

Before the
Federal Communications Commission
Washington, D.C. 20554

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

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 10, 2005

Released: March 14, 2005

Comment Date: 45 Days after publication in the Federal Register
Reply Comment Date: 75 Days after publication in the Federal Register

By the Commission:

I. INTRODUCTION

1. In this further notice of proposed rulemaking (FNPRM), we consider modification of the default rate of per-payphone compensation that applies when carriers are unable to pay per-call compensation to payphone service providers. This action follows our modification of the default rate of per-call compensation for "dial-around" calls set forth in section 64.1300(c) of our rules in the report and order released August 12, 2004, in this proceeding. This FNPRM reflects our continued efforts to implement the requirements of section 276 of the Communications Act of 1934, as amended ("Act"), which directs the Commission to "promote the widespread deployment of payphone services to the benefit of the general public." In pursuit of this mandate, section 276(b)(1) also directs the Commission

1 See 47 C.F.R. § 64.1310(e). See also infra note 16.

2 47 C.F.R. § 64.1300(c).

3 Request to Update Default Compensation Rate for Dial-Around Calls From Payphones, Report and Order, 19 FCC Rcd 15636 (2004) (Per-Call Compensation Rate Order).

4 47 U.S.C. § 276 (b) (1). See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd 6716 (1996) (First Payphone NPRM); Report and Order, 11 FCC Rcd 20541 (1996) (First Report and Order); Order on Reconsideration, 11 FCC Rcd 21233 (1996) (First Reconsideration Order), aff'd in part and remanded in part sub nom. Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997), clarified on reh'g, 123 F.3d 693 (D.C. Cir. 1997), cert. denied, 523 U.S. 1046 (1998) (Illinois); Second Report and Order, 13 FCC Rcd 1778 (1997), aff'd in part and remanded in part sub nom. MCI v. FCC, 143 F.3d 606 (D.C. Cir. 1998) (MCI); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) (Third Report and Order), aff'd sub nom. American Pub. Communications Council v. FCC, 215 F.3d 51 (D.C. Cir. 2000) (American); Second Order on Reconsideration, 16 FCC Rcd 8098 (2001) (Second Reconsideration Order); Third Order on

to establish “a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.”<sup>5</sup>

## II. BACKGROUND

2. When the Commission initially adopted a payphone compensation rule pursuant to section 276(b)(1)(A), many carriers lacked reliable systems for tracking dial-around calls.<sup>6</sup> In the *First Report and Order*, therefore, the Commission ordered compensation to be paid initially on a per-phone, rather than a per-call, basis. To arrive at the total per-payphone rate, it calculated that 131 dial-around calls were placed from the average payphone per month, and each payphone service provider (PSP) was entitled to a default rate of \$.35 per call.<sup>7</sup> This yielded a per-phone compensation rate of \$45.85 per month, to be paid collectively by the carriers.<sup>8</sup> The Commission determined that interexchange carriers with toll revenue exceeding \$100 million would each pay a share of the compensation, pro rated by the ratio of their toll revenue to total industry revenue.<sup>9</sup> The estimate of average per-phone dial-around call volume was based on a straight average of five estimates of average call volume submitted by various PSPs.<sup>10</sup> The period when the per-payphone rate was to be in effect was the “Interim period,” beginning on the effective date of the *First Report and Order*, November 7, 1996, and ending on October 6, 1997.<sup>11</sup>

3. In *Illinois Public Telecommunications Association v. FCC*,<sup>12</sup> the United States Court of Appeals for the D.C. Circuit reversed three critical aspects of that regime. The court held that (1) the underlying \$.35 per-call rate was arbitrary; (2) it was arbitrary to exclude smaller carriers from responsibility for paying per-payphone compensation; and (3) toll revenues were not a rational ground on which to base the pro rata per-company compensation responsibility.<sup>13</sup> Thus, the court required the

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Reconsideration and Order on Clarification, 16 FCC Rcd 20922 (2001) (*Third Reconsideration Order*), remanded *sub nom. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002) (*Fourth Reconsideration Order*); Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) (*Fifth Reconsideration Order*), *aff'd sub nom. AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004); Report and Order, 18 FCC Rcd 19975 (2003) (*Tollgate Remand Order*), *pets. for reconsideration pending*.

