



## **FCC Finds AT&T Calling Card Subject to Universal Service and Intrastate Access Charges**

**– Real Story Is Potential Liability of Domestic Least Cost Routers and Network Providers –**

**February 24, 2005**

Yesterday, the Federal Communications Commission (“FCC” or “Commission”) as expected released an order subjecting AT&T to approximately \$500 million in retroactive liability – \$160 million in federal universal service payments and \$340 million in intrastate access charges. The FCC also initiated a rulemaking regarding the regulatory status of other types of calling card platforms, including those that utilize Internet Protocol (“IP”) transport.

Key points are as follows:

- AT&T’s calling card service is a telecommunications service (and therefore subject to universal service) because it offers “telecommunications for a fee to the public”;
- Playing an automated message (in this case an advertisement) from a calling card platform is insufficient to create an “information” service;
- Interactive information retrieval (e.g., voicemail, contact lists, news, whether, etc.) may constitute an unregulated information service when bundled with calling capability; and
- Switching or transporting a call out of state does not enable a carrier to avoid intrastate access charges – the origination and termination points matter.

### **The AT&T Service and the FCC’s Analysis**

The AT&T service at issue is a straight-up calling card service. The customer dials a number to access the calling card platform, hears an advertisement from a retailer, and then can dial a call. AT&T asserted that the mere playing of the advertisement converted what otherwise would be a “telecommunications service” into an “information service,” which is not subject federal universal service obligations.

The FCC rejected AT&T’s claim at least in part because the advertising message was played automatically and allowed for no interaction with the customer. Moreover, the FCC noted that the advertising message was so completely ancillary to the telecommunications service component that AT&T did not even reference that functionality in its packaging materials. Indeed, the FCC noted that playing an advertisement was no more interactive than the standard “Thank you for using AT&T,” which is played as part of effectively all customer interaction with AT&T calling card platforms.

At bottom, the Commission found that because the AT&T service represented “telecommunications” offered “to the public for a fee,” the calling card product constitutes a “telecommunications service.”

## **The Pending Can of Worms**

In addition to classifying AT&T calling card service as a telecommunications service, the FCC put in play a number of important issues that service providers and carriers – especially information service providers and least cost routers – need to be aware of.

The Commission left open the possibility that interactive information retrieval services that include calling functionality may be enhanced. For example, a voicemail platform that also has calling functionality may constitute an enhanced service. Importantly, if consumers pay for the information retrieval service and also get calling capability, that may be unregulated. Indeed, if calling is offered “for free” as part the information retrieval service, the FCC would be hard pressed to find that such an offering constitutes an offering of telecommunications to the public for a fee.

In addition, the FCC stated plainly that origination and termination points – not the path over which a call travels – will control whether interstate or intrastate access charges and universal service fees are owed. AT&T argued that resellers often avoid higher intrastate access charges by routing calls interstate. The FCC expressly rejected this view, and cautioned both resellers and facilities providers that routing decisions do not change the jurisdictional nature of a call.

Finally, the FCC noted that AT&T claimed that a number of carriers, including IDT and Net2Phone, were utilizing IP transport in conjunction with calling card platforms to create an information service. The FCC sought comment on whether such

a service is in fact an information service, given the 2004 FCC decision that standard “1+” calling that uses “IP in the middle” constitutes a telecommunications service.

## **Conclusion**

As is all too typical, the Commission took a fairly straightforward case and created significant uncertainty calling resellers, facilities providers, and IP service providers. Companies engaged in least cost routing need to be especially careful going forward, as the FCC has expressly stated that routing does not matter when it comes to jurisdictional analysis. The Bell Companies are becoming increasingly aggressive in collecting intrastate and interstate access charges from other providers, and this FCC decision will give the Bells further support in collections actions.

**Please contact Mike Hazzard (202-857-4540) or Ross Buntrock (202-857-4479) if you have any questions regarding this advisory.**

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