ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2004

BRIEF FOR RESPONDENTS

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

NO. 03-1017

AT&T CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

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

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GLOSSARY

ANI	Automatic Number Identification. Data passed from a LEC switch to an IXC indicating that a particular call has originated from a payphone. The software installed on the switch that performs the function is known as "Flex ANI."
BOC	Bell Operating Company. One of the local telephone companies spun off from AT&T at divestiture.
IXC	Interexchange Carrier. A long-distance telephone company. As the primary beneficiaries of long-distance calls placed from payphones, IXCs are responsible for per-call and per-phone compensation for coinless calls.
LEC	Local Exchange Carrier. A company that provides local telephone service. All BOCs are LECs, but not all LECs are BOCs.
PSP	Payphone Service Provider. A company that owns and operates payphones. PSPs can be LECs, or they can be "independent," *i.e.*, not owned by a LEC.
RBOC	Regional Bell Operating Company. For the present case, used interchangeably with BOC.

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BRIEF FOR RESPONDENTS

JURISDICTION

Although the Court has jurisdiction over the petition for review in this case, the challenged order is unreviewable pursuant to the rule of *Beehive Telephone Co. v. FCC*, 180 F.3d 314,318-319 (D.C. Cir. 1999), and *Southwestern Bell Telephone Co. v. FCC*, 180 F.3d 307-310-311 (D.C. Cir. 1999); *see also Interstate Commerce Comm'n v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278-280 (1987). Those cases firmly establish that an agency order denying reconsideration is not reviewable. With respect to the issue the IXCs raise before this Court, the order on review, *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Fifth Order on Reconsideration and Order on Remand*, 17 FCC Rcd

21274 (2002) (*Reconsideration Order*) (JA 812), denied reconsideration of an earlier, underlying order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Fourth Order on Reconsideration and Order on Remand*, 17 FCC Rcd 2020 (2002) (*Fourth Payphone Order*) (JA 433). *See Reconsideration Order* ¶ 16 (JA 817) (noting denial of reconsideration). A petitioner who wishes to seek judicial review of the underlying order from which reconsideration has been denied must make clear in its petition for review or some other contemporaneously filed document that it is asking the court to review not only the order denying reconsideration but the underlying order as well. AT&T failed to do so. Its petition, its statement of issue to be raised, its certificate of parties, rulings and related cases, and indeed even its brief to this court (*see* p. i) all make clear that AT&T sought review *only* of the *Reconsideration Order*, which denied reconsideration. That order is not reviewable.

QUESTIONS PRESENTED

1. Whether an order of the Federal Communications Commission denying petitions for reconsideration of a previous order is reviewable.

2. Whether the Federal Communications Commission properly determined the average number of compensable calls placed from pay telephones.

3. Whether the FCC properly decided that the record did not support the establishment of a factor to reduce the call count volume over time to reflect alleged decreases in payphone usage.

STATUTES AND REGULATIONS

All pertinent materials are set forth in the brief for petitioner.

COUNTERSTATEMENT OF THE CASE

1. Congress Eliminates The LEC Payphone Monopoly.

Historically, payphone service was provided exclusively by local exchange carriers, known as LECs. The largest LECs, which provided much of the service, are the Regional Bell Operating Companies, which are known as the BOCs or RBOCs. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Notice of Proposed Rulemaking*, 11 FCC Rcd 6716, 6719-6720 (1996) (*Payphone Notice*). The functions of the payphone, such as coin processing, were controlled by equipment within the LEC's central switching office, which meant as a practical matter that no competition was possible in the payphone market. *See Registration of Coin Operated Telephones*, 57 R.R. 2d (P&F) 133, 134-135 (1984). Another implication of that arrangement was that the cost of payphone equipment was included in the LECs' regulated rate base, where it was recovered largely through local rates for services that were unrelated to payphones. *Payphone Notice* ¶ 2. As a result, LEC payphone operations were subsidized by revenues generated by other regulated services.

