clarity of pre-existing law as it applied to the two cards, the Commission reasonably applied its classification of cards using IP transport retroactively and denied retroactive effect to its classification of menu-driven calling cards. *Order*, 21 FCC Rcd at 7304-07 (¶¶ 41-45) (J.A. 29-32).

A. The Commission Reasonably Gave Retroactive Effect to Its Classification of Prepaid Calling Cards Using IP Transport.

Contrary to iBasis's claim, the Commission reasonably gave retroactive effect to its regulatory classification of prepaid calling cards that use IP transport, which are used exclusively to make ordinary telephone calls. Because the classification of such cards as telecommunications services was a clearly foreseeable application of established law, the

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[61] *Cassell v. FCC,* 154 F.3d 478, 483 (D.C. Cir. 1998), *quoting Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081-06 (D.C. Cir. 1982), *cert. denied* 485 U.S. 913 (1988). This Court has formulated several multi-part tests for determining "when to deny retroactive effect to adjudicatory rulings involving 'new applications of existing law, clarifications and additions.'" *Verizon*, 269 F.3d at 1109. *See, e.g., District Lodge 64 v. NLRB*, 949 F.2d 441, 447-49 (D.C. Cir. 1991) (three-factor test); *Clark-Cowlitz Joint Operating Agency*, 826 F.2d at 1082 n.6 (en banc) (non-exclusive five-factor test). In more recent cases, however, the Court has "jettisoned multi-pronged balancing approaches" and has stated explicitly that there is no need to "plow laboriously" through each part of the *Clark-Cowlitz* test. *Verizon*, 269 F.3d at 1110, *quoting Cassell*, 154 F.3d at 486. Thus, Qwest is wrong in faulting the Commission for allegedly "making no effort" to address each of the individual factors of the *Clark-Cowlitz* test. Qwest Brief at 25.

retroactive application of that classification is not manifestly unjust. *Order*, 21 FCC Rcd at 7305-06 (¶¶ 43-44) (J.A. 30-31).

As the Commission pointed out, prepaid calling cards that use IP transport "offer the customer no capability to do anything other than make a telephone call." *Order*, 21 FCC Rcd at 7305 (¶ 43) (J.A. 30). Such cards fit squarely within the Act's definition of "telecommunications services" and not "information services," *i.e.*, they offer "telecommunications for a fee directly to the public," 47 U.S.C. § 153(47), without any "capacity for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20). iBasis does not challenge the substantive classification of such cards as telecommunications services and makes no effort to explain how, in light of the statutory definitions and prior precedent, a provider could have had a reasonable expectation that the Commission would classify them as information services.

The Commission's consistent practice has been to classify services that offer only the capability of making ordinary telephone calls as telecommunications services, including services that are in the form of prepaid calling cards. *Order*, 21 FCC Rcd at 7305 (¶ 43) (J.A. 30).[62] In 2003, the Commission's *IP-In-The-Middle Order*, 19 FCC Rcd 7457, held that an ordinary long-distance call with 1+ dialing was a telecommunications service, notwithstanding the use of IP technology to transport the call. *See Order*, 21 FCC Rcd at 7297, 7306 (¶¶ 18, 43) (J.A. 22, 31). That decision provided "ample notice" that the conversion of an ordinary telephone call to IP format and back does not, by itself, convert a telecommunications service into an information

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[62] *See In the Matter of the Time Machine*, 11 FCC Rcd at 1192 (¶ 39). *See also AT&T Order and NPRM*, 20 FCC Rcd 4826 (J.A. 45) (Commission holds that EPPC service is a telecommunications service because it offers its subscribers only the ability to make ordinary telephone calls).

service. 21 FCC Rcd at 7306 (¶ 43) (J.A. 31). *See also* 47 U.S.C. § 153(46) (defining a "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used*") (emphasis added).

iBasis argues that the *IP-In-The-Middle Order* was limited to calls that use 1+ dialing, and could not have put parties on notice that other services using IP transport might also be classified as telecommunications services. iBasis Brief at 23-24. Although the Commission in the *IP-In-The Middle Order* specifically addressed 1+ calls, "nothing in that order suggests that the Commission intended to foreclose the application of the same reasoning to similar services that use a different calling pattern." 21 FCC Rcd at 7306, n.112 (J.A. 31).[63] More to the point, as noted above, both the statutory language ("regardless of the facilities used") and the agency's established practice clearly foreshadowed this classification. *See* 21 FCC Rcd at 7305-06 (¶ 43) (J.A. 30-31).

Next, iBasis argues that retroactive application of the classification decision is unfair because the Commission's statements in the *AT&T Order and NPRM* led it to believe that the Commission would not adjudicate the classification issue with retroactive effect. iBasis Brief at 25. For the reasons set forth in Section I, this argument is unavailing. Moreover, iBasis states (iBasis Brief at 3) that it began offering its calling card service in 2003, yet the *AT&T Order and NPRM* was not issued until 2005. iBasis does not explain how Commission statements made

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[63] Contrary to iBasis's assertion, the fact that the Commission did not decide the issue of retroactivity for the particular service at issue in the *IP-in-the-Middle Order* does not preclude the Commission from lawfully issuing a "blanket ruling broadly applying its telecommunications services designation retroactively." iBasis Brief at 24. The Commission in the *AT&T Order and NPRM* gave retroactive effect to its regulatory classification of EPPC service, and that "blanket ruling" was upheld by this Court as reasonable. *See AT&T,* 454 F.3d 329.

