Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones	)	WC Docket No. 03-225

COMMENTS OF AT&T CORP.

Paul J. Zidlicky
Joseph R. Palmore
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel. (202) 736-8000

Leonard J. Cali
Lawrence J. Lafaro
Martha L. Marcus
AT&T CORP.
Room 3A225
One AT&T Way
Bedminster, New Jersey 07921
Tel. (908) 532-1841

Attorneys for AT&T Corp.

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SUMMARY

AT&T appreciates the Commission's willingness to "reexamine and, if necessary, revise the per-payphone compensation rate." *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WD Docket No. 03-225, ¶ 9 (March 14, 2005) ("*FRPRM*"). It is clear that critical inputs into the Commission's per-phone compensation plan have changed dramatically since the Commission put it in place, and that it is therefore in critical need of an update. As the Commission embarks on this process, it is important to bear in mind that the per-phone compensation rules are based on *three* variables, not two, and that all three must be addressed. If the Commission intends to update the per-call compensation amount, it also must (i) update the average call volume figure for payphones to reflect the steep declines in recent years, and (ii) update the market share allocations to reflect the dramatic changes in the market since the Commission last compiled these data.

First, the Commission must update its compensation rules to reflect the dramatic decline in the number of calls placed at the average payphone since 1997, the year in which the data underlying the current per-phone rate were collected. In fact, the Commission has already made the decline in payphone call volumes the basis for increasing the per-call rate, and, to be consistent, must adjust the per-phone rate to reflect the same phenomenon. Moreover, in early 2002, the Regional Bell Operating Companies ("RBOCs") submitted payphone call data from 2001 demonstrating that even then the Commission's estimate of 148 calls per month at an average payphone was greatly inflated, a problem that has only grown worse in the ensuing years. Indeed, the RBOCs' own public statements, those of the independent payphone service providers ("PSPs"), and more recent data confirm that call volumes have declined markedly. For

these reasons, the Commission should view with skepticism any data purporting to show anything other than steep declines in average payphone calls. *See infra* Section I.

Just as important, the Commission cannot neglect the third critical input into its calculation of the compensation obligations of interexchange carriers ("IXCs"): market share, without which no individual carrier's compensation obligation can be calculated. The Commission's current market share figures come from 2000-2001, after which time there has been a sea of change in the interexchange carrier marketplace. Specifically, in 2000-2001, the RBOCs were hardly a factor in this market, but in the time since then they received regulatory permission to enter the long-distance market in nearly every state and have taken market share from traditional carriers such as AT&T. At the same time, AT&T has actually stopped marketing its long-distances services to residential and small business customers.

The Commission has previously recognized the importance of using timely market share allocations when calculating payphone compensation obligations, and must do so again here by collecting fresh data to calculate accurate market shares. Moreover, in considering requests to update its payphone compensation rules, the Commission has recognized that "[e]specially when market conditions have changed significantly, it is incumbent upon us to reexamine whether the conditions resulting in the present Commission-prescribed rate still apply." Report and Order, *Request to Update Default Compensation Rate for Dial-Around Calls From Payphones*, 19 FCC Rcd. 15636, ¶ 19 (2004) ("*Per-Call Rate Order*"). If the Commission fails to update its market-share data, it will be forcing carriers whose market shares have declined to subsidize calls routed to carriers (like the RBOCs) whose market shares have increased. Such a forced subsidy between competitors would violate the rule of *Illinois Public Telecommunications Association* v. *FCC*, 117 F.3d 555 (D.C. Cir. 1997), in which the D.C.

Circuit vacated the Commission's first interim period payphone compensation plan because it did not accurately allocate compensation obligations among IXCs.

Further, the Commission must ensure that its approach to calculating average call volumes is methodologically sound. Accordingly, once the Commission collects relevant data on call volumes and screens it for reliability, it should use a weighted average to reflect disparities in sample size behind the data points and avoid systematically biasing the average call volume figure upwards. The Commission already has adopted this approach in calculating call volumes for purposes of establishing the per-call rate. *See infra* Section III.

Finally, in calculating an average call volume figure, the Commission should adhere to its longstanding and commonsense definition of a "completed" call as one that is answered by the called party. *See infra* Section IV.

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Pursuant to 47 C.F.R. §§ 1.415 & 1.419, AT&T Corp. ("AT&T") submits these comments in response to the Commission's Further Notice of Proposed Rulemaking, *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WD Docket No. 03-225 (March 14, 2005) ("*FRPRM*").

BACKGROUND

A brief discussion of the Commission's prior determinations puts the issues presented by the Commission in the *FRPRM* into proper focus.

