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

NO. 05-1096

AT&T CORP.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

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

THOMAS O. BARNETT
ACTING ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

LAURENCE N. BOURNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Administrative Decisions

Page

Statutes and Regulations

Page

Others

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

1996 Act	Telecommunications Act of 1996
AT&T	AT&T Corp.
CAM	cost allocation manual
EPPC	enhanced prepaid calling card
FCC	Federal Communications Commission
IXC	interexchange carrier
J.A.	Joint Appendix
LEC	local exchange carrier
USAC	Universal Service Administrative Company

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

NO. 05-1096

AT&T CORP.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

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

BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES

Petitioner AT&T Corp. seeks review of a declaratory order of the Federal Communications Commission, which held that AT&T's so-called "enhanced" prepaid calling card ("EPPC") service was a regulated "basic" service or "telecommunications service." The order accordingly subjected AT&T to liability for past shortfalls in federal universal service contributions that had resulted from AT&T's unilateral decision to treat EPPC service as an unregulated interstate "enhanced" or "information" service. *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid*

Calling Card Services (WC Docket Nos. 03-133 & 05-68), Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005) ("*Order*") (J.A.).

The case presents the following issues for the Court's review.

(1) Did the Commission reasonably conclude that AT&T's EPPC service was a basic/telecommunications service?

(2) Did the Commission reasonably determine that AT&T must compensate the federal universal service fund for past contribution shortfalls attributable to its erroneous treatment of EPPC service as an interstate enhanced/information service?

JURISDICTION

The Court has jurisdiction to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations in addition to those appended to the petitioner's brief are set forth in the statutory addendum to this brief.

COUNTERSTATEMENT OF THE CASE

The FCC consistently has treated prepaid calling card services as telecommunications services, so that providers of those services are subject to the same regulatory requirements as other providers of telecommunications services. These requirements include the obligation to pay applicable interstate and intrastate access charges and the duty to make universal service contributions imposed by the Telecommunications Act of 1996 (the "1996 Act"). *Order*, paras. 3-6 (J.A.). Through its self-described "enhanced" prepaid calling card service, AT&T sought to avoid these regulatory obligations by requiring its calling card customers to listen to pre-recorded advertisements before permitting them to complete a call. *Order*, paras. 7-9, 15 (J.A.).

AT&T acknowledges that, in reliance on this advertising device, it failed to pay more than $160 million that otherwise indisputably would have been due to the federal universal service fund. *Id*., para. 30 (J.A.). AT&T also concedes that it has withheld from local exchange carriers ("LECs") hundreds of millions of dollars in intrastate access charges that otherwise would have been due.[1]

Although AT&T has now discontinued the particular EPPC offering at issue (*see* AT&T Br. 20 n.5), this case arises because AT&T in 2003 asked the Commission to validate its scheme by issuing a declaratory ruling that EPPC is an "enhanced" or "information" service. AT&T argued that, because of the advertising, its EPPC service was a jurisdictionally interstate information service, to which neither intrastate access charges nor federal universal service contributions applied.[2] In the *Order* on review, the FCC denied AT&T's request – finding that, under established regulatory principles, the EPPC offering was a telecommunications service subject both to intrastate access charges (when calls originate and terminate within the same state) and to federal universal service contribution requirements. *Order*, paras. 28, 31 (J.A.). In light of these findings, the FCC required AT&T retroactively to make contributions to the universal service fund that correctly reflect the interstate telecommunications revenues it received from the service, and stated that local telephone companies could pursue claims for unpaid intrastate access charges before "the appropriate court or state commission." *Id*., paras.

---

[1] *See* AT&T Br. 20 (estimating that claims for retroactive liability for universal service fund contributions and intrastate access charges will be as much as $553 million, with more than $150 million of that amount attributable to universal service contribution requirements).

[2] AT&T Corp. Petition for Declaratory Ruling, WC Docket No. 03-133, filed May 15, 2003, at 1 (J.A.) ("AT&T petition"); Reply Comments of AT&T Corp., WC Docket No. 03-133, filed July 24, 2003, at 3-5, 21-22, 31-32 (J.A.) ("AT&T reply").

28 n.58, 31 (J.A.). AT&T now asks this Court to excuse it from the regulatory obligations (and associated liabilities) that the Commission found were applicable to the telecommunications service it was offering.

COUNTERSTATEMENT OF FACTS

A. Regulatory Background

Service Classification. The 1996 Act distinguishes between "telecommunications services" and "information services." A "telecommunications service" is defined as "the offering" of pure transmission capability, or "telecommunications," "for a fee directly to the public." 47 U.S.C. § 153(46).[3] An "information service," by contrast, 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). This telecommunications service/information service dichotomy in the 1996 Act largely codifies the pre-existing regulatory distinction that the Commission had drawn between "basic" common carrier communications services and "enhanced services." An FCC rule (47 C.F.R. § 64.702(a)) defines enhanced services as services "offered over common carrier transmission facilities * * * which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different, or restructured information; or [3] involve subscriber interaction with stored information." *See Order*, para. 15 n.26 (J.A.) (citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 (paras. 102-107) (1996) ("*Non-Accounting Safeguards Order*")).

---

[3] "Telecommunications" means "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).

The FCC had adopted the basic/enhanced regulatory division in its 1980 *Computer II Final Order*[4] – replacing an earlier attempt (in *Computer I*) to distinguish between communications services that use computers to perform message or circuit switching (which the Commission had subjected to common carrier regulation) and data processing services (which the agency had left to marketplace competition). *CCIA v. FCC*, 693 F.2d at 203.[5] Technological and marketplace developments under the *Computer I* regime had led companies increasingly to offer "hybrid" services that combined both communications and data processing functions, leaving to the Commission the difficult task (under *Computer I*) of categorizing such offerings on a case-by-case basis, depending on whether the communications or data processing function was predominant. *CCIA v. FCC*, 693 F.2d at 203. In adopting the basic/enhanced dichotomy in *Computer II*, the Commission sought to draw a regulatory line that "would minimize the type of ad hoc adjudication" that the *Computer I* regime had required. *Id.* at 204.

The Commission has described the *Computer II* line in shorthand as one between "basic transmission service" and "any offering over the telecommunications network which is more than a basic transmission service." *Computer II Final Order*, 77 FCC 2d at 420. That line has required some interpretation at the margin. Thus, for example, the Commission has ruled that, under the *Computer II* basic/enhanced analytical framework, certain services that otherwise

---

[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* (Docket No. 20828), Final Decision, 77 FCC 2d 384, 417-23 (1980) ("*Computer II Final Order*"), *aff'd*, *CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[5] Citing *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities* ("*Computer I*"), Tentative Decision, 28 FCC 2d 291 (1970); Final Decision and Order, 28 FCC 2d 267 (1971), *aff'd*, *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

might meet the literal definition of an enhanced service are nevertheless treated as regulated "adjunct-to-basic" services, rather than enhanced services, if they are "incidental" to underlying basic communications services and do not "alter[] their fundamental character." *See Order*, para. 16 & n.28 (J.A.) (cataloguing decisions).