two years after it launched its service could have raised any reasonable expectations concerning retroactive treatment at the time iBasis entered the calling card services market.

iBasis claims that the Commission disregarded the burdens of "retroactively subjecting iBasis to telecommunications regulation," such as "back payments to the USF," and that it failed "to identify any statutory interest that is served by imposing such obligation." *See* iBasis Brief at 26-27.[64] But section 254(d) of the Act without pertinent exception requires "telecommunications carrier[s] that provide telecommunications service" to contribute to the universal service mechanism in the amount the Commission deems to be equitable. 47 U.S.C. § 254(d). The Commission intended that its classification of prepaid calling card providers as telecommunications carriers would "protect the federal universal service program." *Order*, 21 FCC Rcd at 7290 (¶ 1) (J.A. 15). Although iBasis may prefer not to contribute to the USF for past periods, it should not be heard to complain that the Commission failed to assess "whether there is a sufficiently countervailing statutory interest" in requiring iBasis to make those contributions. iBasis Brief at 27 (internal citation omitted). In sum, iBasis has not overcome its heavy burden to show that the Commission's choice of remedy — retroactive application of its classification ruling of IP transport cards — was manifestly unjust in this context.

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[64] iBasis faults the Commission for denying retroactivity to menu-driven cards on the basis of lack of clarity in the law, while imposing retroactive liability on providers of calling cards that use IP transport. iBasis Brief at 26. However, unlike the case with respect to prepaid calling cards using IP transport, the law "did not clearly point in the direction of treating providers of menu-driven prepaid calling cards as telecommunications services," and thus the equities in the retroactive application of the classification decision are different for these two kinds of cards. *Order*, 21 FCC Rcd at 7307 (¶ 45) (J.A. 32).

B. The Commission Acted Reasonably in Denying Retroactive Effect to its Classification of Menu-Driven Prepaid Calling Cards.

Contrary to petitioner Qwest's claims, the Commission reasonably denied retroactive effect to its regulatory classification of menu-driven prepaid calling cards. Given the uncertainty in the pre-existing law, menu-driven card providers may have reasonably relied upon the assumption that they would not be classified as telecommunications carriers, and the Commission reasonably decided that giving retroactive effect to its classification would be manifestly unjust under these particular circumstances. *Order*, 21 FCC Rcd at 7306-07 (¶ 45) (J.A. 31-32).[65]

Unlike prepaid calling cards that use IP transport, menu-driven calling cards "offer both telecommunications and information service capabilities" on a bundled basis. *Order*, 21 FCC Rcd at 7295 (¶ 14) (J.A. 20). In contrast to the on-point precedent relevant to cards that use IP transport, the Commission's precedent governing services that combine telecommunications and

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[65] Qwest also makes a series of arguments to the effect that the Commission was required to give retroactive effect to its decision because there was no prior FCC precedent that had clearly held that menu-driven cards (or analogous products) provide only information services. There is no support for this position. Qwest is relying on decisions of this Court holding that (on particular facts) an agency decision that grants retroactive effect to a decision can be an abuse of discretion if there were prior unchallenged agency precedents on which claimants had in fact reasonably and detrimentally relied. Qwest Br. at 24-35, *citing AT&T*, 454 F.3d 329; *Cassell*, 154 F.3d 478; *Public Service Co. v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996); *Clark-Cowlitz*, 826 F.2d 1074. These decisions have limited relevance to an order that denies retroactive effect to a ruling. Rather, these decisions merely reflect that agencies have broad discretion to make retroactivity decisions on the basis of the balance that they believe best promotes the overall public interest, and it is only in extraordinary conditions that this discretion will be held to be abused. This principle dictates affirmance of the *Order* under review. We are aware of no decision that prohibits agencies from *denying* retroactive effect to a decision when, as here, the law was uncertain in the past and when the agency finds that providers of the service at issue may have relied to their detriment on a contrary view of the law and facts.

information components did not as clearly indicate that the Commission would classify menu-driven prepaid calling cards as telecommunications services. 21 FCC Rcd at 7307 (¶ 45) (J.A. 32). Before the Supreme Court issued its *Brand X* decision, there was uncertainty in the law as to when a bundled package that combined telecommunications and information components would be treated as two discrete offerings or as a single service that includes both communications and information processing features. 21 FCC Rcd at 7307 (¶ 45) (J.A. 32). In reversing the Ninth Circuit and affirming the Commission's classification of cable modem service as an information service, *Brand X* brought clarity and certainty to the proper analytical approach to these questions. The Court held that the Commission was correct in focusing on the fact that the transmission capability of the cable modem service was sufficiently integrated into the information service offered by the cable systems to make it reasonable to describe the entire service as a single, integrated information service offering. That ruling — which was an intervening event in the consideration of menu-driven prepaid calling cards — undermined the claims of AT&T and other providers that such cards should be classified entirely as information services because of the mere presence of information service capabilities. The issuance of the *Brand X* decision informed the Commission's classification analysis of menu-driven cards and took away one of AT&T's bases for claiming exclusive information service classification. *Order*, 21 FCC Rcd at 7295, 7307 (¶ 45) (J.A. 32).