1. ***First Payphone Order.*** In 1996, when the Commission initially attempted to implement Section 276, many telephone companies lacked the hardware and software necessary to track calls that originated from payphones and to determine which carriers owed compensation and to whom that compensation was owed. Fifth Order on Reconsideration and

Order on Remand, *Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996*, 17 FCC Rcd. 21274, ¶ 4 (2002) ("*Fifth Order*"). Because call tracking was not widely available, the Commission ordered that initial compensation due to PSPs for compensable calls completed during the Interim Period (November 7, 1996 to October 6, 1997) would be paid "on a per-phone, rather than a per-call basis." *Id.* ¶ 6.

For this initial period of per-phone compensation, the Commission determined that (1) there were, on average, 131 payphone calls per month for the average payphone, (2) the per-call compensation rate should be $0.35 per call, and (3) therefore the total monthly per-phone compensation amount should be $45.85 per month. Report and Order, *Implementation of Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996,* 11 FCC Rcd. 20541, ¶ 125 (1996) ("*First Order*"). The Commission, however, concluded that only IXCs with toll revenues exceeding $100 million would be required to pay a pro-rata share of this payphone compensation obligation based upon the ratio of their toll revenue to the total industry revenues. *Id.* ¶ 119. The Commission also concluded that *after* the initial one-year phase-in period, "per-call tracking capabilities will be in place," and carriers would be required to remit "per-call compensation (as opposed to flat-rate compensation)." *Id.* ¶ 51.

On appeal, the D.C. Circuit set aside several of the Commission's conclusions. Specifically, the Court concluded that the Commission's decision to exempt carriers with less than $100 million in toll revenues from any payphone compensation obligations impermissibly and improperly transferred the obligations of one segment of the industry onto large IXCs. *Illinois Public Telecomms. Ass'n*, 117 F.3d at 565. Further, the Court noted that the Commission did not "establish a nexus between total toll revenues and the number of payphone-originated calls." *Id.*

2. ***Second Payphone Order***. On remand, the Commission revised its per-call compensation rate from $0.35 per call to $0.284 per call. Second Report and Order, *Implementation of Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996*, 13 FCC Rcd. 1778, ¶ 111 (1997) ("*Second Order*"). The Commission applied this new rate to the Intermediate Period, *i.e.,* October 7, 1997 and October 6, 1999. *Id.* ¶ 121. The Commission deferred consideration of compensation issues for the Interim Period. *Id.* ¶ 4. On appeal, the D.C. Circuit again concluded that the Commission had acted arbitrarily and capriciously in setting the per-call rate. *MCI Telecomms. Corp.* v. *FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998).

3. ***Waiver Orders.*** Meanwhile, it became apparent that the local exchange industry would be unable to equip payphone lines with coding digits (or "FLEX ANI") that specifically identify calls as payphone-originated, and on which the call-tracking systems of some IXCs depended, as quickly as the Commission had envisioned. As a result, the Common Carrier Bureau extended a waiver of the time period during which coding digits must be provided to interexchange carriers. Memorandum Opinion and Order, *Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996,* 13 FCC Rcd. 4998 (Common Carrier Bur. 1998).

The Bureau also recognized that, without such data, some IXCs could not provide the per-call compensation otherwise required. Accordingly, in April 1998, the Common Carrier Bureau issued a related waiver that allowed those IXCs to satisfy their per-call compensation obligations by paying per-payphone compensation for all phones that did not transmit the data required to compensate on a per-call basis. Such compensation was to be calculated by multiplying the per-call rate established in the *Second Order* by an IXCs' average number of calls from RBOC payphones equipped with call-tracking capabilities. Memorandum Opinion and Order, *Implementation of the Pay Tel. and Compensation Provisions of the Telecomms. Act of 1996*, 13 FCC Rcd. 10893, ¶¶ 26-32 (Common Carrier Bureau 1998).

4. ***Third and Fourth Payphone Orders.*** On remand from the D.C. Circuit's *MCI* decision, the Commission established a new default per-call rate (this time $0.24 per call) and again deferred to another order the per-phone compensation mechanism for the "Interim Period." Third Report and Order and Order on Reconsideration, *Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996,* 14 FCC Rcd. 2545 (1999) ("*Third Order*"). The D.C. Circuit affirmed these per-call compensation calculations. *American Pub. Communications Council* v. *FCC*, 215 F.3d 51, 52 (D.C. Cir. 2000).

In the *Fourth Order*, the Commission adopted a new average monthly per-payphone call volume estimate for the Interim Period. Fourth Order on Reconsideration and Order on Remand, *Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996*, 17 FCC Rcd. 2020 (2002) ("*Fourth Order*"). Specifically, the Commission abandoned its prior 131 call volume estimate from the *First Order* and instead concluded that a new figure of 148 calls-per-month figure was appropriate for the Interim Period. *Id.* ¶¶ 11-13.