<sup>5</sup> 47 U.S.C. § 276 (b)(1)(A).

<sup>6</sup> There are typically three types of calls made from payphones: coin calls; coinless calls using the long distance carrier selected by the payphone owner (referred to as the “presubscribed carrier”); and so-called “dial-around” calls, where the caller makes a coinless call using a carrier other than the payphone’s presubscribed long distance carrier. Generally, there are two types of dial-around calls. The first type is where a caller uses a code to access his or her preferred long distance carrier to make a long distance call, e.g., “1/800/CALL-ATT” or “10-10-321.” The second type of dial-around calls are known as “toll-free” calls, such as 1/800/Flowers. In this type of call, the flower company will pay (or “subscribe” to) a long distance carrier for a toll-free number that its customers can use to make long distance calls to the company without incurring toll charges. Similar to the caller who uses 1/800/CALL-ATT, the flower customer calling from a payphone is making a long distance call using a carrier other than the payphone’s presubscribed long distance carrier.

<sup>7</sup> *First Report and Order*, 11FCC Rcd at 20604, para. 125.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 20601, para. 119.

<sup>10</sup> *Id.* at 20603-04, paras. 124-25.

<sup>11</sup> See 47 C.F.R. § 64.1301(a).

<sup>12</sup> 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998) (*Illinois*).

<sup>13</sup> *Illinois*, 117 F.3d at 565.

Commission to establish an appropriate per-call compensation rate going forward, and also required the Commission to reexamine aspects of its methodology for per-phone compensation during the Interim Period.<sup>14</sup> The court did not, however, disturb the Commission's estimate of average call volume or the methodology used to obtain it.

4. On remand, the Commission established a new per-call rate of 28.4 cents but deferred prescribing a new per-phone rate.<sup>15</sup> The period during which that rate was in effect was the "Intermediate Period," beginning on October 7, 1997 and ending on April 20, 1999.<sup>16</sup> During the Intermediate Period, even though carriers had deployed call tracking systems, there continued to be payphones from which calls could not be tracked.<sup>17</sup> In the absence of a prescribed per-payphone rate, the Common Carrier Bureau instructed carriers to pay, for each of these payphones, compensation reflecting the average amount per-payphone of per-call payments that each carrier paid the regional Bell Operating Companies (RBOCs) for their payphones for the same quarter.<sup>18</sup>

5. In *MCI v. FCC*,<sup>19</sup> the D.C. Circuit held that the 28.4 cent rate was arbitrary. The court did not vacate the rate, but simply remanded for further proceedings.<sup>20</sup> The 28.4 cent rate was thus in effect, and the Intermediate Period lasted, until a new per-call rate of .238 cents was calculated in the *Third Report and Order*. In the *Third Report and Order* the Commission again deferred revisiting the per-payphone rate.<sup>21</sup>

6. In the *Fourth Reconsideration Order* and *Fifth Reconsideration Order* (collectively referred to as "*True-Up Orders*"), we comprehensively addressed the remaining issues from the previous court remands.<sup>22</sup> Among other things, we prescribed a new per-phone compensation rate which applied to the true-up of past payments necessitated by the court remands and to future per-phone payments.<sup>23</sup> As in

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<sup>14</sup> *Id.* at 564.

<sup>15</sup> *Second Report and Order*, 13 FCC Rcd at 1781, 1830, 1845, paras. 4, 121, 165.

<sup>16</sup> 47 C.F.R §64.1301(d).

<sup>17</sup> Even after the October 7, 1997 effective date for per-call compensation, there were many payphone lines that were not supported by Flex ANI technology. Flex ANI is a coding digit technology that allows IXCs to identify payphone-originated calls for per-call compensation purposes. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, TDS Telecommunications Corporation Petition for Waiver of Coding Digit Requirement, International Telecard Association Petition for Reconsideration of Payphone Compensation Obligation*, CC Docket No. 96-128, Memorandum Opinion and Order, 13 FCC Rcd 4998, 5000, para. 2 and n.8 (Com. Car. Bur. 1998)(*Coding Digit Waiver Order*).