The Commission in the *Order* applied the *Brand X* analysis and ultimately determined that, although menu-driven cards offered some information services, there is no "functional integration" between those services and the telephone calling capability of those cards. Thus, it concluded that the telecommunications services components of those cards constituted a separate telecommunications service. 21 FCC Rcd at 7295-96 (¶ 15) (J.A. 20-21). Menu-driven calling

card providers, however, reasonably could have relied, before the Commission applied this "integration" analysis, upon an expectation that they would not be classified as telecommunications services because of the existence of information services in the bundled offering. 21 FCC Rcd at 7307 (¶ 45) (J.A. 32). Indeed, providers of menu-driven cards that filed comments had taken the position that the services were information services under prior law, that they had relied on this belief, and that retroactive imposition of USF and intrastate access charges on these services would burden them with costs that had not been anticipated and that could not be recouped.[66] Because the law that was dispositive of the classification of these cards had been unclear "both before and as a result of the NPRM," *id.*, the Commission reasonably decided that subjecting such providers to the full scope of common carrier regulation on a retroactive basis would be so unfair as to work a manifest injustice. *See AT&T*, 454 F.3d at 334.

Qwest faults the Commission for denying retroactivity because the *Order* cannot be characterized as an abrupt departure from established practice. Qwest Brief at 26-27. That claim is unavailing. To be sure, an agency's decision to deny retroactivity to a decision that replaces "'old law that is reasonably clear'" with "new law" is "uncontroversial."[67] An agency, however, also may deny retroactive effect to a decision involving a "new application[] of existing law"

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[66] For example, in addition to contending that the services are properly classified as information services, IDT had opposed AT&T's proposed interim rules because they would have imposed intrastate access and USF charges on menu-driven card services that "have previously been exempt from them," IDT Telecom, Inc.'s Opposition to AT&T's Emergency Petition for Immediate Interim Relief (May 13, 2005) ("IDT Opposition") at 5 (J.A. 298), and would "drastically" change the "cost structure" of "existing enhanced services that have been developed and marketed in reliance on the Commission's current rules," *id.* at 6 (J.A. 299); Letter from David Lawson, Counsel, AT&T, to Marlene H. Dortch (May 26, 2006) at 8 (J.A. 360).

[67] *Verizon*, 269 F.3d at 1109, *quoting, of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1103 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

when, as here, such action would prevent manifest injustice.[68] Contrary to Qwest's contention, the agency is not required to show actual reliance by a particular party (AT&T in this case) on a settled rule in order to deny retroactivity.[69] The agency's decision on the question of retroactivity involves a balancing of equitable considerations.[70] Part of that balancing process may properly include respect for the fact that it would be reasonable for a party to follow a particular course of action in the absence of clear pre-existing law that required a different course of action. That is what the Commission did here in finding that parties "may have relied on the assumption that they would not be subject to these [USF and access charge] burdens." *Order*, 21 FCC Rcd at 7307 (¶ 4) (J.A. 32).

In support of its argument against prospective application, Qwest relies upon the fact that menu-driven cards were introduced while the regulatory classification of EPPC cards — the subject of AT&T's original petition for declaratory ruling in 2003 —was subject to litigation. Qwest Brief at 29-30. Although its argument is unclear, Qwest appears to claim that the controversy about the EPPC cards should have put AT&T and other menu-driven card providers on notice that menu-driven cards might be classified as telecommunications service. However, arguments concerning the regulatory classification of EPPC cards (which permit a user only to make an ordinary telephone call) do not necessarily support the position that menu-driven cards — cards that enable a user both to make telephone calls and to retrieve information — will be

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[68] *Id. See AT&T*, 454 F.3d at 332.

[69] Whether or not AT&T actually relied on its view of pre-existing law is not the question. This was an industry-wide proceeding and the Commission was entitled to make generic evaluations of whether reliance would have been reasonable, without inquiry into the subjective state of mind of one carrier, such as AT&T.

[70] *E.g., Verizon*, 269 F.3d at 1109.

similarly classified. And the fact that the Commission did not resolve the status of menu-driven cards in the EPPC proceeding but chose to ask for further comment diminished any "notice" value the EPPC proceeding might have had as a harbinger of the status of menu-driven cards.

Qwest also claims that the Commission erred in denying retroactivity because the "record before the FCC" showed that AT&T "was well-aware that its own position as to 'enhanced' prepaid calling cards" was an aggressive litigation position. Qwest Brief at 33-34. The only "record" evidence cited by Qwest, however, is a June 14, 2006, letter, from Qwest's own attorney, filed after the *Order* was adopted. *Id.*[71] Qwest's argument thus is not properly before the Court. Section 405(a)(2) of the Communications Act requires a party to file a petition for agency reconsideration "as a condition precedent to judicial review" of an FCC order where that party relies on "issues of law or fact upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405(a)(2).[72] The Commission had no opportunity to pass upon the matters raised in Qwest's June 14, 2006, letter, because that letter was filed with the agency after the FCC commissioners had voted to adopt the *Order*. Qwest failed to present this

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[71] Letter from Robert B. McKenna, Associate General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC (June 14, 2006). Although Qwest's June 14, 2006, letter, which consists of its counsel's arguments, attaches documents that Qwest had received from AT&T in discovery in its Colorado collection litigation, Qwest's brief does not refer to or cite to any of the AT&T documents. Those documents, like the letter itself, came to the Commission after it had adopted the *Order*.