Technology developed in the 1980s enabled the advent of so-called "smart" payphones that could be served by a "dumb" line and replicate at the phone itself functions that previously could be performed only by the "smart" line controlled by the LEC's switch and attached to a "dumb" phone. That development allowed competitors (known as independent payphone service providers) to enter the payphone market. *Payphone Notice* ¶ 5. But the resulting competition was not true competition. LEC-owned payphones were assured of recovering their costs by virtue of the subsidies built into the regulatory system, whereas independently owned phones had no such guarantee. *See* H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1 at 88 (1995). The local coin rate, which accounted for much of the cash compensation the payphone owner received,

was set by the states under their traditional jurisdiction over intrastate service, and ordinarily did not result in full recovery of payphone service costs. On the other hand, independent owners – unlike the LECs – were able to earn commissions on some long-distance calls placed from their payphones, although they were entirely uncompensated for many other calls, such as calls made to toll-free numbers. *See Payphone Notice* ¶¶7-8, 11.

In the Telecommunications Act of 1996 (1996 Act), Congress directed a restructuring of the entire local telephone industry, including payphones. With respect to payphones, Congress scrapped the existing two-tiered hierarchy in which LEC-owned phones were subsidized and independently owned payphones were not. 47 U.S.C. § 276(a)(1). In place of the old system, Congress directed the FCC 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." 47 U.S.C. § 276(b)(1)(A). Congress took that action in order to "promote competition among payphone service providers and promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1).

2. The Commission Implements The New Payphone Regime.

Two basic types of calls typically are placed from a payphone. Coin calls are the traditional kind, where the caller deposits money into the slot. Compensation for such calls is in the form of the money deposited by the caller. To achieve full compensation for such calls, the Commission deregulated the coin rate (which was traditionally set by state regulators at a below-cost rate) and allowed payphone service providers (PSPs) to set the rate at whatever the market would bear.

Calls in which the caller does not deposit money – coinless calls – present more difficult compensation problems.[1] First, who should pay? The Commission decided that compensation to PSPs for such calls would be paid not by the caller, but by the long distance company (the interexchange carrier or IXC) that handles the call and is the primary economic beneficiary of such a call. *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Report and Order*, 11 FCC Rcd 20541 ¶ 83 (1996) (*First Payphone Order*).

Second, what is a "completed" call? The Commission decided that a completed call "is a call that is answered by the called party." *First Payphone Order* ¶ 63. Third, how does an IXC know that a call has been answered? The Commission required the IXCs to implement technology that would permit the tracking of calls from their origin to their destination. *First Payphone Order* ¶¶ 96-101. Call tracking, in turn, depended in part on the transmission of data, known as automatic number identification (ANI), that identifies the call as having originated from a payphone and thus alerts the IXC that the call must be tracked. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Memorandum Opinion and Order*, 13 FCC Rcd 4998, 5009-5014 (Common Carrier Bureau 1998) (*Coding Digit Waiver Order*). ANI data can be transmitted by the LEC switch for hard-wired "dumb" payphones without any modification to the switch, but a LEC must install special switch software in order to transmit ANI data from "smart" phones. That software is known as "Flex ANI." *Id*. ¶¶ 19-20.

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[1] The two principal types of coinless call are known as access code calls and subscriber toll free calls. In an access code call, the caller dials an access number, which may be either a ten-digit toll-free number or a dialing code such as 101xxxxx, to reach the platform of a long distance carrier, from which he can place a long distance call. In a subscriber toll free call, the caller calls a toll-free number belonging to an end user, such as a catalog company or 1-800-FLOWERS.

The Commission believed that it would take about a year for all of the participants involved in transmitting a payphone call to put in place the systems necessary to perform call tracking and be able to pay per-call compensation as required by the statute. *First Payphone Order* ¶ 99. In the meantime, however, the statute required some measure of compensation. The Commission decided that, starting after publication of the *First Payphone Order* and continuing until October 6, 1997 – an interval that has become known as the Interim Period – compensation would be paid on a flat-rate, per phone basis.