<sup>18</sup> See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Memorandum Opinion & Order, 13 FCC Rcd 10893, 10906-11 (Com. Car. Bur. 1998)(*Per-Phone Compensation Waiver Order*); see also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, AT&T Request for Limited Waiver of the Per-call Obligation*, CC Docket No. 96-128, Order, 13 FCC Rcd 7303 (Enf. Div. 1998). The RBOCs used mostly "dumb" payphones, from which calls could be tracked.

<sup>19</sup> 143 F.3d 606 (D.C. Cir. 1998) (*MCI*).

<sup>20</sup> *MCI*, 143 F.3d at 606, 609.

<sup>21</sup> *Third Report and Order*, 14 FCC Rcd at 2636, para. 197.

<sup>22</sup> See generally *Fourth Reconsideration Order*, 17 FCC Rcd 2020; *Fifth Reconsideration Order*, 17 FCC Rcd 21274.

<sup>23</sup> A true-up is a retroactive adjustment to make the parties whole. See *Per-Phone Compensation Waiver Order*, 13 FCC Rcd at 10899, para. 12.

the *First Report and Order*, we calculated a total per-payphone rate and derived the per-payphone amounts to be paid by each carrier as shares of the total per-payphone rate. To arrive at the total per-payphone rate, we applied the same methodology used in the *First Report and Order*. We multiplied the applicable per-call rate – \$.238 – by the recalculated average call volume of 148 dial-around calls per payphone per month, yielding a total rate of \$35.224 per payphone per month.<sup>24</sup>

7. To recalculate the average dial-around call volume per payphone, we followed the methodology of the *First Report and Order*. We took a straight average of seven estimates representing call data gathered by dozens of large and small PSPs.<sup>25</sup> Unlike the *First Report and Order* averages, however, which were based on very short (one to three months) time periods, the call volume averages used in the *True-Up Orders* were based on data from time periods of up to one year.<sup>26</sup> The D. C. Circuit upheld the *Fifth Reconsideration Order* in *AT&T v. FCC*.<sup>27</sup> The court rejected AT&T's challenge to the calculation of average call volumes for procedural reasons. The court noted, however, that the call volume issue could be revisited in the *Per-Call Compensation Rate* proceeding, initiated in 2003, to consider revising the per-call compensation rate.<sup>28</sup>

8. On May 5, 2004, six months after we issued the Notice of Proposed Rulemaking on per-call compensation, AT&T filed an ex parte asking the Commission “to adopt a new, lower” per-payphone compensation rate.<sup>29</sup> AT&T claimed that “[t]here is already significant data before the Commission” showing a decline in the average number of dial-around calls per payphone.<sup>30</sup> In responsive filings, the PSPs did not object to a review of the per-payphone compensation rate, but they pointed out that a small fraction of payphones currently receive per-payphone compensation.<sup>31</sup> They urged the Commission not to delay the issuance of a decision modifying the per-call compensation rate.<sup>32</sup> In the *Per-Call Compensation Rate Order*, we declined to delay the per-call rate decision but stated that we would shortly issue a Further Notice of Proposed Rulemaking to develop a record on which to determine whether to set a new rate for per-payphone compensation.<sup>33</sup>

### III. DISCUSSION

9. We believe it is appropriate to reexamine and, if necessary, revise the per-payphone compensation rate. In the *Per-Call Compensation Rate Order*, we raised the per-call rate to \$.494. This increase is a substantial change to one of the two inputs we have used to calculate the per-payphone compensation rate. The other input, the average number of dial-around calls per payphone, was last

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<sup>24</sup> *Fifth Reconsideration Order*, 17 FCC Rcd at 21285, para. 33.

<sup>25</sup> *Fourth Reconsideration Order*, 17 FCC Rcd at 2025, paras. 12-13.

<sup>26</sup> *Id.* at 2025, para. 13; *Fifth Reconsideration Order*, 17 FCC Rcd at 21280, para. 17.

<sup>27</sup> *AT&T*, 363 F.3d 504 (D.C. Cir. 2004)

<sup>28</sup> *Id.* at 511.