[72] *See, e.g., Qwest Corp. v. FCC*, -- F.3d --, 2007 WL 860987, slip op. at 2 (D.C. Cir. Mar. 23, 2007); *Petroleum Communications v. FCC*, 22 F.3d 1164, 1169 (D.C. Cir. 1994).

argument to the Commission in a petition for reconsideration, and thus section 405(a)(2) bars Qwest from raising these arguments on review.[73]

Qwest next claims that the decision to deny retroactivity to the classification of menu-driven cards is improper because the result will be to grant a preference to AT&T alone and to sanction discrimination against competing providers of menu-driven cards who allegedly paid USF and access charges. Qwest Br. at 34, 35. This contention is refuted by the record. The record contains comments of four providers of menu-driven cards, and each stated that it treated its services as interstate information services and did not pay USF or intrastate access charges in the past. There is no evidence in the record of any provider of menu-driven cards that has treated its service as a telecommunications service and paid these charges. In all events, the Commission's classification decision applies to all menu-driven prepaid calling card providers equally.

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In sum, petitioners present the Court with diametrically opposed arguments concerning the Commission's choice of remedies in this case. iBasis argues that it was unreasonable for the Commission to give retroactive effect to the classification ruling regarding prepaid calling cards using IP transport; Qwest argues that it was unreasonable for the Court not to give retroactive effect to the classification ruling regarding menu-driven cards. Although each petitioner makes a

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[73] In all events, Qwest's argument is unpersuasive on the merits. Qwest's "evidence" — which was not in the record — consists only of its counsel's letter based upon selective quotations from AT&T documents that did not address menu-driven prepaid calling cards. Qwest's claim that AT&T advanced an aggressive litigation position generally as to "'enhanced' prepaid calling cards" (Qwest Brief at 33) — which includes cards such as EPPC — does not show that the Commission erred in determining that providers of menu-driven card services may have had a reasonable expectation that the Commission would not classify such cards as telecommunications services.

number of arguments for its position, it was the Commission's tasks to weigh those arguments and arrive at an equitable outcome with respect to each type of card. It is precisely this type of determination for which the Commission receives substantial deference, *see AT&T*, 454 F.3d at 334, and neither petitioner has shown that the Commission's resolution of these difficult issues was unreasonable.

III. PETITIONERS' REMAINING ATTACKS ON THE COMMISSION'S RETROACTIVITY DETERMINATIONS ARE BASELESS.

In addition to challenging the Commission's application of the retroactivity standard to their respective calling card services, petitioners Qwest and iBasis advance an invalid assortment of challenges to the lawfulness of the Commission's retroactivity determinations.

A. Qwest Fails to Demonstrate that the Commission Acted Unlawfully.

Qwest in its brief acknowledges both that the declaratory ruling on review is "adjudicatory" and that section 5 of the APA provided the Commission with "jurisdiction" to issue it. Qwest Brief at 1, 2. Nevertheless, it contends that the adjudicatory order cannot be prospective only in its application.

As noted above, an agency has authority to give prospective-only application to an adjudication involving a "new application of existing law," as in this case, if the agency determines that retroactivity would "work a 'manifest injustice.'"[74] Indeed, the Supreme Court in *Chenery* declared 60 years ago that an administrative agency, in evaluating whether to give retroactive effect to an adjudicatory decision, must balance the ill effects of retroactivity "against

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[74] *Verizon*, 269 F.3d at 1109, *quoting Clark-Cowlitz Joint Operating Agency*, 826 F.2d at 1081. *See Cassell*, 154 F.3d at 483; *Consolidated Freightways*, 892 F.2d at 1058.

the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[75] This Court has held that the Commission's decision "whether to permit retroactive application of [its] decision 'boil[s] down to . . . a question grounded in notions of equity and fairness.'"[76]

Notwithstanding this precedent, Qwest argues that the "FCC erred in reaching the issue of retroactivity at all." Qwest Brief at 15. According to Qwest, the Commission's consideration of the retroactivity issue was improper because: (1) the Commission lacked subject-matter jurisdiction even to consider the issue of retroactivity; (2) the Commission's responsibilities as an adjudicator forbid it to deny the declaratory ruling retroactive effect; and (3) denial of retroactive application of the declaratory ruling violates the filed rate doctrine. None of these claims are correct.

1. The Declaratory Ruling Was Not an *Ultra Vires* Ruling in a Collection Action.

Qwest contends repeatedly that, in substance, the declaratory ruling was an adjudication of Qwest's private collection claims against its customer, AT&T, for accrued intrastate access charges. Qwest argues that the complaint provisions of the Communications Act that authorize the Commission to adjudicate private damage claims, 47 U.S.C. §§ 206-09, restrict the agency's jurisdiction "to claims brought by customers against carriers." Qwest Brief at 21. Because the Commission "lacks subject matter jurisdiction over claims [by carriers] for the collection of access charges [from their customers]," Qwest contends that the Commission "does not have jurisdiction to consider equitable defenses" to Qwest's collection action against AT&T.

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[75] *Chenery*, 332 U.S. at 203.

[76] *Cassell,* 154 F.3d at 486, *quoting Clark-Cowlitz Joint Operating Agency,* 826 F.2d at 1082 n.6.

According to Qwest, the Commission therefore acted unlawfully by allegedly entertaining that type of defense in adjudicating AT&T's liability to Qwest. Qwest Brief at 15, 22.

