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January 25, 2005

Hon. Michael K. Powell  
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Federal Communications Commission  
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Dear Chairman Powell:

RE: WC Docket No. 03-133 (Petition for Declaratory Ruling –  
Enhanced Prepaid Calling Card Services)

In the above-referenced Petition, AT&T requests that the Commission determine that its prepaid calling card services are interstate “information services” and therefore exempt from USF and access charge obligations.

Seldom does MMTC take a position on service definition issues contested by the major telecom companies. This matter, however – triggered by AT&T’s refusal to pay interstate USF and access charge fees for its prepaid calling cards – is an exception, because AT&T’s Petition directly challenges the nation’s universal service compact.

In Telephone Subscribership in the United States (Wireline Competition Bureau, October 2004), the Commission reported that as of July 2004, 6.2% of U.S. households still do not subscribe to local phone service. For Hispanic households, the figure was 9.2%, and for African American households it was a startling 12.6%. These troubling statistics underscore the criticality of preserving the means by which all Americans can afford a dial tone.

Today the USF is at great risk. Increasingly, communications services are offered by cable modem and Internet providers, which are not generally required to contribute to the maintenance of our local phone networks or to the USF. Certainly the USF formulas may need to be recalibrated in light of the impending Brand X decision and in connection with the evolution of VOIP. Nonetheless, it should be axiomatic that if a service is regarded and actually used by consumers as telecommunications, providers of that service should pay their USF and access charge obligations. As the Commission considers how to maintain affordable access to local phone service and preserve the USF, it should begin by rejecting any and all invitations to evade these bedrock regulatory obligations.

AT&T's principal theory is that because the consumer who uses one of its calling cards hears or can hear an advertisement for a retail company like Wal-Mart, the cards are transmogrified from a telecommunications service into an "information service" – thus exempting AT&T from the obligation to pay access charges and contribute to the USF.

That theory is entirely without merit. The Communications Act defines a telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153(46). These services are not "information services", which the statute defines as "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(20).

Merely attaching an advertisement to an otherwise typical telecommunications service does not, and should not, magically transform the telecommunications service into an information service. After all, consumers are buying the cards to make telephone calls, not to hear about Wal-Mart. If a brief advertisement transformed a call into an "information service," there would be no end to the creative ruses that companies would devise to opt out of participation in our national telecommunications social compact. Suppose, for example, that a company embedded in its calling cards a two-second expression of James Earl Jones' gratitude for the call. Based on that subterfuge, the calling card provider could avoid altogether access charges and USF contributions that otherwise would be due.

Such a loophole would swallow the rule. Were it permitted, no rational company would provide a telecommunications service, and no carrier would pay USF contributions or access charges anymore. The poor could still make long distance calls, but they would largely be compelled to use pay phones because the cost of a residential dial tone would be prohibitive. Nor would calling card calls be any less expensive. Calling card providers would simply charge the rates competitively established by the marketplace and retain any surplus revenues (including the USF contributions and access charges they formerly had made) as profits for their shareholders. This natural economic phenomenon explains why prepaid calling card rates are essentially uniform today even though one provider, AT&T, has chosen not to pay access charges and USF contributions. AT&T's competitors have made these payments, yet they still maintain comparable rates.

AT&T asserts that its five-year, nearly \$500,000,000 USF and access charge holdback was justified because calling cards are widely used by military personnel and minorities. The record in this docket shows that AT&T has persuaded several well intentioned parties that (1) the FCC secretly intends to raise rates on prepaid calling cards by as much as 20%; (2) since AT&T donates some free calls to military personnel, opposition to its prepaid calling card holdbacks is unpatriotic; and (3) AT&T's access charge and USF holdbacks actually benefit minorities.