To calculate such a per-phone fee, one must multiply a price per call by a predicted volume of calls. The Commission accordingly had to determine both the price and volume figures. In the *First Payphone Order*, the Commission determined the price of a call to be 35 cents – which the agency believed to be the "market price" of a call, as established by data showing the price of a local coin call in jurisdictions where the local calling rate had been freed from government regulation. *Id.* ¶ 122. The 35 cent compensation amount was intended to remain valid not just during the interim period, but also subsequently, for the first year of per-call compensation as a default rate for each call, unless the parties agreed upon a different amount. *Id.* ¶ 72.

The Commission calculated the number of calls to be 131 per month. It reached that figure by averaging estimates provided by five payphone operators of the average number of compensable calls placed from their phones. *First Payphone Order* ¶ 125. Multiplying 131 calls by a compensation rate of 35 cents per call yielded a per-phone compensation rate of $45.85 per month.

A PSP was entitled to that amount from all IXCs collectively. Thus, the Commission had to determine how to allocate that amount among the various IXCs. It decided, on the basis of

administrative convenience, that it would divide the overall amount, in proportion to pro-rata share of long distance revenue, among those IXCs that had more than $100 million in toll revenue. *First Payphone Order* ¶ 119. As there are more than 450 IXCs, most of which had revenue well under the threshold, that approach necessarily excused many IXCs from payment entirely.

3. The *Illinois* Decision.

Various parties challenged aspects of the regulations established in the *First Payphone Order*. Although the Court upheld many of the Commission's decisions, such as the deregulation of the local coin rate and requiring IXCs to track calls, the Court reversed several other aspects of the order with bearing on the present dispute. It reversed the 35 cent per-call compensation rate for coinless calls, finding that the cost of a coin call was insufficiently related to the costs of a coinless call to justify using the coin rate as a proxy for a fair coinless rate. *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 563-564 (D.C. Cir. 1997) (*Illinois*). The Court later clarified that it "intend[ed] to vacate those portions of the *Payphone Orders* setting at $.35 the compensation that the IXCs must pay to payphone service providers for subscriber 800 and access code calls, both prescriptively during the interim period and as the default rate thereafter." *Illinois Public Telecommunications Ass'n v. FCC*, 123 F.3d 693 (D.C. Cir. 1997). No party challenged the 131 average call estimate.

The Court also struck down the Commission's method of allocating per-phone compensation among the various IXCs. Whatever administrative convenience the FCC achieved when it limited payment to only the largest IXCs, the Court held, it "comes at a huge cost" and "cannot possibly justify" the Commission's approach. *Illinois*, 117 F.3d at 565. The Court also struck down the use of proportionate toll traffic as an allocation methodology. It found that the

Commission had failed to "establish a nexus between total toll revenues and the number of payphone-originated calls." *Ibid*.

4. Proceedings On Remand: The *MCI* and *APCC* Decisions.

On remand, the Commission developed a new per-call compensation rate of 28.4 cents per call. *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Second Report and Order*, 13 FCC Rcd 1778 (1997). It derived that rate by subtracting the costs of the coin-related mechanisms from the price of a coin call.

Although the Commission had expected that call tracking would be fully implemented by the end of 1997, implementing tracking systems and the installation of Flex ANI software had proven to be more complex than originally believed, and many calls at that time were not being tracked. Thus, the new rate continued to serve not only as a default rate for tracked calls but as a basis for per-phone compensation as well.

The decision setting the 28.4 cent rate was reversed in *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998). The Court held that the Commission could not rationally derive a market rate for coinless calls by subtracting the cost of the coin mechanism from the market rate for coin calls. The Court did not vacate the 28.4 cent rate, but decided to allow it to remain in effect, on the understanding that "if and when on remand the Commission establishes some different rate of fair compensation for coinless payphone calls, the Commission may order payphone service providers to refund to their customers any excess charges for coinless calls pursuant to the current rate." *Id*., 143 F.3d at 609. The Commission refers to the period during which the 28.4 cent rate was in effect – from October 7, 1997 to April 20, 1999, the effective date of a newly issued rate – as the Intermediate Period.