This argument suffers from two fatal flaws. In the first place, Qwest is mistaken in characterizing the declaratory ruling on review as the Commission's "adjudication of a private debt" owed by AT&T to Qwest. Qwest Brief at 15. The Commission in its interpretive declaratory ruling determined that providers of a specific type of prepaid calling cards, *i.e.*, menu-driven cards, "offer telecommunications services" and thus are "now subject to all 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." *Order*, 21 FCC Rcd at 7298 (¶ 21) (J.A. 23). That declaratory ruling interprets the meaning of "telecommunications service" in the agency's governing statute and its own regulations, and elaborates on the obligations of all providers of menu-driven cards. Although the Commission decided not to apply its interpretive ruling retroactively, the Commission did not purport to adjudicate Qwest's private claim that AT&T owes access charges to Qwest. That issue is the subject of a pending collection action brought by Qwest in the United States District Court for the District of Colorado. The Commission was not required to forbear from exercising its own responsibilities under the Act — or deprived of its jurisdiction to carry out those responsibilities — simply because Qwest had a pending collection action in district court. *See* Qwest Brief at 15.

Second, as a legal matter, any restrictions on the Commission's authority to adjudicate complaints under sections 206-209 of the Act, 47 U.S.C. §§ 206-09, do not limit the agency's jurisdiction to issue the interpretive declaratory ruling that is before the Court. Sections 206-09, which do not speak to the Commission's authority to issue declaratory rulings, authorize the Commission to adjudicate complaints by an injured party alleging that a carrier has violated the

Act. The Commission in the declaratory ruling did not purport to adjudicate any complaint, and thus the extent of its jurisdiction under sections 206-209 is irrelevant to this case.

Qwest acknowledges in its brief that the authority for the declaratory ruling is section 5 of the APA, which authorizes the agency "to issue a declaratory order to terminate a controversy or remove uncertainty."[77] Qwest Brief at 1. Qwest points to nothing in the Communications Act or the APA that would limit the Commission's authority under section 5(d) of the APA to address matters that might affect the results of damages actions brought under sections 206-209. Indeed, section 208 conveys on "any person" a statutory to right to complain of "anything done or omitted to be done" by "any common carrier" in violation of the Communications Act. 47 U.S.C. § 208(a). If the Commission's authority to issue declaratory rulings under section 5(d) were limited to subjects that were outside the scope of section 208, as Qwest appears to suggest, the Commission would be virtually unable to issue a declaratory ruling on any matter involving the Communications Act. Such a result would eviscerate the Commission's express authority to issue declaratory rulings under 5(d).[78]

2. The Commission Properly Discharged Its Obligations as Adjudicator when It Gave Prospective Effect to Its Regulatory Classification of Menu-Driven Calling Cards.

Qwest argues that the Commission, by denying retroactive effect to its regulatory classification of menu-driven calling cards, violated its duty to "resolve a pending dispute based

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[77] 5 U.S.C. § 554. *See also* 47 C.F.R. § 1.2.

[78] This Court has recognized that the kind of declaratory ruling that the Commission issued below, *i.e.*, one that "illuminate[s] the meaning" of regulatory requirements, is a "particularly appropriate" use of an agency's section 5(d) authority. *British Caledonian Airways, Ltd. v. CAB*, 584 F.2d at 993. *See AT&T*, 454 F.3d 329.

on the law as it existed at the time of the actions giving rise to the dispute." Qwest Brief at 22. According to Qwest, the Commission decided that AT&T was required by law to pay Qwest's tariffed access charges for its menu-driven services and then unlawfully "modif[ied] the impact" of that ruling by not applying it retroactively. Qwest Brief at 22. That argument is unavailing.

The Commission in its declaratory ruling *interpreted* an ambiguous term contained in the Act and its own rules as applied to menu-driven services, and it gave that interpretation prospective effect only. The Commission did not *apply* that interpretation in adjudicating Qwest's private dispute with AT&T, let alone unlawfully modify the impact of its interpretation. As noted above, the Colorado district court — not the Commission — will adjudicate the Qwest-AT&T collection dispute, taking into account the relevant law, which includes the Commission's interpretation of the Communications Act and its regulations.

Qwest's reliance upon *American Telephone & Telegraph Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), is misplaced. In that case, AT&T had filed a complaint with the Commission claiming that MCI Telecommunications Corporation ("MCI") had violated the Communications Act by charging customers rates that were set in contracts instead of in tariffs filed with the Commission. The Commission dismissed AT&T's complaint without deciding under existing law whether MCI had violated the Act, explaining that it would address the legal issue raised in AT&T's complaint in a rulemaking that would establish general principles governing tariff contract disputes. The Court held that the Commission had erred by violating its "obligation to answer the questions" raised in AT&T's section 208 complaint. 978 F.3d at 732.

That case does not support Qwest's position. The Commission here decided the substantive issue before it, *i.e.*, the regulatory classification of menu-driven prepaid calling cards. Significantly, Qwest does not argue that the Commission failed to resolve a substantive issue that

it had an obligation to decide; instead, it argues that the Commission unlawfully denied retroactive effect to the substantive decision that it made. The Court in *American Telephone & Telegraph Co. v. FCC* did not question the Commission's authority to deny retroactive effect to an adjudicatory order. To the contrary, the Court in that case expressly recognized that the Commission on remand was free to consider a decision that would not give its adjudicatory order retroactive effect. 978 F.2d at 737.[79]

3. The Declaratory Ruling Does Not Violate the Filed Rate Doctrine

Qwest argues that the Commission's decision to deny retroactive effect violates the filed rate doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).[80] This doctrine, as applied to interstate telecommunications carriers, arises from section 203 of the Act — a statutory provision that requires interstate telecommunications carriers (1) to file tariffs with the Commission setting forth the rates, terms and conditions of service, and (2) to adhere to those tariffs in providing service to customers.[81] The filed rate doctrine prohibits any such carrier from collecting rates — established by contract

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[79] Qwest's reliance upon *MCI Telecommunications Corp. v. FCC*, 10 F.3d 842 (D.C. Cir. 1993), is also unavailing. In that case, the Court vacated the Commission's decision not to award MCI damages in a section 208 adjudication because the agency's decision was based upon a legally incorrect reading of an earlier agency decision. That case lends no support for Qwest's contention that the agency lacked authority in this case to deny retroactive effect to its interpretive declaratory ruling.