In making this change, the Commission recognized the importance of using time-appropriate data, stating that revision of the original call volume estimate was appropriate because it had new data that actually overlapped with the Interim Period. *Id.* ¶ 12. In justifying its modification of the call volume estimate, the Commission explained that "'the more data that can be subject to analysis, the better" because "the payoff in . . . accuracy will invariably justify the effort.'" *Id.* ¶ 12 n.35 (omission in original). The Commission multiplied the new 148 call volume figure by the per-call compensation rate ($0.229) to conclude that the per-phone compensation rate for payphones in the Interim Period would be $33.892 per month. *Id.* ¶ 14.[1]

Despite its decision on a per-phone rate, the Commission in the *Fourth Order* did not actually award any compensation because it recognized that a critical variable was still absent, namely an "Allocation Methodology" among carriers. *See id.* ¶ 39. As a result, the Commission noted that it had requested new data from RBOCs from which it could determine the market share of each carrier and thereby determine what percentage of the per-phone compensation each would be required to pay. *Id.* The Commission "realize[d]" that waiting for market share data would "effectively defer the determination of compensation owed until [it was] able to establish a reasonable allocation methodology," but found this delay unavoidable in order to establish an accurate compensation methodology. *Id.*

5. *Fifth Payphone Order.* In the *Fifth Order*, the Commission finished the work "beg[u]n in the *Fourth Reconsideration Order* by resolving how monthly per-phone compensation owed to [PSPs] is to be allocated among [IXCs] and local exchange carriers (LECs)." *Fifth Order* ¶ 1. In making this allocation, the Commission recognized the importance of using timely data. The Commission carefully chose data reflecting each of the three periods at issue (Interim, Intermediate, and Post-Intermediate) and accordingly used three *different* market share allocations, with each appearing in a separate appendix to the *Fifth Order*. *See id.* ¶ 48

[1] Although it had just recognized the need for comprehensive and timely data, *Fourth Order*, ¶12, the Commission, without prior notice or the benefit of any relevant data, simply applied the same call volume estimate from the Interim Period to the entirety of the Intermediate Period from 1997 through 1999, *id.* ¶ 35 & n.99. Further, although the Commission did not mention the Post-Intermediate Period anywhere within the body of the *Fourth Order*, in Appendix A, the Commission simply stated that the 148 call volume figure also would apply to the period after April 20, 1999 (*i.e.*, the Post-Intermediate Period). *Id.* App. A.

(citing Apps. A, B, & C). Therefore, for the Interim Period (November 7, 1996, to October 6, 1997), the Commission used data for calendar year 1997. *See id.* ¶ 49 & App. A. For the Intermediate Period (October 7, 1997 to April 20, 1999), the Commission used calendar year 1998 data because "it would cover the majority of the Intermediate Period." *Id.* ¶ 49 & App. B. And for the Post-Intermediate Period – which began on April 21, 1999 and continues to this day – the Commission used data from October 1, 2000 to September 30, 2001. *See id.* ¶ 49 & App. C; *see also* 47 C.F.R. § 64.1301(e) (Post-Intermediate Period is ongoing).

In making its allocations, the Commission also recognized that it was incumbent upon it to reflect changes in the IXC marketplace. Specifically, the Commission noted that LECs were increasingly entering this market and that they should accordingly pay per-phone compensation. *See id.* ¶ 57. The Commission "therefore conclude[d] that incumbent LECs owe compensation for calls where the incumbent LEC performed the function of an IXC, and that this compensation obligation should be allocated in a manner consistent with other payors of per-phone compensation, including IXCs." *Id.*

6. ***Per-Call Rate Order.*** In 2004, the Commission revisited the $.24 per call rate it had established for dial-around calls five years before in the *Third Order*. *See Per-Call Rate Order* ¶ 1. According to the Commission, it was necessary to revise the rate because "market conditions ha[d] changed significantly" since 1999, making it "incumbent upon us to reexamine whether the conditions resulting in the present Commission-prescribed rate still apply." *Id.* ¶ 19. Specifically, "the decline in call volumes . . . requires us to reexamine the dial-around rate" since that rate was derived "by spreading the largely fixed costs of payphones over a measure of the number of calls." *Id.* ¶ 1; *see also id.* ¶ 15 ("[T]he dial-around rate is affected by the volume of payphone calls, which has indisputably declined since the Commission set the current rate, necessitating the reexamination we undertake here."). The Commission reviewed data provided by the RBOCs and independent PSPs and concluded that the number of calls made from a "marginal payphone" that just recovers its costs had fallen by more than half. *See id.* ¶¶ 11, 80. Accordingly, the Commission increased the per-call rate from to $.494. *See id.* ¶ 1.

ARGUMENT

I. PER-PHONE COMPENSATION OBLIGATIONS MUST BE UPDATED TO REFLECT THE FACT THAT DIAL-AROUND CALL VOLUMES HAVE DECLINED DRAMATICALLY SINCE 1997.