<sup>29</sup> *In the Matter of Request To Update Default Compensation Rate For Dial-Around Calls From Payphones*, WC Docket No. 03-225, Order and Notice of Proposed Rulemaking, 18 FCC Rcd 22811 (*Dial-Around NPRM*), AT&T Notice of Ex Parte Communication, May 5, 2004, at 1 (AT&T Ex Parte).

<sup>30</sup> AT&T Ex Parte at 3.

<sup>31</sup> RBOC Payphone Coalition Ex Parte Filing, May 17, 2004 (RBOC Coalition Ex Parte); APCC Ex Parte Communication, May 18, 2004 (APCC Ex Parte).

<sup>32</sup> APCC Ex Parte at 3.

<sup>33</sup> *Per-Call Compensation Rate Order*, 19 FCC Rcd at 15665, para. 91.

determined based on data collected in 1997.<sup>34</sup> The record in this proceeding indicates that since 1998 there has been a significant decline in per-payphone call volumes.<sup>35</sup> If dial-around call volumes have followed the same trend as overall call volumes, then the second input in our per-payphone rate calculation also will have changed substantially. In this FNPRM, therefore, we seek comment on the specific issue raised by AT&T -- the average number of compensable dial-around calls per payphone. Based on the resulting record, we tentatively conclude that we will calculate a new rate of per-payphone compensation by multiplying the average number of dial-around calls per payphone by the new \$.494 per-call compensation rate.<sup>36</sup>

10. Although AT&T contends that the Commission has sufficient data to establish the average number of dial-around calls per-payphone, we conclude that it is necessary to collect additional data.<sup>37</sup> AT&T refers to the payphone traffic data submitted by the RBOCs in early 2002 and argues that an average of the RBOC data “yields an absolute ceiling on average call volumes of only 116 calls per month.”<sup>38</sup> We note, however, that the payphone traffic data solicited from the RBOCs was collected for purposes of allocating traffic among carriers, not to determine average total dial-around traffic per payphone.<sup>39</sup> Although the RBOC data proved useful at that time in determining a fair allocation of the per-payphone rate among carriers, it is not clear to what extent the RBOC data will prove useful in establishing average total traffic per payphone.

11. First, there appear to be some inconsistencies in the manner in which the various RBOCs gathered the data. For example, some of the RBOCs were able to obtain traffic data from all payphones in their territory, while others were able to provide data only from their own payphones, thereby excluding independent payphones.<sup>40</sup> We have previously found that call volumes at independent payphones are significantly higher, on average, than call volumes at RBOC payphones.<sup>41</sup> Further, in preparing their submissions, the RBOCs assumed that a call was completed if it had a hold time of 40 seconds or more.<sup>42</sup> The Commission, however, has never found that a 40 second hold time equates to a completed call for purposes of determining a precise number of calls. In fact, in the *First Report and Order*, the Commission found that a call is completed for purposes of determining compensation if it is

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<sup>34</sup> *Fourth Reconsideration Order*, 17 FCC Rcd at 2024-2025, paras. 11-13.

<sup>35</sup> For example, in 1998 the RBOCs reported that their average payphone originated 478 calls (of all types) per month. *Third Report and Order*, 14 FCC Rcd at 2608. By 2003 the average had declined to 190 calls per payphone per month. RBOC Coalition Comments, Exh. 1, Calculation of Per-Call Compensation, at 14 (January 7, 2004).

<sup>36</sup> The two changes in inputs may very well offset each other; a lower average call volume may be offset by the higher per-call rate. It remains to be seen whether the net effect is to justify a lower per-payphone rate, a higher one, or possibly the same per-payphone rate that is in effect today.

<sup>37</sup> AT&T Ex Parte at 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Fifth Reconsideration Order*, 17 FCC Rcd at 21289, paras. 48-52.

<sup>40</sup> *Compare* Letter from W.W. Jordan, BellSouth, to William Caton, FCC, filed Mar. 19, 2002 (data submitted did not “reflect any traffic/messages that other payphone providers may have generated from their payphones located in the territory serviced by BellSouth”), *with* SBC Communications, Inc., “Rules for FCC Data Request,” filed Jan. 22, 2002 (Ameritech data “was only available for all payphone providers for the three quarters of 2001”).