[80] Although the filed rate doctrine originated under the Interstate Commerce Act ("ICA"), it "applies to the Communications Act as well." *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1998). *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000).

[81] 47 U.S.C. § 203(a), 203(c). *See Central Office Telephone, Inc.*, 524 U.S. at 221-22.

or otherwise — that differ from the rates in their filed tariffs.[82] The doctrine also bars an agency from preventing a carrier from collecting a filed rate "solely because the parties had agreed to a lower rate," because such action would "permit the very price discrimination" among customers that section 203 and cognate statutes are designed to prevent.[83]

But the filed rate doctrine does not excuse carriers from adhering to the agency's rules and pronouncements simply because adherence may affect the interpretation and application of tariffs. *See ICC v. Transcon Lines*, 513 U.S. 138, 147 (1995) ("[c]arriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it, and their failure to do so may justify [an agency action to compel a] departure from the filed rate"). The filed rate doctrine does not bar the Commission from declaring with prospective effect that menu-driven prepaid calling cards are "telecommunications services" as defined in the Act and its rules — whether or not the Commission's declaration may affect the application of Qwest's tariffs or even its filed rates. *See Qwest Corp. v. Scott*, 380 F.3d 367, 375 (8th Cir. 2004) ("the filed rate doctrine . . . addresses the relationship between a carrier and its customers, not the relationship between a carrier and a regulator").

Qwest's filed tariff doctrine claim is perplexing because the Commission did not have any of Qwest tariffs before it, and the Commission neither addressed those tariffs nor purported to excuse compliance with them. What Qwest seems to be complaining about is merely the unremarkable fact that the Commission's constructions of its own rules in certain circumstances can have consequences in other litigation. But those consequences arise because Qwest's tariffs

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[82] *E.g., Central Office Telephone, Inc.*, 524 U.S. at 229.

[83] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130 (1990).

are subject to the Commission's regulations, not because the Commission abrogated Qwest's tariffs or excused AT&T from complying with them.

B. iBasis's Claim that the Commission's Order Cannot Apply to iBasis Because It Was Not a Party Below Is Not Properly Before the Court and Lacks Merit.

Attacking from the opposite direction, iBasis argues that the Commission is without authority to give its declaratory ruling retroactive effect as to iBasis because iBasis was not a "party" to the adjudicatory declaratory ruling it challenges on review. iBasis Brief at 28-29. That argument is not properly before the Court and, in any event, is incorrect.

As noted above, section 405(a) requires a person to file a petition for agency reconsideration before seeking judicial review if that person raises an issue "upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405(a)(2). Because the issue of the Commission's authority to make its classification order applicable retroactively to non-parties was not raised before the agency before the *Order* issued and was not raised in a petition for reconsideration, iBasis is barred from raising that issue on review.[84]

Moreover, iBasis's argument, if valid, would defeat the jurisdiction of this Court to consider iBasis's petition. iBasis invokes the Hobbs Act, 28 U.S.C. § 2344, as the source of the Court's jurisdiction. iBasis Brief at 1. The Hobbs Act confers jurisdiction on this Court to review a final agency decision only if an aggrieved "party" to the agency proceedings files a

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[84] iBasis raised this argument in a motion for stay that it filed *after* the *Order* was released. That motion did not give the Commission an opportunity to consider the matter when it issued its *Order*. iBasis also did not petition the Commission to reconsider its decision.

petition for review within the prescribed time limits.[85] iBasis's argument that it was not a party below, if accepted by the Court, thus would compel the Court to dismiss its petition for review for want of jurisdiction.

In all events, iBasis's argument is both factually and legally infirm. As a factual matter, iBasis was a party to the adjudicative proceeding because it filed reply comments and a written *ex parte* communication in WC Docket No. 05-68, the docket under which the Commission issued its adjudicatory declaratory ruling. iBasis also filed a motion for stay in that proceeding after release of the *Order*.

As a legal matter, iBasis is wrong in claiming that the Commission lacks authority to apply a declaratory ruling retroactively to non-parties. The Commission has authority under the APA and its own rules to issue interpretive declaratory rulings.[86] The Commission may issue such rulings "*sua sponte*" — even in the absence of any parties before it — with binding effect on persons who "were not parties to the FCC proceedings."[87] Moreover, because the Commission has authority to issue such rulings "with like effect as in the case of other orders," the Commission has the discretion to give its declaratory orders, like other adjudicatory rulings, retroactive effect.

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[85] 28 U.S.C. § 2344. *See Simmons v. ICC*, 716 F.2d 40, 41-43 (D.C. Cir. 1983); *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 723 (D.C. Cir. 1996). The Hobbs Act's limitation of review to parties is reinforced by section 405(a)(1) of the Communications Act, which requires the filing of a petition for reconsideration as a "condition precedent to judicial review" where the person seeking judicial review "was not a party to the proceedings resulting in such order." 47 U.S.C. § 405(a) (1). As we pointed out above, iBasis did not file a petition for agency reconsideration.