It is beyond dispute that payphone call volumes have declined precipitously since 1997, the year in which data underlying the current per-payphone rate were collected. *See FRPRM* ¶ 9. This is shown by three different data sources. First, the Commission is already on record as stating that call volumes have plummeted, and its rationale for increasing the per-call rate rests on this fact. Second, RBOC data previously provided to the Commission show that as long ago as 2001 the Commission's figure of 148 dial-around calls per month at the average payphone was already much too high. In the four years that have passed since those data were collected, the decline can only have grown more pronounced. Finally, the RBOCs and APCC have admitted – indeed, trumpeted the fact – that average call volumes have declined.

A. The Commission Increased The Per-Call Rate Because Of Declining Call Volumes, And It Must Now Reflect Those Declines In The Per-Phone Rate.

The critical factor driving the Commission's revision of the per-call payphone rate last year was its conclusion that payphone call volumes had declined precipitously. *See Per-Call Rate Order*, ¶ 1. As the Commission explained, the payphone sector had changed dramatically – "from a growing industry to a shrinking industry" – since it set the default compensation rate of $ .24 for dial-around payphone calls in 1999. *Id.* Moreover, "[b]ecause the dial-around compensation rate is derived by spreading the largely fixed costs of payphones over a measure of the number of calls, the decline in call volumes . . . requires us to reexamine the dial-around rate." *Id.*

The Commission emphasized that the increase in the per-call rate was necessitated by a decline in payphone call volumes. *See, e.g., id.* ¶ 15 ("[T]he volume of payphone calls . . . has indisputably declined since the Commission set the current rate, necessitating the reexamination we undertake here."); *id.* ("Payphone usage is decreasing as the use of wireless services increases."). The Commission recognized that "when market conditions have changed significantly, it is incumbent upon us to reexamine whether the conditions resulting in the present Commission-prescribed rate still apply." *Id.* ¶ 19.

To determine the relevant number of calls over which to spread these fixed costs, the Commission used a "'marginal payphone'" methodology. *See id.* ¶ 10. Under this approach, the Commission determines how many calls are made at a typical payphone that "'is able to just recoup its costs.'" *Id.* (quoting *Third Order*, ¶ 139). In its decision to increase the per-call rate, the Commission concluded that this number had plummeted since 1999. At that time, the Commission found that 439 calls per month were made at a marginal payphone. *See id.* ¶ 11. Using a weighted average of data submitted by the RBOCs and the American Public Communications Council ("APCC") in 2002, the Commission found that this figure had fallen to 191 calls per month. *See id.* ¶ 80 & n.218. That was a decline of *56.5 percent*. Although this decline was in marginal, not average, call volumes, there is no doubt a similarly substantial decline in the latter category. Moreover, since the data on which the Commission based its finding on the number of calls placed at a marginal payphone came from 2002, one would further expect the declines through 2005 to be even larger.

Given that the Commission has already concluded that payphone call volumes have declined precipitously and has cited that decline as its reason for giving PSPs a substantial rate increase, it has an obligation to update the per-phone compensation figure to reflect the same decline. *See id.* ¶ 19 (recognizing that it is "incumbent" on the Commission to update rates when "market conditions have changed").

B. RBOC Data Previously Provided To The Commission Demonstrate That The Commission's Call Volume Estimate Was Too High Five Years Ago.

The conclusion that call volumes have declined also is confirmed by the data submitted by the RBOCs in 2002. As the Commission noted in its *FRPRM*, the RBOCs submitted dial-around payphone data to the Commission in early 2002 relating to periods as late as 2001. *See FRPRM* ¶ 10. Although these data were solicited for the purpose of allocating market share among IXCs, the Commission derived those market shares by identifying the total number of payphone calls originating from RBOC payphones and determining where those calls were delivered. The Commission also obtained information about the number of RBOC payphones corresponding to the call data provided by the RBOCs. *See id.* Simply dividing the number of calls by the number of payphones "'yields an absolute ceiling on average call volumes of only 116 calls per month.'" *Id.*[2]

Of course, that calculation significantly *overstates* the number of calls at an average payphone for a number of reasons. First, the call data submitted by the RBOCs were not limited to access code and subscriber 800 calls that are subject to per-payphone compensation. For example, the data submitted by the RBOCs would have overstated the number of

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[2] This 116 call volume ceiling is derived by taking the total number of RBOC estimated completed payphone calls in that year, dividing by the total number of RBOC payphones, and then dividing by 12. *See Fifth Order* ¶ 20 n.33 (identifying relevant RBOC data).

compensable calls because they would have included 0+ calls, *i.e.*, "credit card, collect, and third number billing calls." *Fourth Order*, ¶ 21 & n.54. Indeed, the Commission estimated that the number of 0+ calls from payphones averaged about 18.67 calls per month. *Id.* ¶ 25.

Further, the RBOC data also were overstated because they "assume[] that a call was completed if it had a hold time of 40 seconds or more." *FRPRM* ¶ 11. The Commission, on the other hand, has rejected such proxies and instead considers a call to be "completed for purposes of determining compensation" only "if it is answered by the called party." *Id.*; *see infra* Section IV (Commission should adhere to its current definition of "completed" call.).