On remand once again, the Commission established a new rate of 23.8 cents per call, which it derived by accounting for all of the costs of a coinless call. *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Memorandum Opinion and Order*, *Third Report and Order*, 14 FCC Rcd 2545 (1999) (*Third Payphone Order*).[2] Specifically, the Commission calculated the monthly cost of the payphone, exclusive of the coin functions, and divided by the number of coinless calls placed from a "marginal" phone, which it defined as one that just recovered its costs. In the course of that rulemaking, the Commission received new data on the number of calls placed from payphones.

In the *Third Payphone Order*, the Commission also declared that the newly established rate would apply retroactively to calls placed during the Interim and Intermediate Periods. *Id*., 14 FCC Rcd at 2635-2636. Thus, IXCs would be required to pay at that rate for calls made during the Interim Period, and the PSPs would be required to reimburse the IXCs for payments made during the Intermediate Period at the higher rate that had been in existence at that time. The Court affirmed the 23.8 cent rate in *American Public Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) (*APCC*).

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[2] The actual rate determined was 24 cents per call, but that rate included a cost component of 0.2 cents that represented the PSPs' payment of a charge that LECs could impose on PSPs for only a limited period to recover the non-recurring costs of installing Flex ANI. The Commission expected that the $.24 rate would be in force for about three years after the effective date of the *Third Payphone Order*, after which time PSPs would have fully recovered the total Flex ANI charges paid to LECs. Because the PSPs would fully recover those costs in future years, the Commission did not apply this cost component retrospectively to the Interim and Intermediate periods.

5. Resolving Payment For The Interim And Intermediate Periods.

The vacatur of the Interim Period rate and the method of allocation of per-phone costs among the various IXCs, along with the remand of the Intermediate Period rate, had left payphone industry participants unable to settle payment matters for the Interim and Intermediate Periods. Some IXCs had paid too much compensation, some had paid too little, and few, if any, players had either paid or been paid the proper amounts. After the Court approved the 23.8 cent rate, the Commission set out to put those matters to rest and allow proper compensation and reimbursement to go forward. In *Implementation of the Pay Telephone Reclassification and Compensation Provisions, Fourth Order on Reconsideration and Order on Remand*, 17 FCC Rcd 2020 (2002) (*Fourth Payphone Order*) (JA 433), the Commission made some minor adjustments to the per-call rate to account for interest costs and other matters, resulting in a per-call rate of 22.9 cents for the Interim and Intermediate Periods, and it decided that all IXCs should be responsible for paying compensation (although it did not perform an allocation of payment responsibility among the IXCs).

The *Fourth Payphone Order* also adjusted the number of calls on which to base per-phone compensation. The original figure of 131 compensable calls per month had rested on data provided by seven payphone operators that those operators collected over a short period – one to three months – prior to beginning of the Interim Period. In the course of determining the per-call cost, those same PSPs had submitted new data, which the Commission found more accurate for two principal reasons. *Fourth Payphone Order* ¶ 12 (JA 438). First, they were in some cases collected over a longer period of time and thus, as a matter of statistics, were more accurate. *Id.* ¶ 12 & n.35 (JA 438). Second, the new data were collected during a period of time that overlapped the Interim Period and thus had greater validity than the prior data, which predated

the most relevant time period. The Commission accordingly "deem[ed] the new data to be a better basis from which to predict typical payphone usage." *Ibid*. (JA 438).

The Commission also examined the data points themselves, which ranged from about 131 to 163 calls per month, and found that all of them "appear to be accurate numbers for the submitting company and none of [them] seems to be so errant that we can exclude it on that basis." *Id*. ¶ 13 (JA 438). "[W]hile the estimates vary," the Commission found, "they do not vary by significant orders of magnitude and fall within a relatively narrow range." *Ibid*. The Commission thus was unable "to rationally pick a single number from the range provided, nor are we aware of methodologies that would result in a better estimate than empirical observation." *Ibid*. The Commission decided to take the simple average of the numbers – the same mathematical analysis it had used to derive the 131 call estimate in the *First Payphone Order*. The seven data points averaged 148 calls per month. Multiplying 148 calls by 22.9 cents per call yielded a per-phone payment of $33.892 per month.