The distinction between information services and telecommunications services has important regulatory consequences. Of particular pertinence here, under the 1996 Act, "[e]very telecommunications carrier that provides interstate *telecommunications services* shall contribute, on an equitable and nondiscriminatory basis," to the universal service fund described in the Act. 47 U.S.C. § 254(d) (emphasis added). The Commission has implemented this "equitable and nondiscriminatory" contribution obligation by requiring carriers to contribute to the universal service mechanism on the basis of the revenues they receive from end users of their interstate telecommunications services. *See* 47 C.F.R. § 54.706(b).[6] Carriers are not required to make contributions to the fund on the basis of their information service receipts.

Federal and State Jurisdiction. The Communications Act establishes a system of dual state and federal regulation of the originating and terminating access services that LECs provide to enable long-distance carriers to reach their customers. *See generally Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 737

---

[6] Telecommunications carriers are required to pay into the universal service program an amount equal to a percentage of their interstate telecommunications service revenues. That percentage – known as the "contribution factor" – is adjusted each quarter on the basis of the projected demand for universal service support and the projected telecommunications service revenues that carriers expect to collect from their end user customers. *See generally* 47 C.F.R. § 54.709. To the extent that some carriers underreport their pertinent revenues, the "contribution factor" paid by all carriers must be raised to generate the needed level of support from the reduced pool of revenues to which the factor is applied. For the fourth quarter of 2005, the Commission established a contribution factor of 10.2%. *See Public Notice*, Proposed Fourth Quarter 2005 Universal Service Contribution Factor, DA 05-2454 (September 15, 2005).

F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). In general, state or federal regulatory authority with respect to such services depends on whether the originating and terminating points of a call – viewed on an "end-to-end" basis, and disregarding intermediate points of switching – are in the same state or in different states.[7] If the calling and called parties are in the same state, intrastate access charges apply; if the parties are in different states, the call is subject to interstate access charges.

Prepaid Calling Card Services. Prepaid telephone calling cards give consumers the ability to make long-distance calls without pre-subscribing to an interexchange carrier ("IXC") or using a credit card. A customer uses a prepaid calling card to make a call by first dialing a number to reach the service provider's calling card "platform" – essentially a computerized switch. The platform requests from the user the unique identification number associated with the card for purposes of verification and billing. When prompted by the platform, the customer then dials the telephone number of the party he or she wishes to call, and the platform routes the call accordingly. *Order*, para. 3 (J.A.). A calling card arrangement thus provides an alternative means of paying for ordinary toll telephone calls, whether made from payphones, hotels, or even from homes.

The Commission traditionally has regulated prepaid calling card services as telecommunications services, because – like conventional telephone service – prepaid calling card services offer the transmission of information, without change in the form or content of the

---

[7] *See Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, 1620-22 (1992), *aff'd*, *Georgia Public Service Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. 1993) (table); *Teleconnect Co. v. Bell Telephone Co. of Pa.*, 10 FCC Rcd 1626, 1628-30 (1995), *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

information, for a fee directly to the public. *Order*, para. 4 (J.A.) (citing *The Time Machine*, 11 FCC Rcd 1186 (Com. Car. Bur. 1995) ("*Time Machine*"), and 47 U.S.C. §§ 153(43) & (46)). Consistent with that classification of calling card services as telecommunications services, the Commission treats "[a]ll prepaid card revenues * * * as end-user revenues" that subject the carrier to federal universal service contribution obligations. *Order*, para. 4 n.4 (J.A.) (quoting Instructions to Telecommunications Worksheet, FCC Form 499-A at 22).

To determine whether calling card calls are interstate or intrastate in nature, the Commission has employed conventional "end-to-end" jurisdictional analysis – which looks to the end points of a call (*i.e.*, the locations of the calling and called parties) and disregards the actual path of the communication (*e.g.*, through intermediate switches at remote locations). *Time Machine,*11 FCC Rcd 1186 (para. 30). Applying that end-to-end analysis, the Commission has found prepaid calling card services to be "jurisdictionally mixed" telecommunications services because they permit customers to make both interstate and intrastate calls. *Id*., para. 29. More particularly, the Commission has found that a calling card call "that originates and ends in the same state is an intrastate call," potentially subject to state regulation, "even if it is processed through [a switch] located in another state." *Id*., para. 30.

B. The Proceeding Below

In May 2003, AT&T filed a petition with the FCC asking the agency for a declaratory ruling concerning the regulatory status of its EPPC service.[8] AT&T stated that its EPPC service was a prepaid calling card service that it offered to end user customers (the card purchasers)

---

[8] AT&T invoked 47 C.F.R. § 1.2, which provides that "[t]he 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." *See* AT&T petition at 1 (J.A.).

while employing retailers and other outlets as "effective distribution mechanisms" for the cards. AT&T petition at 4-5 (J.A.). EPPC service was like conventional prepaid calling card services, except that, "[d]uring call set-up, the customer hear[d] an advertisement from the retailer that sold the card," and the customer could not "dial the destination phone number" until the advertisement was complete. *Order*, para. 6 (J.A.) (citing AT&T petition at 5, 6 (J.A.)).

AT&T asked the Commission to rule that EPPC service was jurisdictionally interstate (and, therefore, immune from intrastate access charges), except when both parties to a call were located within the same state as the calling card platform. AT&T petition at 9-17 (J.A.).[9] In support of this claim, 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 separate call "from the platform to the third party." *Id.* at 2 (J.A.); *see also id.* at 8-10 (J.A.).[10]

AT&T also argued that its EPPC service, unlike other calling card services, was an unregulated information (or enhanced) service, rather than a telecommunications service. AT&T petition at 18-21 (J.A.). According to AT&T, the recorded advertisement delivered to the cardholder from the carrier's centralized switching platform provided "additional, different or restructured information" to the cardholder and involved "subscriber [*i.e.*, cardholder] interaction with stored information." This infusion of information at the platform, AT&T asserted, excluded

---

[9] AT&T did not contest that EPPC service was subject to interstate access charges. *See Order*, para. 9 n.14 (J.A.).

[10] Although AT&T consistently identified the first alleged call as one between the calling party and the platform, in at least one instance AT&T appears to have characterized the second alleged call as one between the calling party and the called party. *See* AT&T petition at 2 (J.A.) (describing "one [call] from the calling party to the enhanced service platform, and a second communication involving the calling party, the enhanced service platform and a third party").

EPPC service from the traditional basic/telecommunications service category for calling card services and instead brought it within the applicable definitions of enhanced/information services.[11] *Order*, para. 9 & nn.14 & 16 (J.A.) (citing AT&T reply at 9 (J.A.)).

AT&T's petition generated swift opposition from local exchange carriers, state regulators, and some competing card providers.[12] Opponents argued that, under the Commission's precedent, EPPC calls should be viewed as single end-to-end calls from the cardholder to the called party, rather than multiple calls to and from the switching platform, as AT&T had urged.[13] Accordingly, they claimed, if both the calling party and the called party are in a single state, the call is intrastate (and subject to intrastate access charges), even if the calling card platform that switches the call is located in another state.[14]

Opponents also disputed AT&T's claim that its EPPC service was an enhanced/information service. They stressed that the service AT&T actually was "offer[ing]," or holding out, to the public was the capability to make a telephone call – a telecommunications service under the applicable statutory definition. Verizon comments at 2 (J.A.); Qwest

---

[11] *See* 47 U.S.C. § 153(20) (defining "information service"); 47 C.F.R. § 64.702(a) (defining "enhanced service"); *see also* pp. 4-6, above.