<sup>41</sup> *Fifth Reconsideration Order*, 17 FCC Rcd at 21288, para. 42

<sup>42</sup> *Id.* at 21280-81, para. 20 n.33.

answered by the called party.<sup>43</sup> We solicit comment as to whether our earlier assumptions regarding data treatment of completed calls is reasonable.

12. We also seek additional data to enable us to determine a more accurate estimate of the average number of compensable dial-around calls at a payphone. We urge PSPs to provide us with current data showing the average number of compensable dial-around calls placed at their payphones. We request that parties submitting data provide details that will enable us to evaluate the data and determine how to use the data. Data submissions should include, if possible, details showing how the data were gathered, how samples were selected, the total number of payphones of each type (e.g., “dumb” vs. “smart,” RBOC vs. independent) in the sample and in the population from which the sample was taken, and the types of locations represented in the sample. We caution commenters at the outset that attempts to gain advantage by failing to provide us with the necessary context to evaluate their submissions will result in their data being discounted or rejected.

13. We also seek comment on how we should use the data submitted. In the past, we have calculated a straight (i.e., unweighted) average of the various estimates submitted. Some parties have argued that we should calculate a weighted average in order to take into account variations in sample size.<sup>44</sup> We seek comment on the merits of using an average that is weighted by sample size. Finally, we also seek comment on other possible methods for weighting the data.

14. We also seek comment on whether the various samples should be evaluated or weighted based on how closely they resemble the population of payphones that actually receive per-payphone compensation. For example, when a carrier is required to pay per-phone compensation instead of per-call compensation, it is generally because the Flex ANI technology necessary to transmit payphone-specific information digits from the payphone lines is unavailable or inoperable for certain payphone lines.<sup>45</sup> Only “smart” payphones, however, require Flex ANI service. As noted above, we have previously found that “smart” payphones tend to have more traffic than “dumb” payphones. Therefore, we seek comment on whether we should limit the data used to data from “smart” payphones, or weight the samples in some manner that takes account of the differences in traffic patterns at “smart” and “dumb” payphones.

15. We also seek comment on whether we should set more than one rate of per-phone compensation. In the *Per-Phone Compensation Waiver Order*, the Common Carrier Bureau determined that payphones in areas where “equal access” was unavailable and areas served by small telephone companies that could not economically deploy Flex ANI technology originated substantially fewer dial-around calls than the average payphone.<sup>46</sup> Therefore, the Bureau directed carriers to pay a substantially lower per-payphone rate to PSPs located in non-equal access areas and areas where small telephone companies had been granted a waiver of the Flex ANI requirement.<sup>47</sup> PSPs sought reconsideration of this ruling. The per-payphone rule adopted in the *Fourth Reconsideration Order* applies a uniform per-payphone rate to all payphones.<sup>48</sup>

16. We invite parties to submit information on the number of payphones that currently are located in non-equal access areas and in areas where small telephone companies have received a waiver

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<sup>43</sup> *First Report and Order*, 11 FCC Rcd at 20573-74, para. 63.

<sup>44</sup> *Fifth Reconsideration Order*, 17 FCC Rcd at 21280, para. 18.

<sup>45</sup> See note 16, *supra*.

<sup>46</sup> *Per-Phone Compensation Waiver Order*, 13 FCC Rcd at 10911-12, paras. 30-32.

<sup>47</sup> *Id.*

<sup>48</sup> *Fourth Reconsideration Order*, 17 FCC Rcd at 2034, para. 36; see 47 C.F.R. §64.1301.

of the Flex ANI requirement, and on the average number of compensable dial-around calls originating from such payphones. We seek comment on whether it is appropriate to apply a different rate to these two types of payphones. We seek comment on whether, if we apply a different rate to these payphones, we should adjust the per-payphone rate applicable to other payphones in order to reflect the elimination of certain payphones from the averaging process. We also seek comment on whether, if we apply a different rate to these payphones, we should further differentiate the rates applicable to classes of payphones, and, if so, which classes of payphones should be subject to different rates. We also ask whether any such differentiation is administrable.