[86] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

[87] *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 398 (9th Cir. 1996). *See* 47 C.F.R. § 1.2 (Commission may issue a declaratory ruling "on its own motion.").

iBasis's claim shows a fundamental misunderstanding of the Commission's ruling. The Commission's declaratory ruling has retroactive effect only in the sense that it applies to conduct antedating the decision by clarifying preexisting laws and policies. The ruling does not, as iBasis claims, "impose retroactive liability,"[88] *i.e.,* "attach[] new legal consequences to events completed before its enactment."[89] For example, the genesis of iBasis's duty to make universal service payments is section 254(d), enacted in 1996, which obligates providers of interstate telecommunications services to contribute, "on an equitable and nondiscriminatory basis," to the universal service fund. 47 U.S.C. § 254(d). A declaration in 2006 clarifying that iBasis and other providers of calling cards that use IP transport are subject to the statutory obligation enacted ten years earlier is not a retroactive imposition of a new obligation. That kind of interpretive ruling is well within the Commission's discretion.

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[88] iBasis Brief at 29.

[89] *Landgraf v. USI Film Products,* 511 U.S. 244 (1994).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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April 27, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

QWEST SERVICES CORP. AND IBASIS, Inc. PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS	)	NOS. 06-1274, 06-1298 AND 06-1309

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 16987 words.

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June 7, 2007

STATUTORY APPENDIX

5 U.S.C. § 553
5 U.S.C. § 554

47 U.S.C. § 153(20)
47 U.S.C. § 153(47)
47 U.S.C. § 154(i)
47 U.S.C. § 154(j)
47 U.S.C. § 208
47 U.S.C. § 405

47 C.F.R. § 1.2

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice

shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553 (continued)

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

47 U.S.C.. § 153(20)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER I--GENERAL PROVISIONS

§ 153. Definitions

. . . .

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

. . . .

47 U.S.C.. § 153(47)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER I--GENERAL PROVISIONS

§ 153. Definitions

. . . .

(47) Telephone exchange service

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

. . . .

47 U.S.C.A. § 154(i)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER I--GENERAL PROVISIONS

§ 154. Federal Communications Commission

. . . . .

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

. . . . .

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 – WIRE OR RADIO COMMUNICATION
SUBCHAPTHER I – GENERAL PROVISIONS

§ 154. Federal Communications Commission

. . . . .

(j) Conduct of proceedings; hearings

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. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or be attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

. . . . .

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART I--COMMON CARRIER REGULATION

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C. § 405 (continued)

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
CABLE COMMUNICATIONS
MISCELLANEOUS PROVISIONS

§ 554. Equal employment opportunity

(a) Entities within scope of coverage

This section shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system.

(b) Discrimination prohibited

Equal opportunity in employment shall be afforded by each entity specified in subsection (a) of this section, and no person shall be discriminated against in employment by such entity because of race, color, religion, national origin, age, or sex.

(c) Equal opportunity programs; establishment; maintenance; execution; terms

Any entity specified in subsection (a) of this section shall establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices. Under the terms of its program, each such entity shall--

(1) define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

(3) communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, age, or sex, and solicit their recruitment assistance on a continuing basis;

(4) conduct a continuing program to exclude every form of prejudice or discrimination based on race, color, religion, national origin, age, or sex, from its personnel policies and practices and working conditions; and

5 U.S.C. § 554 (continued)

(5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all its organizational units, occupations, and levels of responsibility.

(d) Revision of rules; required provisions; annual statistical report; notice and comment on amendments

(1) Not later than 270 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, and after notice and opportunity for hearing, the Commission shall prescribe revisions in the rules under this section in order to implement the amendments made to this section by such Act. Such revisions shall be designed to promote equality of employment opportunities for females and minorities in each of the job categories itemized in paragraph (3).

(2) Such rules shall specify the terms under which an entity specified in subsection (a) of this section shall, to the extent possible--

(A) disseminate its equal opportunity program to job applicants, employees, and those with whom it regularly does business;

(B) use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation;

(C) evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area;

(D) undertake to offer promotions of minorities and women to positions of greater responsibility;

(E) encourage minority and female entrepreneurs to conduct business with all parts of its operation; and

(F) analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program.

(3)(A) Such rules also shall require an entity specified in subsection (a) of this section with more than 5 full-time employees to file with the Commission an annual statistical report identifying by race, sex, and job title the number of employees in each of the following full-time and part-time job categories:

5 U.S.C. § 554 (continued)

(i) Corporate officers.

(ii) General Manager.

(iii) Chief Technician.

(iv) Comptroller.

(v) General Sales Manager.

(vi) Production Manager.

(vii) Managers.

(viii) Professionals.

(ix) Technicians.

(x) Sales Personnel.

(xi) Office and Clerical Personnel.

(xii) Skilled Craftspersons.

(xiii) Semiskilled Operatives.

(xiv) Unskilled Laborers.

(xv) Service Workers.