[12] *See*, *e.g.*, Opposition of SBC Communications Inc., filed June 26, 2003 (J.A.) ("SBC opposition"); Opposition of BellSouth Corp., filed June 26, 2003 (J.A.) ("BellSouth opposition"); Comments of the Verizon telephone companies, filed June 26, 2003 (J.A.) ("Verizon comments"); Comments of Qwest Services Corp., filed June 26, 2003 (J.A.) ("Qwest comments"); Reply Comments of the Regulatory Commission of Alaska, filed June 26, 2003 (J.A.); Reply Comments of the New York State Department of Public Service, dated July 23, 2003 (J.A.) ("New York reply"); Opposition of Sprint Corp., filed June 26, 2003 (J.A.) ("Sprint opposition").

[13] Sprint opposition at 6-10 (J.A.); BellSouth opposition at 2-5 (J.A.); Verizon comments at 3-6 (J.A.); SBC opposition at 3-6 (J.A.); Qwest comments at 4-5 (J.A.).

[14] Qwest comments at 2 (J.A.); BellSouth opposition at 1 (J.A.); Verizon comments at 5 (J.A.).

comments at 5 (J.A.). The advertising feature, they pointed out, was not even disclosed to the customer on the card itself or in any of its associated packaging materials; and, when making a call, the customer was not billed for the time period during which the advertising message was delivered, or otherwise charged for this undisclosed and unsolicited feature. *See* Sprint opposition at 8 & App. II (J.A.).

Opponents asserted that AT&T's jurisdictional and service classification theories could have far-reaching, adverse policy implications. If AT&T were correct, a carrier could control the interstate or intrastate jurisdictional nature of a call – and thus the applicable access charges – simply by inserting unsolicited advertising into each call and manipulating the location of the switching platform that transmits that advertising. *See* SBC opposition at 2, 6-7 (J.A.) (noting that this risk is not limited to calling card calls, but could apply to conventional "1+" long-distance calls as well); *accord* New York reply at 2-3 (J.A.); BellSouth opposition at 4-6 (J.A.); Sprint opposition at 4 n.3 (J.A.).

Commenters also raised the concern – quickly acknowledged and fully addressed by AT&T in the proceeding – that treating EPPC service as an information service would have significant consequences for universal service funding under the 1996 Act, because mandatory contributions to the universal service fund are based entirely on revenues from interstate telecommunications services and exclude revenues from information services.[15] Carriers with

---

[15] Sprint opposition at 4, 11-13 (J.A.); SBC opposition at 6 (J.A.); Verizon comments at 3 (J.A.). Effectively agreeing that the question of universal service funding was squarely within the scope of the declaratory ruling proceeding, AT&T expressly asked the Commission to expand the proceeding to rule that an additional variant of its EPPC service, "like the EPPC variant described in the Petition, is an interstate 'information service' not subject to universal service assessments." Letter, dated November 22, 2004, from Judy Sello, AT&T, to FCC Secretary, at 1 (J.A.). *See also* AT&T reply at 3-5, 21-22, 31-32 (J.A.) (addressing universal service issue).

competing calling cards that had made universal service contributions argued that AT&T's practice of withholding such contributions gave it an unfair competitive advantage.[16] And if that practice were upheld, opponents argued, other carriers would be forced to follow suit, potentially undermining universal service funding.[17]

The Commission rejected AT&T's arguments with respect to both the categorization of EPPC service as an information service and its jurisdictional nature. The Commission found that, notwithstanding the insertion of the recorded advertisement, the service that AT&T actually was "offering" (*see* 47 U.S.C. §§ 153(20) & 153(46)) was a conventional telecommunications service – *i.e.*, a service "offer[ed]" directly to the public for a fee, consisting of the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content." *Order*, para. 14 (J.A.) (citing 47 U.S.C. §§ 153(43) & (46)). The Commission stressed that "[b]ecause the advertising message is provided automatically, without the advance knowledge or consent of the customer, there is no 'offer' to the customer" of an information service. *Id*., para. 15 (J.A.) (quoting 47 U.S.C. § 153(20)).

The Commission added, as an independent basis for its decision, that even if one regarded the provision of recorded advertising itself as sufficient to meet "the literal definition of an information service," it would still regard EPPC service as a telecommunications service. This is so because the advertisement is no more than an "adjunct-to-basic" service that is "incidental" to and does not "alter[] the[] fundamental character" of the underlying calling card

---

[16] *See* Sprint opposition at 2, 4 n.4, 11-13 (J.A.); Letter, dated July 27, 2004, from David L. Sieradzki, counsel for WilTel Communications, LLC, to FCC Secretary, Attachment at 1-2 (J.A.).

[17] Sprint opposition at 4 & n.4, 12, 13 (J.A.).

offering, which is the offering of the ability to place a telephone call. *Order*, para. 16 (J.A.). The agency distinguished decisions that AT&T had proffered as precedent for its position. *See id*., paras. 17-20 (J.A.).

With respect to jurisdiction, the FCC concluded that EPPC service was subject to the customary end-to-end jurisdictional analysis that the agency had applied to prepaid calling card services. *Order*, para. 22 (J.A.) (citing *Time Machine*, para. 30). Accordingly, the Commission held 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 another state. *Id.*[18] The agency, once again, specifically distinguished the authority AT&T had proffered for a contrary result. *See id*., paras. 23-29 (J.A.).

Finally, noting AT&T's admission that it had "'saved' $160 million in universal service contributions since the beginning of 1999" by "unilaterally deciding" to treat EPPC service as an information service, the Commission directed AT&T to file corrected reports with the Universal Service Administrative Company ("USAC") so that USAC "may calculate and assess the appropriate additional universal service contributions" AT&T may owe for past periods.[19] *Order*, paras. 30-31 (J.A.). The Commission further ordered USAC to issue revised invoices reflecting AT&T's corrected revenue submission, and required AT&T to pay any past-due amounts reflected in those invoices. *Id*. (J.A.).

---

[18] *See* 47 U.S.C. § 153(22) ("interstate communication" does not include communication between points within the same state "through any point outside thereof," where such communication is regulated by a state commission).

[19] USAC is an independent entity created and appointed by the FCC to serve as permanent administrator of the federal universal service support mechanism. *See* 47 C.F.R. § 54.5.

The Commission noted that AT&T in a subsequent amendment to its petition also had sought a declaratory ruling with regard to two "variants" to its EPPC service. *Order*, paras. 2, 38 (J.A.). "Rather than continuing to address the appropriate regulatory regime for variations of prepaid calling cards in a piecemeal manner," the Commission decided to issue a notice of proposed rulemaking to address comprehensively the issues raised by the service variants. *Id.*, para. 38 (J.A.). "EPPC service," as that term is used in the *Order* on review and in this brief, does not include those variants.