In its *FNPRM,* the Commission noted that these data were solicited to calculate market share and not specifically for the purpose of calculating average dial-around traffic. *See id.* ¶ 10. That fact makes the data more, not less, reliable. Given that these data were submitted for a different purpose unconnected to the level of compensation, there was little incentive to skew the call volume numbers.

AT&T recognizes that the Commission declined to update its per-phone compensation figure based on these RBOC data alone, instead choosing "to collect additional data." *Id.* These RBOC data relating to the 2001 time frame can nonetheless serve as a reality check for the new data the Commission receives. Since that new data should cover time periods later than 2001 and since payphone call volumes have continued to decline, the new data should show average call volumes that are substantially lower. The Commission should view with great skepticism any data that do not reflect such declines.

C. The RBOCs And APCC Are On Record Trumpeting The Decline In Payphone Call Volumes.

The need to update the per-phone compensation rate to reflect declining call volumes is especially clear because APCC and the RBOCs are on record agreeing that call volumes have fallen dramatically in recent years. At the time they made these comments, it was in their interest to show a decline to support an increase in the per-call rate. But the same statements and data now support a decrease in the per-phone rate.

In urging the Commission to initiate a proceeding to increase the per-call rate in 2002, the RBOCs called the Commission's attention to "the extraordinary decline in the volume of payphone calls due to the proliferation of wireless telephones." RBOC Payphone Coalition, Petition for Rulemaking to Establish Revised Per-Call Payphone Compensation Rate, RM-10568, at 1 (Sept. 4, 2002) ("RBOC Petition"). According to the RBOCs, as of August 2001, "call volumes across the country ha[d] fallen *more than 50%* since 1998." *Id.* (emphasis in original).[3] Specifically, a study completed for the RBOCs by KPMG found that 253 calls were made at the average payphone in August 2001, down from the 478 average call figure used by the Commission to calculate the previous per-call rate. *See id.* at 12.[4] (This is a *total* call figure, which is obviously higher than the figure for access code and subscriber 800 calls.)

Similarly, in APCC's request that the Commission increase the per-call rate, it complained that there "ha[d] been a marked decrease across the board in the number of calls made from payphones." APCC, Request That the Commission Issue a Notice of Proposed Rulemaking (or in the Alternative, Petition for Rulemaking) to Update Dial-Around Compensation Rate, RM 10568, at 3 (Aug. 30, 2002). APCC attributed the decline in payphone call volumes to the "dramatic expansion of wireless services." *Id.* at 7.

After the Commission agreed to initiate a rulemaking in response to the requests filed by the RBOCs and APCC, they continued pressing their case that call volumes had

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[3] According to the RBOCs, this decline did not merely reflect a decline in the number of payphones, since that number fell less, by only 20 percent. *See* RBOC Petition at 1.

[4] The RBOCs separately calculated average and marginal call volumes. *See id.* at 12.

declined. APCC told the Commission that "lower wireless rates and creative pricing plans" had "caus[ed] a significant reduction in payphone use." Reply Comments of APCC, WC Docket 03-225, at 22 (Jan. 22, 2004). For their part, the RBOCs said the "trend[]" of "declining call volumes" had "continued" since they filed their request for rulemaking. RBOC Payphone Coalition's Comments on Notice of Proposed Rulemaking, WC Docket 03-225, at 2 (Jan. 7, 2004).

To support this contention, the RBOCs updated their study to incorporate data through September 2003. *See id.*, Exh. 1 at 2 (Jan. 7, 2004). The new data showed that average call volumes had declined another 25 percent since the RBOCs' previous study and *60.3 percent* since the Commission arrived at its average call volume figure in 1998. *See id.* Exh. 1 at 14. The new RBOC figure for average number of total (not just access code and subscriber 800) calls at a payphone was 190. *See id.*

If one assumes that the number of access code and subscriber 800 calls has declined at the same 60.3 percent rate, then the revised per-month figure would be *59*. In fact, the decline should be even more pronounced since nearly two years have passed since the RBOCs collected their data in the per-call proceeding. Just as with the RBOCs' 2002 market share data, this number provides a reality check to the Commission that it can use to evaluate any new data provided by the PSPs in this proceeding.

II. THE COMMISSION ALSO MUST RECALCULATE MARKET SHARE FOR PURPOSES OF ALLOCATING PER-PHONE COMPENSATION OBLIGATIONS.

The Commission also needs to recalculate the market share for purposes of per-payphone compensation. The Commission calculates each IXC's per-phone payment obligations using three inputs: the default per-call rate for dial-around calls, the average dial-around call volume at a payphone, and the particular IXC's market share. The Commission recently updated the first input (by increasing the per-call rate), and has solicited data in this proceeding to update the second. It also has an obligation to update the third critical variable: carrier market share. As the Commission has explained in the specific context of the imperative to keep its payphone compensation rules up to date, "[e]specially when market conditions have changed significantly, it is incumbent upon us to reexamine whether the conditions resulting in the present Commission-prescribed rate still apply." *Per-Call Rate Order*, ¶ 19. The Commission's current market share allocation data are nearly five years old, and there have been substantial changes in the IXC marketplace since they were collected. Without updating the market share allocations, the Commission will not be able to establish a per-phone compensation rate for dial-around calls based on current data, and will be forcing carriers whose market shares have declined to pay for calls routed to carriers whose market shares have increased.