17. Finally, the RBOC Coalition has stated that fewer than five percent of its payphones qualify for per-payphone compensation.<sup>49</sup> APCC indicates that approximately four percent of its payphones qualify for per-payphone compensation.<sup>50</sup> We seek comment on the actual number of payphones receiving per-payphone compensation and the trend in these payments.

#### IV. PROCEDURAL MATTERS

##### A. Initial Regulatory Flexibility Act Analysis

18. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>51</sup> the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided *infra* in Section B. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>52</sup> In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>53</sup> In particular, we seek comment on whether changes are appropriate in the default rate of monthly per-payphone compensation paid to payphone service providers pursuant to 47 U.S.C. 276.

##### Need for, and Objectives of, the Proposed Rules

19. In this proceeding, we seek comment on whether changes are appropriate in the default rate of *per-payphone* compensation that applies when carriers are unable to pay per-call compensation to payphone service providers pursuant to 47 U.S.C. 276, Public Law No. 104-104, 110 Stat. 56 (1996). We find that a reexamination and opportunity for public comment on modifying the current rate is appropriate in light of the recent adoption of a new per-call rate in this proceeding.

##### Legal Basis

20. This FNPRM is adopted pursuant to sections 1, 2, 4(i)-(j), 201, 226 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201, 226 and 276 and

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<sup>49</sup> RBOC Coalition Ex Parte at 1.

<sup>50</sup> APCC Ex Parte at 2.

<sup>51</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>52</sup> See 5 U.S.C. § 603(a).

<sup>53</sup> See *id.*

sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216, of the Commission's rules, 47 C.F.R. §§ 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216.

### **Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply**

21. The RFA directs agencies to provide a description of, and an estimate of the number of small entities that may be affected by the rules proposed herein, where feasible.<sup>54</sup> The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>55</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are more appropriate to its activities.<sup>56</sup> Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>57</sup>

22. We have included small incumbent LECs in this initial RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>58</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.<sup>59</sup> We have therefore included small incumbent LECs in this initial RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

23. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>60</sup> According to the Commission's *Telephone Trends Report* data, 1,310 incumbent local exchange carriers reported that they

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<sup>54</sup> 5 U.S.C. § 604(a)(3).

<sup>55</sup> 5 U.S.C. § 601(6).

<sup>56</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

<sup>57</sup> 5 U.S.C. § 632.

<sup>58</sup> 5 U.S.C. § 601(3).

<sup>59</sup> See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to Chairman William E. Kennard, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 5 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

<sup>60</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310.

were engaged in the provision of local exchange services.<sup>61</sup> Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285, alone or in combination with affiliates, have more than 1,500 employees.<sup>62</sup> Consequently, we estimate that 1,024 or fewer providers of local exchange service are small entities that may be affected by the rules and policies that may be adopted herein.

24. *Competitive Local Exchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small providers of competitive local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>63</sup> According to the Commission's *Telephone Trends Report* data, 563 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.<sup>64</sup> Of these 563 companies, an estimated 472 have 1,500 or fewer employees and 91, alone or in combination with affiliates, have more than 1,500 employees.<sup>65</sup> Consequently, the Commission estimates that fewer than 381 providers of competitive local exchange service are small entities that may be affected by the rules and policies proposed herein.

25. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a small entities size standard specifically applicable to competitive access providers (CAPS). The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>66</sup> According to the Commission's most recent *Telephone Trends Report* data, 563 CAPs or competitive local exchange carriers and 37 other local exchange carriers reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.<sup>67</sup> Of these 563 competitive access providers and competitive local exchange carriers, an estimated 472 have 1,500 or fewer employees and 121, alone or in combination with affiliates, have more than 1,500 employees.<sup>68</sup> Of the 37 other local exchange carriers, an estimated 36 have 1,500 or fewer employees and one, alone or in combination with affiliates, has more than 1,500 employees.<sup>69</sup> Consequently, the Commission estimates that there are 472 or fewer small entity CAPS and 37 or fewer other local exchange carriers that may be affected by the rules and policies proposed herein.

26. *Local Resellers.* The SBA has developed a size standard for small businesses within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>70</sup> According to the Commission's most recent *Telephone Trends Report*

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<sup>61</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (May 2004) (*Telephone Trends Report*). This source uses data that are current as of October 22, 2003.