C. Subsequent Developments

AT&T filed its petition for judicial review of the *Order* on March 28, 2005. On April 18, 2005, AT&T filed a motion for stay pending appeal. The Court denied that stay motion on May 16, 2005, because AT&T had "not satisfied the stringent standards required for a stay pending court review." Order, D.C. Circuit No. 05-1096, filed May 16, 2005. AT&T has made additional contributions to the federal universal service mechanism to reflect amended invoices issued by USAC pursuant to the *Order*.

SUMMARY OF ARGUMENT

The Commission reasonably concluded that AT&T's EPPC service is a telecommunications service and not an enhanced/information service on two independently sufficient grounds. First, the 1996 Act defines both "telecommunications services" and "information services" on the basis of what the carrier is "offering" to its customers. *See* 47 U.S.C. §§ 153(20) & (46). The Commission found that the service that AT&T was "offering" to cardholders was a telecommunications service – the ability to make telephone calls. *Order*, paras. 14 & 15 (J.A.). By contrast, the recorded advertisements embedded within the service were not being "offer[ed]" within the meaning of section 153(20), because they were provided

without the customer's "advance knowledge or consent." *Order*, para. 15 (J.A.). Second, and independently, the Commission found that EPPC service is a telecommunications service because, under the agency's precedent, the canned advertising was no more than an "adjunct-to-basic" service that was incidental to the underlying telecommunications service and did not alter its fundamental character. *Order*, para. 16 (J.A.).

AT&T does not seriously dispute the Commission's finding that it "offer[ed]" or marketed EPPC service to cardholders only as a telecommunications service. AT&T responds instead with the argument – never presented below – that it offered its EPPC product as an information service to the retailers that distributed its cards. The lone support AT&T conjures for this completely restructured claim is a three-sentence description of the service buried in a lengthy attachment to an *ex parte* letter that it submitted below for a different purpose. The claim is barred by 47 U.S.C. § 405(a), which prevents the Court from considering "an issue of law or fact upon which the Commission has been afforded no opportunity to pass." Moreover, even if the *ex parte* submission were sufficient to overcome section 405's jurisdictional bar, AT&T's claim should be denied because it was not presented "with sufficient force to require [the Commission] to formally respond." *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000). On the record before it, the Commission reasonably understood the customers to be the cardholders and the retailers, at most, to be AT&T's agents in distributing the cards.

The Commission reasonably interpreted its own precedent in reaching the alternative holding that EPPC service is a basic/telecommunications service because the recorded advertising was no more than an "adjunct-to-basic" feature. *Order*, para. 16 (J.A.). The adjunct-to-basic analysis that the Commission undertook reasonably reflects an established and longstanding gloss that the Commission has placed on the *Computer II* regulatory definitions of

"enhanced" and "basic" services. Contrary to AT&T's claims, that analysis neither ignored the *Computer II* definitions nor departed from them.

Having determined that AT&T's unilateral and self-serving decision to treat its EPPC service as an enhanced/information service rather than a basic/telecommunications service conflicted with established statutory and regulatory principles, the Commission reasonably required AT&T to satisfy the universal service obligations that attach to the provision of a telecommunications service. *Order*, paras. 30-33 (J.A.). Under this Court's precedents, the retroactive application of an agency's decision is presumed where that decision does not represent an abrupt break with settled policy and where retroactive application would not cause "manifest injustice." *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). The Commission's conclusion that "AT&T had no reasonable basis to expect" under existing law that it could avoid universal service obligations, combined with the agency's decision also to apply its ruling to any other carriers that may have provided similar services, fully justified the imposition of retroactive remedies under that standard. *See Order*, para. 32 & n.67 (J.A.).

STANDARD OF REVIEW

To the extent that AT&T challenges the FCC's interpretation of the Communications Act, the agency's decision is reviewed under the framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Under *Chevron*, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 843 n.9. If the intent of Congress is clear – that is, if the statute conveys "a plain meaning that requires a certain interpretation," *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997) – then "the court, as well as the agency, must give effect to the unambiguously expressed intent of

Congress." *Chevron*, 467 U.S. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. *Accord*, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 539 (2002) (under *Chevron*, the court asks "whether the Commission made choices reasonably within the pale of statutory possibility"). Under those circumstances, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005) ("*Brand X*") (citing *Chevron*). The Court must give the agency's interpretation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

To the extent that AT&T challenges the reasonableness of the Commission's action, the Court must uphold the *Order* unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action"; the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202-08 (D.C. Cir. 1996). Moreover, where, as here, the case involves the FCC's interpretation of its own rules and prior orders, the Commission's interpretations must be given "controlling weight" unless "plainly erroneous or inconsistent with the regulation." *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1069 (D.C. Cir. 2004). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational

connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

I. The Commission Reasonably Determined That AT&T's EPPC Service Is A Telecommunications Service.

The FCC reasonably determined that AT&T's EPPC service is a telecommunications service – and not an information (or enhanced) service – on two alternative and independently sufficient grounds. First, both "information services" and "telecommunications services" under the 1996 Act are defined in terms of what the carrier is "offering" to purchasers. *See* 47 U.S.C. §§ 153(20) & (46); *see also* 47 C.F.R. § 64.702(a) (defining "enhanced service" in terms of the service "offered"). The Commission determined that the service that AT&T was "offering" – or holding out – to its cardholding customers is a telecommunications service, *i.e.*, the ability to "make a telephone call." *Order*, paras. 14 & 15 (J.A.) (citing 47 U.S.C. §§ 153(43) & (46)). The Commission reasonably found that the unexpected – and likely unwanted – advertisements that AT&T invoked to claim "information service" status for its EPPC product were not being "offered" to consumers within the meaning of 47 U.S.C. § 153(20), because they were provided "without the advance knowledge or consent of the customer." *Order*, para. 15 (J.A.). That interpretation of what service AT&T was "offering" is entitled to deference. *Brand X*, 125 S.Ct. at 2703-06.

Second, and independently, the Commission sensibly determined that EPPC service was a telecommunications service, rather than an information service, because the advertising AT&T inserted into the call completion process was no more than an "adjunct-to-basic" service – *i.e.*, a service that is "'incidental' to an underlying telecommunications service [here, the traditional

calling card service] and do[es] not 'alter[] [its] fundamental character.'" *Order*, para. 16 & n.28 (J.A.) (citations omitted). The FCC explained that AT&T had designed its service so that "the advertising is merely a necessary precondition to placing a telephone call." *Order*, para. 16 (J.A.).

AT&T's challenges to the Commission's conclusions are insubstantial.

A. The Commission Reasonably Determined That The EPPC Service That AT&T Described Below Is Not An "Offering" Of An Information Service.

1. AT&T now argues principally that the Commission misunderstood who the relevant EPPC customer was in concluding that EPPC service was not an information service. Br. 24. In particular, AT&T asserts that the Commission mistakenly focused on what was "'offered' to the *end users* who purchased the cards" and "ignored AT&T's showing that it does 'offer' the information capabilities to the *retailers* that sell the cards." *Id*. (emphasis added to "end users"). AT&T made no such showing below with respect to retailers and, accordingly, the Commission's *Order* does not address AT&T's newly-minted theory. Because "[i]t is black-letter administrative law that 47 U.S.C. § 405 bars [the Court] 'from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass,'" *American Family Assn v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004); *accord AT&T Corp. v. FCC*, 317 F.3d 227, 235-36 (D.C. Cir. 2003), the Court should not consider AT&T's completely restructured "retailer-as-customer" argument now. 47 U.S.C. § 405(a).