A. The Commission Has Highlighted The Importance Of Accurate And Timely Market Share Data In Connection With Per-Payphone Compensation.

As the Commission has recognized, it did not "complete the work [it] started" when it settled on a per-call compensation rate and average payphone call volume until it made market share calculations. *Fifth Order*, ¶ 12. In fact, in the *Fourth Order*, the Commission deferred actually ordering per-phone compensation because "the record contain[ed] insufficient data" on the third input: market share. *Fourth Order*, ¶ 1; *see also id.* ¶ 39 ("We realize that this [collection of market share data] will effectively defer the determination of compensation owed until we are able to establish a reasonable allocation methodology.").

The Commission's decision to defer awarding compensation until it had accurate market share data was absolutely necessary given its per-phone compensation methodology. Under that methodology, the Commission calculates each IXC's compensation obligations by multiplying the per-call rate by the average number of calls at a payphone and then in turn multiplying that figure by the IXC's market share percentage. *Fifth Order* ¶ 33. No IXC's payment obligation could be calculated without each of these three inputs. *See id.*

Moreover, in allocating compensation obligations by market share, the Commission recognized the importance of using timely data. Accordingly, the Commission did not simply arrive at one aggregate market share allocation and apply it to all of the compensation time periods under consideration. Instead, it carefully chose data reflecting each of the three periods, and derived three *different* market share allocations, with each appearing in a separate appendix to the *Fifth Order*. *See id.* ¶ 48 (citing Apps. A, B, & C). Thus, for the Interim Period (November 7, 1996, to October 6, 1997), the Commission used data for calendar year 1997. *See id.* ¶ 49 & App. A. For the Intermediate Period (October 7, 1997 to April 20, 1999), the Commission used calendar year 1998 data because "it would cover the majority of the Intermediate Period." *Id.* ¶ 49 & App. B. And for the Post-Intermediate Period – which began on April 21, 1999 and continues to this day – the Commission used data from October 1, 2000 to September 30, 2001. *See id.* ¶ 49 & App. C; *see also* 47 C.F.R. § 64.1301(e) (Post-Intermediate Period is ongoing).

In using timely data, the Commission recognized that it could not assign compensation obligations to carriers based on stale data because to do so would result in a misallocation of payment obligations. The wisdom of this approach is shown by simply comparing the allocations reflected in Appendices A and C of the *Fifth Order*, governing the Interim and Post-Intermediate Periods. For example, between those periods, AT&T's market share declined from 35.7% to 33.7%. *Compare Fifth Order* App. A at 1 *with id.* App. C at 1. This resulted in a drop in AT&T's per-phone payment obligations from $12.57 to $11.97, a decline of nearly five percent. *Compare Fifth Order* App. A at 1 *with id.* App. C at 1. During the same time period, Qwest's market share grew dramatically from 0.3% to 7.1%, and its compensation obligations accordingly grew from roughly a penny a phone to $2.53 per phone. *Compare Fifth Order* App. A at 1 *with id.* App. C at 1. These significant changes in market share occurred over a period of less than three years. Yet nearly four years have now passed since the time period from which the Commission drew its current market share allocation data.

B. There Is A Compelling Need To Update The Market Share Component of Per Payphone Compensation.

The need to address the market share component of per payphone compensation is critical because there are compelling reasons to conclude that changes in market share have accelerated in recent years. Notably, the period following 2001 witnessed entry of a major group of new competitors – the RBOCs – into the long-distance telephone market.[5] Those new entrants have obviously taken market share from existing competitors such as AT&T. Indeed, during this period, AT&T has ceased marketing itself to residential and small business customers.

The Commission's own data also confirm the need to update market share allocations. As part of its annual statistical compilation, the Commission analyzes the share of total toll service revenues of all long distance toll providers. *See Statistics of Communications Common Carriers* at 8, tbl. 1.5 (2004). Although these data are different from those used by the

[5] The RBOCs were granted approval to provide interexchange service in only two states prior to October 1, 2000 (the starting point of the window on which the Commission's current market share allocations are based): New York (Verizon) and Texas (SBC). *See* RBOC Applications to Provide In-region Inter-LATA Service Under Section 271, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/. Permission was granted for an additional five states between October 1, 2000 and September 30, 2001 (Kansas, Oklahoma, Massachusetts, Connecticut, and Pennsylvania), *see id.*, but given the time necessary to ramp up operations and acquire customers, RBOC market share remained small during this time period. *See, e.g.*, *Fifth Order* App. C at 1 (Verizon: 0.075% market share); *id.* at 2 (SBC: 0.009%). All remaining approvals came after the end of the *Fifth Order*'s data collection period. *See* RBOC Applications to Provide In-region Inter-LATA Service Under Section 271, *supra*.