<sup>62</sup> *Id.*

<sup>63</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>64</sup> Telephone Trends Report, Table 5.3.

<sup>65</sup> *Id.*

<sup>66</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>67</sup> Telephone Trends Report, Table 5.3.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 13 C.F.R. § 121.201, NAICS code 513330.

data, 127 companies reported that they were engaged in the provision of local resale services.<sup>71</sup> Of these 127 companies, an estimated 121 they have 1,500 or fewer employees and six, alone or in combination with affiliates, have more than 1,500 employees.<sup>72</sup> Consequently, the Commission estimates that there are 131 or fewer local resellers are small entities that may be affected by the rules and policies proposed herein.

27. *Toll Resellers.* The SBA has developed a size standard for small businesses within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>73</sup> According to the Commission's most recent *Telephone Trends Report* data, 645 companies reported that they were engaged in the provision of toll resale services.<sup>74</sup> Of these 645 companies, an estimated 619 have 1,500 or fewer employees and 26, alone or in combination with affiliates, have more than 1,500 employees.<sup>75</sup> Consequently, the Commission estimates that there are 619 or fewer toll resellers are small entities that may be affected by the rules and policies proposed herein.

28. *Payphone Service Providers.* Neither the Commission nor the SBA has developed a small entities size standard specifically applicable to payphone service providers (PSPs). The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that SBA size standard, such an entity is small if it has 1,500 or fewer employees.<sup>76</sup> According to the Commission's most recent *Trends in Telephone Service* data, 613 companies reported that they were engaged in the provision of payphone services.<sup>77</sup> Of these 613 payphone service providers, an estimated 609 have 1,500 or fewer employees and three, alone or in combination with affiliates, have more than 1,500 employees.<sup>78</sup> Consequently, the Commission estimates that there are 609 or fewer PSPs are small entities that may be affected by the rules and policies proposed herein.

29. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small entities size standard specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>79</sup> According to the most recent *Telephone Trends Report* data, 281 carriers reported that their primary telecommunications service activity was the provision of interexchange services.<sup>80</sup> Of these 281 carriers, an estimated 254 have 1,500 or fewer employees and 27, alone or in combination with affiliates, have more than 1,500 employees.<sup>81</sup> Consequently, we estimate that there are 254 or fewer small entity interexchange carriers that may be affected by the rules and policies proposed herein.

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<sup>71</sup> Telephone Trends Report, Table 5.3.

<sup>72</sup> *Id.*

<sup>73</sup> 13 C.F.R. § 121.201, NAICS code 513330.

<sup>74</sup> Telephone Trends Report, Table 5.3.

<sup>75</sup> *Id.*

<sup>76</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>77</sup> Telephone Trends Report, Table 5.3.

<sup>78</sup> *Id.*

<sup>79</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>80</sup> Telephone Trends Report, Table 5.3.

<sup>81</sup> *Id.*

30. *Operator Service Providers.* Neither the Commission nor the SBA has developed a small entities size standard specifically applicable to operator service providers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>82</sup> According to the Commission's most recent *Telephone Trends Report* data, 21 companies reported that they were engaged in the provision of operator services.<sup>83</sup> Of these 21 companies, an estimated 20 have 1,500 or fewer employees and two, alone or in combination with affiliates, have more than 1,500 employees.<sup>84</sup> Consequently, the Commission estimates that there are 20 or fewer local resellers which are small entities that may be affected by the rules and policies proposed herein.

31. *Prepaid Calling Card Providers.* The SBA has developed a size standard for small businesses within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>85</sup> According to the Commission's most recent *Telephone Trends Report* data, 40 companies reported that they were engaged in the provision of prepaid calling cards.<sup>86</sup> Of these 40 companies, an estimated 40 have 1,500 or fewer employees and none, alone or in combination with affiliates, had more than 1,500 employees.<sup>87</sup> Consequently, the Commission estimates that there are 31 or fewer local resellers are small entities that may be affected by the rules and policies proposed herein.

#### **Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

32. We do not expect that any proposal we may adopt pursuant to this FNPRM will increase existing reporting, recordkeeping or other compliance requirements.