From the beginning of this proceeding, AT&T consistently described its EPPC service in terms of what it offered end users. In the petition for declaratory ruling that initiated the proceeding, AT&T described its EPPC product as a "low-priced prepaid card service[] upon which many *low-income consumers* rely." AT&T petition at 1 (J.A.) (emphasis added). That

service, AT&T stressed, was an information service "because each time *the cardholder* uses the card, the AT&T enhanced platform engages in its own communications with the cardholder by sending third-party messages and other information." *Id.* at 18 (J.A.). AT&T described the role of retailers merely as "effective distribution mechanisms" that enabled AT&T efficiently to offer its product to cardholders. *Id.* at 5 (J.A.). AT&T continued this focus on the cardholder rather than the retailer as its customer,[20] notwithstanding that opponents placed the identity of the customer directly in issue with their claims that AT&T's EPPC product did not qualify as an information service because the service being "offered" to *cardholders* was merely the capability to make telephone calls. *See*, *e.g.*, Verizon comments at 2 (J.A.); Qwest comments at 5 (J.A.);

---

[20] *See* AT&T reply at 2 (J.A.) (describing EPPC service as one upon which "the poor, senior citizens, members of minority groups and military personnel increasingly depend"); *id.* at 9 (J.A.) (arguing that EPPC is an information service because "[a]n AT&T cardholder * * * establishes a connection with an enhanced prepaid services platform, which then provides the subscriber with additional information"); Letter, dated July 6, 2004, from Amy L. Alvarez, AT&T, to FCC Secretary, Attachment at 1 (J.A.) (describing EPPC service as an information service because of the information transmitted "[w]hen a customer places a call"); Letter, dated July 13, 2004, from David L. Lawson, counsel for AT&T, to FCC Secretary, at 6 (J.A.) (arguing for information service status due to "the stored information made available to AT&T's enhanced prepaid card customers"); Letter, dated July 21, 2004, from David L. Lawson to FCC Secretary, at 7-8 (J.A.) ("Consumers universally regard enhanced prepaid cards as a single service, not two separately available services that are bundled together"); Letter, dated October 12, 2004, from Judy Sello, AT&T, to FCC Secretary, at 3, 4 (J.A.) (describing EPPC service as a "uniquely affordable long-distance service[] aimed at segments of our society that have been traditionally excluded from access to the telecommunications network"); Letter, dated November 8, 2004, from Judy Sello, AT&T, to FCC Secretary, at 2 (J.A.) (describing EPPC service as providing soldiers and groups traditionally excluded from the telecommunications network with the ability "to gain low-cost access to telephone services"); Letter, dated January 13, 2005, from Robert W. Quinn, Jr., AT&T, to FCC Secretary, at 1 (J.A.) (stating that EPPC service is an information/enhanced service "because AT&T provides end users of its enhanced prepaid card service additional non-call-related information (in the form of an advertisement or other message approved by the card distributor)"); Letter, dated January 14, 2005, from Judy Sello, AT&T, to FCC Secretary, at 2, 6 (J.A.) (describing EPPC service as an "offering that constitutes a single service from the end user's perspective," and as a service "sold to the end user"); and Letter, dated February 9, 2005, from Judy Sello, AT&T, to FCC Secretary, at 3 (J.A.) ("In EPPC service, the customer is supplied additional information, in the form of computer-stored spoken words").

Sprint opposition at 8 & App. II (J.A.). AT&T never claimed before the FCC that the distributor was its customer.

In its brief, AT&T seeks to conjure from an attachment to a single *ex parte* letter a "showing" sufficient to overcome the bar that section 405 poses to its claim that EPPC service was an information service offered to retailers. Br. 5 (citing Letter, dated November 1, 2004, from Amy Alvarez, AT&T, to FCC Secretary, Attachment at Section II, p. 5 (J.A.) ("November 1 *ex parte*"). That attachment – a more than 70-page cost allocation manual ("CAM") that AT&T had filed with the Commission in 1994 to set out its preferred method of separating regulated and nonregulated costs – contained a three-sentence description of what AT&T characterized in its accompanying letter as "an early prepaid calling card service." November 1 *ex parte* at 2 (J.A.). Although the CAM itself described the retailer as the customer of the service,[21] the accompanying *ex parte* letter makes clear that AT&T tendered the CAM in this docket to support the more general (non-customer-specific) proposition that the Commission previously had accepted treatment of EPPC service as an information/enhanced service. November 1 *ex parte* (J.A.). AT&T filings in this docket – both before and after the November 1 *ex parte* – consistently characterized EPPC service as a service that "AT&T provides *end users* of its enhanced prepaid card service," although it claimed that the service was enhanced because the end users also received "additional non-call-related information (in the form of an advertisement or other message approved by the card distributor)." Letter, dated January 13,

[21] The CAM described that early calling card service as follows: "PPPC [Promotional Pre Paid Card] is a customized Pre Paid Card that contains promotional advertisements for specific customers. These customers provide the cards to their end-user customers who will hear the advertisements initially when they dial into the PPPC platform. This activity is an enhanced service that utilizes network plant." November 1 *ex parte*, Attachment at Section II, p. 5 (J.A.).

2005, from Robert W. Quinn, Jr., AT&T, to FCC Secretary, at 1 (J.A.) (emphasis added). *See generally* n.20, above.

In these circumstances, even if the November 1 *ex parte* (and attached CAM) were considered sufficient to overcome the jurisdictional bar that section 405(a) poses with respect to issues that are never presented to the Commission at all, that filing did not present AT&T's "retailer customer" claim "with sufficient force to require [the Commission] to formally respond." *MCI WorldCom, Inc. v. FCC*, 209 F.3d at 765 (rejecting AT&T's claim that the FCC arbitrarily failed to address an argument, where AT&T presented that argument only weakly and in an *ex parte* filing). Accordingly, if the Court does not dismiss that claim under section 405, it should nevertheless deny the claim on the merits as insufficiently "forceful * * * to have obliged the Commission to squarely confront it." *Ibid*. *See also Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) ("The Commission 'need not sift pleadings and documents to identify' arguments that were not 'stated with clarity' by a petitioner.") (citation omitted).

In any event, it is clear that the Commission regarded the end user as the customer of EPPC service. *E.g.*, *Order*, paras. 34-37 (J.A.) (rejecting AT&T's argument that denial of its request for declaratory ruling will unreasonably raise the rates for calling card calls to consumers). And sensibly so. So far as the record indicates, the ability to make telephone calls under AT&T's service is offered to the cardholders, not to the retailers who merely distribute the cards, effectively acting as AT&T's agents. AT&T described the retailers as "effective distribution mechanisms" to get the cards out to end user purchasers of the service. AT&T petition at 4-5 (J.A.). The value to the retailers of the recorded advertising can be regarded as part of their compensation for acting as distribution agents. The reasonableness of viewing retailers as agents rather than customers is underscored by the fact that if AT&T's retailer-as-

customer theory were correct, the retailers would be acting as common carriers (subject to the duties attendant to that status) in providing the calling card service to cardholders – a proposition the retailers likely would find surprising.