Several IXCs sought reconsideration of the new call figure. In the Order that AT&T has brought before the Court, the Commission declined to reconsider its estimate. *Reconsideration Order*, 17 FCC Rcd at 21280 ¶ 16 (JA 818). The Commission reiterated that the new estimate was based on better and more pertinent data and that the use of such data was appropriate. *Id*. ¶ 17 (JA 818). The agency rejected the claim that it was obligated to calculate the average by weighting more heavily the RBOCs' call figures because those data represent more payphones. *Id*. ¶ 18 (JA 818). The Commission had used a simple average in its past call count calculation, no party had challenged that calculation, and such analysis was appropriate here as well. *Ibid*. Moreover, the RBOCs typically deployed phones in lower volume locations, while independent

PSPs typically deployed phones in high volume areas. To give greater weight to the RBOC data "would underestimate the volumes for independent PSPs." *Id*. ¶ 20 (JA 819).

The Commission also declined to reconsider its use of the data points that had been submitted. "[T]he call volume data used was fairly representative of the average payphone and the most accurate available indication of average monthly dial-around call volumes at independent payphones." *Reconsideration Order* ¶ 19 (JA 818) (quotation marks omitted). Indeed, the agency pointed out, even though Sprint, one of the large IXCs that had sought reconsideration, has its own payphone operations, it had declined to submit its own data on call volumes. In the absence of data that appeared both more reliable and "broadly representative" of all payphone owners, both LEC and independent, the Commission used the best data available to it. *Id*. ¶ 19 (JA 818).

The Commission disagreed that it "must adopt a factor that would account for a decline in calls for periods beyond the Intermediate Period." *Reconsideration Order* ¶ 22 (JA 819). That request had been made by WorldCom (now known as MCI). The Commission found that "WorldCom has not provided evidence of any such decline that would allow us to determine some reasonable factor, and the record in this proceeding does show that, at least for the Intermediate Period, per-phone call volumes may have actually increased." *Ibid*. In the absence of better data, the Commission could not rationally adjust the call figure.

In the *Reconsideration Order*, the Commission also established the allocation among IXCs of per-phone payments, which AT&T does not challenge. During the rulemaking process, the Commission had asked the RBOCs to provide data on the number of payphone calls placed to each IXC. The Commission analyzed the data to determine the percentage of payphone calls routed to each long distance company and used those percentages to apportion the financial

responsibility for per-phone compensation among the various IXCs. The results are set forth in three appendices to the *Reconsideration Order*, each appendix corresponding to one of the three periods at issue: Interim, Intermediate, and post-Intermediate. (JA 851, 862, 875).

Elsewhere in the *Reconsideration Order*, the Commission addressed a number of difficult issues concerning "true-ups" for the interim and intermediate periods. No one challenges any of those rulings. At this point, the only regulatory matter that stands in the way of a final resolution of payment for calls made during the Interim and Intermediate periods – *i.e.*, from 1996 to 1999 – is the call count figure that AT&T and the IXC intervenors (collectively, the "IXCs") now seek to challenge.

SUMMARY OF ARGUMENT

1. AT&T has sought review of the wrong order. It is black letter law that an agency order that denies reconsideration of an earlier order is not itself reviewable. That rule applies squarely to this case, and the Court should accordingly dismiss the petition for review outright. The Commission action complained of, adjustment of the call count figure, was made in the *Fourth Payphone Order*. In the *Reconsideration Order*, the Commission simply declined to reconsider its earlier action. Yet AT&T's petition, docketing statement, preliminary statement of issues to be raised, and even its brief on the merits all plainly state that it seeks review only of the *Reconsideration Order*. AT&T can point to nothing that indicates its intent to seek review of the *Fourth Payphone Order*. The *Reconsideration Order* is not subject to review.