Commission to allocate per-phone compensation obligations, there is no reason to believe the trends they demonstrate would not also be reflected in the payphone numbers.[6] Indeed, in the *Fifth Order*, the Commission highlighted that RBOCs should be included in the market share calculation because they "sometimes behaved as IXCs." *Fifth Order* ¶ 57 (explaining that "incumbent LECs owe compensation for calls where the incumbent LEC performed the function of an IXC").

Between 2000 – the year from which the first part of the Commission's payphone market share data now comes – and 2003 – the most recent year for which FCC data are available – AT&T's market share of total long-distance revenues declined from 34.8 percent to 29 percent. *See Statistics of Communications Common Carriers* at 8, tbl. 1.5. If such a decline of roughly two percent a year has continued, AT&T's market share for 2005 would be only 25 percent. Assuming that the proportion of calls routed to AT&T from payphones have similarly declined, AT&T's current per-phone payment obligations are grossly inflated.

Indeed, there is evidence that the decline in AT&T's market share has accelerated considerably since 2003. In 2004, AT&T decided to cease marketing its services to residential and small business customers and has selectively raised prices. *See* SBC Communications Inc. and AT&T Corp., *Applications for Consent to Transfer Control*, WC Docket No. 05-65, Description of the Transaction, Public Interest Showing, and Related Demonstrations, Declaration of John Polumbo (President and CEO of AT&T Consumer Services), ¶ 9 (filed Feb. 22, 2005). As a result, the number of AT&T customers has plummeted. For example, in the first

[6] The Commission calculates market share for purposes of allocating payphone compensation obligation by calculating the percentage of calls routed to each interexchange carrier from local exchange carriers' switches. *See Fifth Order* ¶ 48.

quarter of 2003, AT&T had 38.4 million stand-alone long distance customers. *See id.* ¶ 37. By the end of 2003, that number had fallen to 30.3 million, and by the end of 2004 it had declined again to about 20 million. *See id.* Since many calling cards are associated with residential long-distance accounts, this precipitous decline in the number of residential long-distance customers has clearly affected the number of dial-around calls handled by AT&T from payphones.

C. Timely And Accurate Market Share Determinations Are Necessary To Prevent One Set Of Carriers From Paying For Calls Completed By Other Carriers.

To ignore all these market developments and continue assigning compensation obligations to IXCs based on demonstrably outdated market share allocations would be inconsistent with the D.C. Circuit's decision in *Illinois Public Telecommunications Association*, 117 F.3d 555.

In the *First Order*, the Commission decided that only IXCs with annual toll revenue exceeding $100 million would have to pay per-phone compensation. *See First Order* ¶ 119. The decision to exempt small IXCs from the compensation obligation effectively meant that the large IXCs would have to compensate PSPs for calls routed to the large IXCs' exempted competitors. The D.C. Circuit held that such a forced subsidy was unlawful and could not be justified by the Commission's claim for "administrative convenience." *Illinois Pub. Telecomms. Ass'n*, 117 F.3d at 565. As the Commission has explained, *Illinois* requires "the Commission [to] establish a nexus between the allocation methodology and the number of payphone calls routed to a specific carrier." *Fourth Order*, ¶ 39.

To continue use of the outdated market share allocation would be unlawful under *Illinois*, for there would be an insufficient "nexus" between allocation percentages and the number of calls actually "routed to a specific carrier." *Id.* Continued use of the stale data would force IXCs that had lost market share since 2001 (such as AT&T) to compensate PSPs for calls routed to IXCs that had gained market share since that time (such as the RBOCs). Such a forced subsidy could not be justified by "administrative convenience," *Illinois Pub. Telecomms. Ass'n*, 117 F.3d at 565, *e.g.*, or based upon a suggestion that it was too burdensome to recalculate market share allocations.

Accordingly, in arriving at a new per-phone rate, it would be unlawful for the Commission to simply multiply the payment obligations reflected in Appendix C of the *Fifth Order* by a figure designed to adjust those obligations based on the new per-call rate and a new average call-volume figure. *Cf. FRPRM* App. A (proposed amendment to 47 C.F.R. § 64.1301). Since the figures in Appendix C are based on outdated and now-erroneous market share allocations, they cannot provide the basis for a revision to IXCs' per-phone payment obligations. Instead, the Commission should solicit fresh market allocation data, and arrive at an accurate compensation allocation system based on current data.