2. Apart from its newly discovered retailer-as-customer theory, AT&T has almost nothing to say about the Commission's reasonable conclusion that the only service AT&T was "offering" within the meaning of the pertinent 1996 Act definitions was a telecommunications service to EPPC cardholders. *Order*, paras 14-15 (J.A.) (citing 47 U.S.C. §§ 153(20) ("information service") & (46) ("telecommunications service")). AT&T does not dispute the Commission's amply-supported finding that EPPC service was not *marketed* to cardholders as an information service product. *See* Br. 25-26 & n.6 (acknowledging "the purported fact that the 'packaging materials' for these cards do not mention their possible use as a device for listening to messages"); Sprint opposition at 8 & App. II (J.A.) (appending EPPC packaging materials); *Order*, para. 15 & n.27 (J.A.) (citing Sprint opposition). In the absence of any marketing or holding out with respect to the embedded advertising messages, the Commission could reasonably conclude that there was "no 'offer' to the customer of anything other than telephone service." *Order*, para. 15 (J.A.).

AT&T's only response comes in the form of assertions about the alleged benefits of EPPC advertising. AT&T contends in passing that the FCC should have considered evidence that the advertisements have "proven valuable to retailers." Br. 25. AT&T also chides the Commission, in a footnote, for failing directly to address alleged evidence that cardholders "want and appreciate" the canned messages they receive. Br. 26 n.6 (J.A.). Some of AT&T's

"evidence" that cardholders value EPPC messages is debatable in its own right,[22] even apart from the likelihood that most cardholders would rather *not* have to delay their calls until after canned recordings have been completed. But even if the record below conclusively established that both retailers and cardholders valued the pre-recorded EPPC messages, that would have no logical bearing on what capability AT&T was "offering" – or holding out – with respect to its EPPC service, or on what capability end-user customers thought they were getting when they bought the card. Given that the cards were packaged and marketed solely as telecommunications services, it was reasonable for the Commission to conclude that telecommunications services, rather than information services, were being "offered." *See Brand X*, 125 S. Ct. at 2704 (holding that what is "offer[ed]" under sections 153(20) & (46) can reasonably be construed to depend in part on what the customer "perceives" to be the service).

B. The FCC's Alternative Holding That EPPC Service Was An "Adjunct-To-Basic" Service Was Reasonable.

The FCC's primary ruling – that the only "capability" that AT&T "offer[ed]" was the ability to make a telephone call – provides a wholly sufficient basis for the agency's holding that EPPC service was a telecommunications service and not an information/enhanced service. Under that analysis, the proper classification of the advertising capability, *if it were offered*, simply is not relevant, because the Commission found that it was *not* offered. As an alternative

---

[22] For example, AT&T points to an *ex parte* letter in which it asserts, without explanation or substantiation, that in 17-20 percent of EPPC calls the end user only hears the advertising message and never completes a call. Br. 26 n.6 (J.A.) (citing Letter, dated October 12, 2004, from Judy Sello, AT&T, to FCC Secretary, at 3 (J.A.)). In the absence of information about how that 17-20% of calls was calculated, AT&T's assertion proves nothing about cardholder preferences. AT&T's statistics, if correct, more likely reflect busy signals, "no answer" calls, or calls to add minutes to the card, than any conscious use of the card to obtain access to the embedded messages.

ruling, however, the Commission concluded that, even if the advertising component of EPPC were considered to be part of the "offering," the service as a whole nevertheless was a telecommunications service, because the advertising component was no more than an "adjunct-to-basic" service under established precedent. *Order*, para. 16 (J.A.).

The adjunct-to-basic classification – which the Commission developed under the *Computer II* basic/enhanced framework and, contrary to AT&T's assertion (Br. 27, 29), is not an unexplained departure from that framework – encompasses features that might bring a service offering within the "literal reading of our definition of * * * enhanced service[s]," but do not change the treatment of the service as regulated basic (telecommunications) service. *In the Matter of North American Telecommunications Ass'n*, 101 FCC 2d 349 (para. 24) (1985) ("*NATA Centrex Order*"). Service features or capabilities come within the adjunct-to-basic classification if they meet two criteria: (1) they must be "incidental" to an underlying telecommunications service – *i.e.*, "'basic' in purpose and use" in the sense that they "facilitate use of the basic network;" and (2) they must "not alter the fundamental character of [the] telephone service." *NATA Centrex Order*, paras. 24, 27, 28. *Accord*, *In the Matter of North American Telecommunications Ass'n*, 3 FCC Rcd 4385 (para. 8) (1988) ("*NATA Centrex Reconsideration*"); *Beehive Telephone Co. v. The Bell Operating Cos.*, 10 FCC Rcd 10562 (para. 21) (1995), *aff'd on remand*, 12 FCC Rcd 17930 (1997). The Commission concluded that the recorded advertising feature of EPPC service met those criteria: It was "incidental" to an underlying telecommunications service, because AT&T designed its EPPC product so that

completion of the message was "a necessary precondition to placing a telephone call;"[23] and the recording "d[id] not in any way alter the fundamental character" of the long-distance service that cardholders actually bought EPPC cards to receive. *Order*, para. 16 (J.A.).

AT&T's attacks on this analysis are misplaced. AT&T argues, first, that the Commission's analysis is arbitrary because the agency allegedly "never even asked whether EPPC service fits within its regulatory definition of an 'enhanced service.'" Br. 27. That claim ignores the fact that the "adjunct-to-basic" analysis that the Commission applied here is itself a gloss that the Commission has placed on the regulatory definitions of enhanced and basic services. Under substantial precedent, a service is treated as basic even if it might satisfy a literal reading of the definition of an enhanced service, provided that the features permitting that literal reading satisfy the "adjunct-to-basic" criteria. *NATA Centrex Order*, para. 24; *see also id*., paras. 25-26 (describing why speed dialing, call forwarding, and computer-provided directory assistance, for example, are treated as basic under the "adjunct-to-basic" criteria, notwithstanding that they might meet the literal definition of an enhanced service). AT&T's argument mistakenly assumes that the adjunct-to-basic classification excludes all services that literally meet the "enhanced service" definition.

---

[23] The advertising feature also is "incidental" to underlying telecommunications service, because it arguably "facilitate[s] use of the basic network," *NATA Centrex Order*, para. 28, by reducing the cost of the service to cardholders. *See Order*, paras. 34-35 (J.A.) (acknowledging that AT&T's EPPC service "can provide a low-cost calling option for all types of consumers, including members of the military and their families"); AT&T petition at 5 (J.A.) (noting that retailers that supplied the recorded advertising were "effective distribution mechanisms" for the cards); SBC opposition at 1 (J.A.) (asserting that the "sole purpose of the advertisement is to reduce the cost of the prepaid long distance service that the end user has purchased"); Qwest comments at 5 (J.A.) (noting that "[t]he commercial message is * * * a method of reducing the cost of the call to the end user rather than an actual service offered to the public").

