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## **Court Rejects FCC Limitation on “Telecommunications Service” Category For Certain Prepaid Cards**

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The U.S. Court of Appeals for the D.C. Circuit has affirmed in part and vacated in part the Commission’s 2006 decision classifying IP-transport prepaid telephone calling cards and menu-driven calling cards as “telecommunications services.”

“IP-transport cards” use internet protocol technology to transport part or all of a phone call. Because part of the call utilizes IP technology, AT&T argued to the FCC that IP-transport cards constitute an “information service”, as opposed to a “telecommunications service” — this despite the fact that the Commission had previously ruled that similar so-called “IP-in-the-Middle” calls were NOT information services. “Menu driven cards” use a menu-driven interface through which users can either make a call or access several types of information. AT&T had argued to the FCC that the offering of information (such as weather or news) through either a menu or an operator qualified it is an “information service.” Both of these arguments were intended to exempt AT&T’s card services from the obligation to pay the access charges, Universal Service Fund contributions, and other fees which are associated with telecommunications services but not information services.

The FCC saw through the ploy rather easily, and there was no dispute about the correctness of the FCC’s classification of both types of card as “telecommunications services.” But since that classification meant that issuers of the cards were subject to various charges, the date on which the classification would be applied was a matter of some consequence.

In its 2006 decision, the Commission determined that the “telecommunications services” classification would be retroactive for IP-transport cards but prospective only for menu-driven cards. In other words, all IP-transport cards — including those which had been issued prior to the FCC’s 2006 decision — were to be treated under the newly-announced classification. Menu driven cards, on the other hand, would be subject to the new classification only if the cards were issued after the FCC’s decision.

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The Court upheld the retroactive application of the ruling with respect to IP-transport cards, but decided that the FCC had not articulated any sound basis for not also making the ruling retroactive with respect to menu-driven cards. Accordingly, the Court vacated the FCC's order "to the extent that it foreclosed application of its substantive ruling in the calculation of access charges before the Order's issuance." This opinion underscores the crucial difference between adjudicatory decisions and rulemaking decisions in administrative law: adjudications (which deal with past conduct) are normally retroactive in effect, while rulemakings (which deal with changes in the regulations) are normally prospective. The Court's assessment of the case as an adjudication determined the outcome.