III. THE COMMISSION SHOULD USE A WEIGHTED AVERAGE WHEN CALCULATING THE AVERAGE NUMBER OF DIAL-AROUND CALLS AT PAYPHONES.

Once the Commission collects new data on call volumes and screens out data that are not reliable, it should take a weighted average of the remaining data points in order to properly account for differences in the number of phones they reflect. *See FRPRM* ¶ 13 (soliciting comments on use of weighted average). To continue use of a straight average would skew the average call volume figures upward by over-weighting data from independent PSPs and under-weighting that from the RBOCS.

In the past, some of the data the Commission received from independent PSPs in response to its request for data represented only a few thousand payphones, while data compiled and submitted by the RBOCs encompassed hundreds of thousands of payphones. *See Fifth Order* ¶ 51 (RBOCs account for "more than 85 percent of the payphones in the United States"). To use a straight-line average for such disparate data points would give undue weight to the relatively tiny number of payphones of the small PSPs and insufficient weight to the overwhelming number of phones of the RBOCs.

In this very context, the Commission itself has recognized that it must use a weighted average. As part of the proceedings that resulted in the recent increase in the per-call rate, both the RBOCs and APCC submitted studies on the number of calls at a "marginal payphone" and arrived at different numbers. *Per-Call Rate Order* ¶ 40. Rather than simply average the two figures (a "straight-line" approach), the Commission used a "weighted average" reflecting the fact that the RBOC phones comprised 65 percent of the total. *Id.* ¶ 49; *see also id.* ¶ 80 n.218 ("[W]e take a weighted average of the estimates of call volume . . . as follows: 166 * .65 + 238 * .35 = 191.").[7]

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[7] Any decision to undervalue the data provided by the RBOCs by treating it equally with that submitted by independent PSPs with substantially fewer phones would also be irreconcilable with the Commission's treatment of the RBOCs' data for purposes of market-share allocations. In the *Fifth Order*, the Commission assigned exclusive and controlling weight to the RBOC data for the purpose of determining carrier market allocations. *See Fifth Order* ¶ 51 & n.88. Indeed, the Commission did not even consider data from independent PSPs. According to the Commission, it did not need to do so because the RBOCs own "more than 85 percent" of the payphones in the country and their data reflect geographic diversity. *Id.* ¶ 51. Thus, the Commission adopted an approach to calculating market-share percentages that would be flatly inconsistent with continued use of an averaging methodology that systematically undervalues the RBOC data. The Commission can avoid this inconsistency by using a weighted average to calculate its average call volume figure.

Not only would continued use of a straight-line average in the per-phone context be inconsistent with the Commission's approach to calculating the per-call rate, it would also systematically distort the call-volume average in one direction: upwards. Because independent PSPs generally claim higher call volumes than the RBOCs, *see FRPRM* ¶ 11, employing a straight average would inflate the overall estimate of per-payphone call volume.[8]

IV. THE COMMISSION SHOULD ADHERE TO ITS PRIOR CONCLUSION THAT ONLY A CALL ANSWERED BY THE CALLED PARTY IS "COMPLETED."

There is no basis for changing the Commission's longstanding conclusion that "a call is completed for purposes of determining compensation if it is answered by the called party." FRPRM ¶ 11 (citing *First Order* ¶ 63). Congress specified that PSPs are to be compensated only for "completed" calls. 47 U.S.C. § 276(b)(1)(A).

If the Commission were to abandon this common-sense meaning and adopt some sort of time-based proxies, it should do so both with respect to completed and uncompleted calls. In the *First Order*, the Commission considered – but ultimately rejected – proposals that it use a "duration surrogate for completed calls" and exempt calls under 25 seconds or 60 seconds from compensation. *First Order* ¶ 63. If the Commission chooses to use a hold-time surrogate for completed calls, it should simultaneously adopt such a duration surrogate for uncompleted ones.

[8] Taking an ordinary average of data points reflecting different sample sizes is no more sensible than calculating the per capita income in North America by determining the per capita income in Canada, Mexico, and the United States, adding those three numbers together, and then dividing by three. This approach would overemphasize the incomes in the less-populace Canada and Mexico and under-represent the incomes in the more-populace United States.

CONCLUSION

For the reasons stated above, the Commission should (i) adjust the per-phone compensation rate to reflect the decline in payphone call volumes; (ii) solicit new market allocation data and update its allocations with that data; (iii) use a weighted average to calculate average call volumes and (iv) adhere to its current definition of a "completed" call.

Respectfully submitted,

/s/ Martha L. Marcus

Paul J. Zidlicky
Joseph R. Palmore
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel. (202) 736-8000

Leonard J. Cali
Lawrence J. Lafaro
Martha L. Marcus
AT&T CORP.
Room A225
One AT&T Way
Bedminster, New Jersey 07921
Tel. (908) 532-1841

Counsel for AT&T Corp.

Dated: June 27, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2005, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: June 27, 2005
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554*

Natek Inc.
Portals II
445 12th Street, SW
Washington, D.C. 20554

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