AT&T also is wrong in claiming that the "adjunct-to-basic" classification is inapplicable here because the advertising feature allegedly is not what AT&T vaguely describes as "call related." Br. 27-28. To the extent that AT&T means that an adjunct-to-basic service must be "technologically necessary to call completion," the Commission expressly has "reject[ed]" that proposition. *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528 (para. 21) (1992). In any event, the EPPC advertising feature is necessary – if not technologically, then practically – for call completion, because AT&T designed the service to prevent cardholders from completing calls until the advertisement has ended. And the feature facilitates use of the basic network by reducing the cost to cardholders of making a long-distance call. *See* n.23, above.

AT&T also suggests that the adjunct-to-basic category must be limited to specific functions that the Commission already has associated with that category in past decisions. Thus, AT&T suggests that adjunct-to-basic services must "relate[] to call setup, call routing, call cessation, called or calling party identification or billing and account," and cannot provide "access to information that the carrier does not obtain and use in the 'provision and management of the customers' [basic] telephone service.'" Br. 27-28 (citations omitted). But the Commission has stated that the adjunct-to-basic category is not merely a "grandfather clause" that preserves basic/telecommunications service treatment for specified functions that previously have been treated that way. *NATA Centrex Order*, para. 23. Rather, that category is defined by the two-part test described above, and the Commission reasonably concluded that the EPPC advertising feature satisfied that test.

AT&T also contends that the Commission "rested its decision" on the conclusion that "'there is no meaningful interaction with the information provided by AT&T's service.'" Br. 31

(quoting *Order*, para. 17 (J.A.)). In doing so, AT&T asserts, the Commission arbitrarily ignored the fact that EPPC recorded advertisements met the part of the "'enhanced service" definition that includes services that "provide the subscriber additional, different or restructured information.'" Br. 31 (quoting 47 C.F.R. § 64.702(a)).[24] The Commission, however, already had concluded reasonably that the canned advertisements – transmitted "without the advance knowledge or consent of the customer" – qualified for adjunct-to-basic treatment, even if they arguably might come within a literal reading of the pertinent enhanced service/information service definitions. *Order*, paras. 15, 16 (J.A.). The Commission's finding that EPPC service lacked meaningful subscriber interaction with stored information thus did not purport to be the complete basis for its conclusion that EPPC service was not an enhanced/information service. Rather, that finding served simply to distinguish this case from the *Talking Yellow Pages* decision,[25] in which the Commission had determined that a service that "played advertisements in response to subscribers' individual selections for various categories of information" was an enhanced/information service. *Order*, para. 17 (J.A.) (citing *Talking Yellow Pages*, para. 20). The nature of that service – unlike the "automatic imposition of an advertising message" in EPPC (*Order*, paras. 17, 21 (J.A.)) – rendered it more than an "incidental" service that did not alter the fundamental character of the underlying telecommunications service offering.

---

[24] AT&T also asserts that the Commission arbitrarily ignored interaction between the *retailer*, which selects the message, and information capabilities that AT&T's service provides. Br. 31. This challenge is not before the Court because, as previously discussed (at pages 19-23, above), AT&T never presented to the Commission the claim that the retailer was the customer of EPPC service.

[25] *Northwestern Bell Telephone Petition for Declaratory Ruling*, 2 FCC Rcd 5986 (1987) ("*Talking Yellow Pages*").

For similar reasons, there is no merit to AT&T's assertion that the staff's *AT&T CEI Order*[26] and the *NATA Centrex* decision required the Commission to treat the EPPC advertising feature as an enhanced/information service. *See* AT&T Br. 32-34. The *AT&T CEI Order*, issued by the staff on delegated authority, involved AT&T's decision to append outbound calling capabilities to indisputably enhanced interactive voice and data services that AT&T had been offering on a "stand-alone" basis. *Order*, para. 18 (J.A.) (citing *AT&T CEI Order*, para. 6). In that circumstance, the previously stand-alone enhanced component of the combined service was not merely incidental to the outbound calling capability included in that service; nor did it leave the combined offering a fundamentally unaltered basic/telecommunications service. By contrast, the Commission correctly determined that the "automatically impos[ed]" advertising feature in AT&T's EPPC service – which AT&T never separately offered cardholders, and for which it did not charge them – was merely adjunct to the underlying telephone service for which customers purchased the cards. *Order*, paras. 17, 20 & n.43, 21 (J.A.).

The Commission's *NATA Centrex* decision likewise is distinguishable, because the offering that the Commission found to be an enhanced/information service there gave customers the *option* of receiving "additional billing information * * * if they dialed extra digits before making a call (*e.g.*, so calls could be tracked by client)." *Order*, para. 19 (J.A.) (citing *NATA Centrex Reconsideration*, paras. 42-46); *see also NATA Centrex Order*, para. 42. Unlike the EPPC advertising feature, the enhanced feature at issue in *NATA Centrex* was not automatically

---

[26] *In the Matter of American Telephone and Telegraph Company Comparably Efficient Interconnection Plan for Enhanced Services Complex*, 6 FCC Rcd 4839 (Com. Car. Bur. 1991) ("*AT&T CEI Order*").

imposed on customers that had taken the service only to make conventional telephone calls.[27] Moreover, contrary to AT&T's argument (Br. 32), the Commission correctly stated that AT&T was seeking "to exempt the entire service at issue from Title II regulation merely by including an advertising message." *Order*, para. 18 (J.A.). Because the advertising component in EPPC was adjunct-to-basic, the relevant "entire service" was the telecommunications service that included that advertising component, even if AT&T also continued to make available a different prepaid calling card service that did not include that feature.

Finally, the Court should not consider AT&T's contention (Br. 30) that the FCC arbitrarily failed to consider the possibility that the statutory "information service" exclusion of computer capabilities used for "the management, control, or operation of a telecommunications system or the management of a telecommunications service" is narrower than the adjunct-to-basic classification developed under the Commission's pre-1996 Act precedent. *See* AT&T Br. 30 (citing 47 U.S.C. § 153(20)). AT&T acknowledges that the Commission previously had construed the quoted language to codify its adjunct-to-basic precedent, and that the Commission squarely relied on that prior interpretation in the *Order*. Br. 30 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958 (para. 107)), and *Order*, para. 16 & n.29). AT&T points to nothing in the record to suggest that any party challenged the prior interpretation on which the Commission relied. In these circumstances, the FCC was not given a reasonable opportunity to pass on the question, and the claim is barred by 47 U.S.C. § 405(a). *American*

---

[27] Notably, the Commission in the *Order* reserved judgment on the status of a new generation of AT&T prepaid calling cards, which gives customers "the option to listen to additional information or perform additional functions before listening to the advertising message." *Order*, paras. 2, 38 (J.A.). The Commission instead commenced a rulemaking proceeding to address those service options. *Id.*, paras. 30-43 (J.A.).

Family Assn v. FCC, 365 F.3d at 1166. In any event, the Supreme Court has stressed that a service is not converted from a telecommunications service (under section 153(46)) to an information service (under section 153(20)) by adding a nominal information feature that "only trivially affect[s]" the underlying service. *Brand X*, 125 S.Ct. at 2709 (citing "a time-of-day announcement that played every time the user picked up his telephone" as an example of a "trivial[]" addition that would not change the nature of the service). That observation fully applies to the canned advertising feature that AT&T imposed on its EPPC customers.