(B) The report required by subparagraph (A) shall be made on separate forms, provided by the Commission, for full-time and part-time employees. The Commission's rules shall sufficiently define the job categories listed in clauses (i) through (vi) of such subparagraph so as to ensure that only employees who are principal decisionmakers and who have supervisory authority are reported for such categories. The Commission shall adopt rules that define the job categories listed in clauses (vii) through (xv) in a manner that is consistent with the Commission policies in effect on June 1, 1990. The Commission shall prescribe the method by which entities shall be required to compute and report the number of minorities and women in the job categories listed in clauses (i) through (x) and the number of minorities and women in the job categories listed in clauses (i) through (xv) in proportion to the total number of qualified minorities and women in the relevant labor market. The report shall include information on hiring, promotion, and recruitment practices necessary for the Commission to evaluate the

5 U.S.C. § 554 (continued)

efforts of entities to comply with the provisions of paragraph (2) of this subsection. The report shall be available for public inspection at the entity's central location and at every location where 5 or more full-time employees are regularly assigned to work. Nothing in this subsection shall be construed as prohibiting the Commission from collecting or continuing to collect statistical or other employment information in a manner that it deems appropriate to carry out this section.

(4) The Commission may amend such rules from time to time to the extent necessary to carry out the provisions of this section. Any such amendment shall be made after notice and opportunity for comment.

(e) Annual certification of compliance; periodic investigation of employment practices

(1) On an annual basis, the Commission shall certify each entity described in subsection (a) of this section as in compliance with this section if, on the basis of information in the possession of the Commission, including the report filed pursuant to subsection (d)(3) of this section, such entity was in compliance, during the annual period involved, with the requirements of subsections (b), (c), and (d) of this section.

(2) The Commission shall, periodically but not less frequently than every five years, investigate the employment practices of each entity described in subsection (a) of this section, in the aggregate, as well as in individual job categories, and determine whether such entity is in compliance with the requirements of subsections (b), (c), and (d) of this section, including whether such entity's employment practices deny or abridge women and minorities equal employment opportunities. As part of such investigation, the Commission shall review whether the entity's reports filed pursuant to subsection (d)(3) of this section accurately reflect employee responsibilities in the reported job classifications.

(f) Substantial failure to comply; penalties; notice to public and franchising authorities

(1) If the Commission finds after notice and hearing that the entity involved has willfully or repeatedly without good cause failed to comply with the requirements of this section, such failure shall constitute a substantial failure to comply with this subchapter. The failure to obtain certification under subsection (e) of this section shall not itself constitute the basis for a determination of substantial failure to comply with this title. For purposes of this paragraph, the term "repeatedly", when used with respect to failures to comply, refers to 3 or more failures during any 7-year period.

(2) Any person who is determined by the Commission, through an investigation pursuant to subsection (e) of this section or otherwise, to have failed to meet or failed to make best efforts to meet the requirements of this section, or rules under this section, shall be liable to the United States for a forfeiture penalty of $500 for each violation. Each day of a

5 U.S.C. § 554 (continued)

continuing violation shall constitute a separate offense. Any entity defined in subsection (a) of this section shall not be liable for more than 180 days of forfeitures which accrued prior to notification by the Commission of a potential violation. Nothing in this paragraph shall limit the forfeiture imposed on any person as a result of any violation that continues subsequent to such notification. In addition, any person liable for such penalty may also have any license under this chapter for cable auxiliary relay service suspended until the Commission determines that the failure involved has been corrected. Whoever knowingly makes any false statement or submits documentation which he knows to be false, pursuant to an application for certification under this section shall be in violation of this section.

(3) The provisions of paragraphs (3) and (4), and the last 2 sentences of paragraph (2), of section 503(b) of this title shall apply to forfeitures under this subsection.

(4) The Commission shall provide for notice to the public and appropriate franchising authorities of any penalty imposed under this section.

(g) Discrimination complaints; investigation; enforcement

Employees or applicants for employment who believe they have been discriminated against in violation of the requirements of this section, or rules under this section, or any other interested person, may file a complaint with the Commission. A complaint by any such person shall be in writing, and shall be signed and sworn to by that person. The regulations under subsection (d)(1) of this section shall specify a program, under authorities otherwise available to the Commission, for the investigation of complaints and violations, and for the enforcement of this section.

(h) "Cable operator" defined; owners of multiple unit dwellings

(1) For purposes of this section, the term "cable operator" includes any operator of any satellite master antenna television system, including a system described in section 522(7)(A) of this title and any multichannel video programming distributor.

(2) Such term does not include any operator of a system which, in the aggregate, serves fewer than 50 subscribers.

(3) In any case in which a cable operator is the owner of a multiple unit dwelling, the requirements of this section shall only apply to such cable operator with respect to its employees who are primarily engaged in cable telecommunications.

(i) Regulatory powers of States and franchising authorities; nonexclusive nature of remedies and enforcement provisions; covered franchises

5 U.S.C. § 554 (continued)

(1) Nothing in this section shall affect the authority of any State or any franchising authority--

(A) to establish or enforce any requirement which is consistent with the requirements of this section, including any requirement which affords equal employment opportunity protection for employees;

(B) to establish or enforce any provision requiring or encouraging any cable operator to conduct business with enterprises which are owned or controlled by members of minority groups (as defined in section 309(i)(3)(C)(ii) of this title) or which have their principal operations located within the community served by the cable operator; or

(C) to enforce any requirement of a franchise in effect on the effective date of this subchapter.

(2) The remedies and enforcement provisions of this section are in addition to, and not in lieu of, those available under this or any other law.

(3) The provisions of this section shall apply to any cable operator, whether operating pursuant to a franchise granted before, on, or after October 30, 1984.

47 C.F.R. § 1.2

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART A--GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL

§ 1.2 Declaratory rulings.

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.