#### **Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

33. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>88</sup>

34. The overall objective of this proceeding is to evaluate whether changes are necessary in the current per-payphone monthly compensation that applies when carriers are unable to pay per-call default rate of compensation for dial-around calls originating at payphones, in order to ensure that payphone service providers are fairly compensated, promote payphone competition, and promote the

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<sup>82</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>83</sup> Telephone Trends Report, Table 5.3.

<sup>84</sup> *Id.*

<sup>85</sup> 13 C.F.R. § 121.201, NAICS code 513330.

<sup>86</sup> Telephone Trends Report, Table 5.3.

<sup>87</sup> *Id.*

<sup>88</sup> 5 U.S.C. § 603(c).

widespread deployment of payphone services. The FNPRM seeks comment on specific issues related solely to the level of per-payphone monthly compensation.

### **Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

35. None.

### **B. Comment Filing Procedures**

36. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>89</sup> interested parties may file comments within 45 days after publication of this Notice in the Federal Register and may file reply comments within 30 days after the date for filing comments. All filings should refer to WC Docket No. 03-225. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>90</sup> Comments filed through ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket number, which in this instance is WC Docket No. 03-225. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form<your e-mail address.>" A sample form and directions will be sent in reply.

37. Parties that choose to file comments or reply comments by paper must file an original and four copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Natek, Inc., receives hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

38. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters is delivered to our Capitol Heights facility for screening prior to delivery at the Commission. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, at the filing window at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by

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<sup>89</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>90</sup> See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

a cover letter and should be submitted in “read only” mode. The diskette should be clearly labeled with the commenter’s name, proceeding (including the docket number, in this case, WC Docket No. 03-225), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: “Disk Copy -- Not an Original.” Each diskette should contain only one party’s pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission’s copy contractor, Natek, Inc., Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554.

If you are sending this type of document or using this delivery method...	It should be addressed for delivery to...
Hand-delivered or messenger-delivered paper filings for the Commission’s Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12 <sup>th</sup> Street, SW Washington, DC 20554

39. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission’s copy contractor, Natek Inc., Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at [natekinc@aol.com](mailto:natekinc@aol.com). Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission’s rules.<sup>91</sup> We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

### C. Ex Parte Presentations

40. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules.<sup>92</sup> Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>93</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

41. Alternate formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice, (202) 418-7365 TTY, or [bmillin@fcc.gov](mailto:bmillin@fcc.gov). This *Notice* can also be downloaded in Microsoft Word and ASCII formats at <http://www.fcc.gov/wcb/ppd>.

<sup>91</sup>See 47 C.F.R. § 1.48.

<sup>92</sup>47 C.F.R. §§ 1.1200-1.1216.

<sup>93</sup>See 47 C.F.R. § 1.1206(b)(2).

**D. Initial Paperwork Reduction Act Analysis**

42. This FNPRM contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this FNPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due 60 days after date of publication in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

43. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judith Boley Herman, Federal Communications Commission, Room 1-C804, 445 12th Street SW, Washington, DC 20554, or via the Internet to Judith B. Herman@fcc.gov, and to Kristy L. Lalonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street NW, Washington, DC 20503, or via the Internet to Kristy L. LaLonde@omb.eop.gov.

**V. ORDERING CLAUSES**

44. IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-4(j), 201, 226 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201, 226, 276, NOTICE IS HEREBY GIVEN of the rulemaking described above and COMMENT IS SOUGHT on these issues.

45. IT IS FURTHER ORDERED that the Commission's Consumer and Government Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**

The Federal Communications Commission amends 47 C.F.R. Part 64 as follows:

§ 64.1301 Per-payphone compensation obligation.

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(e) *Post-intermediate access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix C of the Fifth Order on Reconsideration and Order on Remand in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for access code calls and payphone subscriber 800 calls for the period beginning April 21, 1999, and ending \_\_\_\_\_, in the amount listed in Appendix C for any payphone for any month during which per-call compensation for that payphone for that month is not paid by the listed entity. A complete copy of Appendix C is available at [www.fcc.gov](http://www.fcc.gov). Effective \_\_\_\_\_, the default compensation to be paid by each entity shall be the amount listed in Appendix C multiplied by \_\_\_.