II. The Commission Reasonably Applied Its Ruling Retroactively.

The FCC reasonably required AT&T to satisfy the universal service obligations associated with its former EPPC service for the years in which AT&T defaulted on those obligations.[28] It is well established that, "[i]n cases in which there are 'new applications of existing law, clarifications, and additions,' the courts start with a presumption of retroactivity." *Verizon Telephone Cos. v. FCC*, 269 F.3d at 1109 (citations omitted); *see also United Food and Commercial Workers Int'l Union v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993) (noting the Court's "consistent willingness to approve the retroactive application of rulings that do not represent an 'abrupt break with well-settled policy'") (citations omitted). Retroactivity will be denied in such circumstances only when necessary to avoid "manifest injustice." *Verizon Telephone Cos.*, 269 F.3d at 1109.

No such injustice exists here. First, for the reasons already discussed, there is no substance to AT&T's claim (Br. 35) that the Commission's declaration that EPPC service is a

[28] The Commission did not limit its jurisdictional analysis to prospective application. However, it provided that any "[c]laims for unpaid intrastate access charges should be filed in the appropriate court or state commission." *Order*, para. 28 n.58 (J.A.).

basic/telecommunications service rather than an enhanced/information service constitutes "new law" that replaces "old law that was reasonably clear." The Commission's "prior decisions had always treated prepaid calling cards as telecommunications services," and "the universal service contribution forms submitted to USAC plainly require revenues from prepaid calling cards to be reported." *Order*, para. 32 (J.A.). Indeed, the Commission's pertinent universal service contribution rules specifically contemplated prepaid cards (such as AT&T's) that were distributed through retailers – requiring carriers to "'include revenues from pre-paid calling cards provided either to customers *or to retail establishments*.'" *Order*, para. 32 n.66 (J.A.) (quoting Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A at 18 (July 1999)) (emphasis added); *see* 47 C.F.R. § 54.711 (requiring that "contributions shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet"). Those requirements further specified that "'[g]ross billed revenues should represent the amounts actually paid by customers and not the amounts paid by distributors or retailers, and should not be reduced or adjusted for discounts provided to distributors or retail establishments.'" *Order*, para. 32 n.66 (J.A.) (quoting Telecommunications Reporting Worksheet at 18-19). Given that express notice, AT&T "had no reasonable basis to expect to avoid" its obligations as a provider of telecommunications services "merely by adding an unsolicited advertising message to its prepaid calling card service." *Order*, para. 32 (J.A.).[29]

[29] AT&T's argument (Br. 37) that it was entitled to rely upon general statements in "contribution forms and governing contribution rules" exempting enhanced/information service revenues from contribution requirements begs the question at hand – *i.e.*, whether EPPC was an enhanced/information service. In any event, such general statements cannot override the specific treatment of prepaid calling cards in the worksheets.

AT&T counters that, although the FCC may not have been "legally bound" as a result, the Common Carrier Bureau's failure in 1994 to prevent AT&T from classifying its EPPC revenues as enhanced in its cost allocation manual provided AT&T a reasonable basis for expecting that the agency would treat that service as an information service. Br. 39. However, the Commission reasonably explained that: (1) the CAM filing – which was merely "deemed accepted" under the Commission's rules when the Common Carrier Bureau did not affirmatively reject it[30] – did not establish the proper legal classification of the service for any purpose other than the allocation of costs between regulated and non-regulated services; (2) even that limited purpose had expired (in 1995, when AT&T was declared non-dominant) by the time the universal service contribution requirements of the 1996 Act took effect; and (3) nothing in the agency's decisions regarding the universal service contribution mechanism ever suggested that some types of prepaid cards should be exempt from the contribution requirement. *Order*, para. 33 (J.A.). In these circumstances, AT&T's CAM filing does not constitute the type of "clear" prior law that might overcome the general presumption in favor of retroactivity or make a denial of retroactivity "uncontroversial." *Verizon Telephone Cos.*, 269 F.3d at 1109.

Nor does the CAM filing fall within the scope of subsequent Commission statements "that [the agency] was exempting [from universal service contribution requirements] all services 'previously considered enhanced' in order to promote 'certainty and continuity.'" AT&T Br. 36, 40 (quoting *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (para. 788) (1997) ("*Universal Service Order*")). In the *Universal Service Order* – and in the *Non-*

---

[30] *See American Telephone & Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 1786 (para. 109) (Com. Car. Bur. 1988).

Accounting Safeguards Order on which that order relies – the Commission concluded that the differently worded definitions of "information services" and "enhanced services" could and should be interpreted so that that all services that came within the enhanced service definition would also be considered information services under the 1996 Act definition. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905 (para. 102); *Universal Service Order*, 12 FCC Rcd 8776 (para. 788). What the Commission was preserving for the sake of "certainty and continuity" was the "*definitional scheme*" – not the status of individual services under cost allocation manuals that had been "deemed granted" as a result of agency inaction. *Id*. (emphasis added).

Also meritless is AT&T's claim that the Commission failed to conduct a required retroactivity analysis before applying its decision to AT&T's past conduct. Br. 35-36. In fact, the Commission expressly and reasonably "rejected AT&T's arguments" against retroactive application of the *Order*, because the ruling neither created new law nor upset any reasonable reliance interest. *Order*, para. 32 (J.A.). And addressing AT&T's argument below that it would be inequitable to apply the ruling only to AT&T, the Commission made clear that its ruling applied equally to "similar" services offered by other carriers. *Order*, para. 32 n.67 (J.A.); *compare* AT&T Br. 37-38 (claiming that the Commission ignored the conduct of other carriers). This analysis easily satisfies this Court's standards for applying decisions retroactively. *See Verizon Telephone Cos.*, 269 F.3d at 1109 (retroactivity is presumed where there is no clear break from past law and no manifest injustice).

Finally, AT&T's argument for prospective application of the *Order* ignores the "strong equitable presumption in favor of retroactivity that would make [injured] parties whole." *Exxon Company v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999). Under the FCC's universal service contribution formula, other parties have had to increase their contributions to make up for

AT&T's unilateral decision to limit its contributions. This result follows from the fact that the contribution rate (expressed as a percentage of contributing carriers' interstate end user revenues) is set to meet the fund's program needs, not *vice versa*. *See generally* 47 C.F.R. § 54.709. If AT&T were excused from its obligation to compensate the fund for past shortfalls, other carriers would not receive the reduction in contribution obligations to which they are entitled, and their millions of end users would be denied the benefits of a pass-through of those reduced contributions. *See* 47 C.F.R. § 54.712.

CONCLUSION

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

Respectfully submitted,

THOMAS O. BARNETT
ACTING ASSISTANT ATTORNEY GENERAL

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

LAURENCE N. BOURNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

October 3, 2005

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

AT&T CORP.,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NO. 05-1096
	)	
	)	
RESPONDENTS.	)	
	)	
	)	
	)	

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 10699 words.

LAURENCE N. BOURNE
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

October 3, 2005