2. If the Court reaches the merits of this case, the IXCs have not shown that the Commission's number of calls figure was arbitrary. Each of their three claims is wrong.

a. The Commission properly used a simple average rather than a weighted average. During the Interim Period, LECs were entitled to receive per-phone compensation for

about half the time, while independent PSPs were entitled to such compensation the entire time. During that period, LECs owned about twice as many payphones as independents. In the circumstances, a simple average works out to just about the right number, whereas a weighted average would unfairly underestimate the volumes for independent PSPs. In subsequent periods, independent-owned phones were also disproportionately likely to be paid on a per-phone basis, and an average that gives equal weight to independent PSPs was necessary to ensure that the call number figure reflected reality and was representative of the entities actually receiving per-phone compensation.

Moreover, the APA does not require the use of a weighted average. The real question is whether the agency's action is reasonable given the regulatory problem at hand. Here, the statutory scheme makes the use of a simple average reasonable. The statute requires that all PSPs be fairly compensated for each and every completed call. It also directs the FCC to adopt regulations that will promote both widespread payphone deployment and competition among PSPs. Those goals would be undermined by the use of a weighted average because BOC-owned payphones typically have lower call volumes than independent payphones. Weighting the average in favor of BOC data would thus result in systematic undercompensation of independent PSPs. No average figure would ever achieve the "right" solution. Forced to choose between weighting the BOC figures or compensating the independents adequately, the Commission chose the latter as best in keeping with congressional policy. That choice was reasonable.

The Commission did not, as the IXCs incorrectly claim, act inconsistently by using BOC and independent PSP data in one of its decisions, but using BOC-only data in another. The purposes for which the two data sets at issue were used – estimating the number of calls in one case and allocating the compensation responsibility among the IXCs in the other – are different

from and independent of each other. In determining an allocation, there was no reason to believe that the BOC data alone failed to represent the industry as a whole. In determining the call count, by contrast, there was good reason to believe that the BOC data alone would not fairly indicate independent PSP call volumes.

b. The Commission reasonably relied on the available data. With respect to the Interim and much of the Intermediate Periods, it was literally impossible to obtain precise data on completed call volumes. The Commission had no choice but to rely on estimates provided by industry participants, and it was entitled to make its decisions on the basis of the information that was available to it. The Commission studied all of the various estimates submitted to it and found that they appeared reasonable and in keeping with expectations. In such circumstances, the IXCs' claims that the numbers lacked statistical validity are not well taken – particularly where Sprint, one of the intervenor IXCs, operates its own payphone business yet chose to withhold its own call volume data from the Commission. The IXCs complain that the independent PSPs had an incentive to overstate the numbers, but at the time the numbers at issue were submitted to the Commission, the independent PSPs had the exact opposite incentive.

c. The IXCs' charge that the Commission improperly manipulated the call count figure in order to assure that PSPs would recover a pre-determined amount of per-phone compensation is unavailing. First, agency orders speak for themselves, and the Court is generally unwilling to try to read an agency's mind looking for improper motivations. On its face, the Commission's action is reasonable. Second, the total per-phone compensation amount is the mathematical product of a cost-per-call (which the agency determined years ago) multiplied by a number of calls (which the Commission determined on the basis of data that were

available for all participants to examine). There was nothing improper in that calculation. The single sentence on which the IXCs base their argument obviously does not support the claim.

3. The Commission reasonably determined that the record did not require implementation of an annual decline factor for call count volumes in the post-Intermediate Period. WorldCom's request that the Commission implement such a factor, made in its petition for reconsideration and other pleadings, relied on data purporting to show declines of 16.7 percent per year, but WorldCom also provided data showing declines of as little as 2.7 percent per year. Inexplicably, WorldCom variously asked the Commission to use a nine or ten percent decline figure, without explaining where those numbers came from. On that record, the Commission properly determined that it lacked sufficient argument or data to create a reasonable factor. That decision was proper; indeed, the Court upheld a similar decision in the *APCC* case, where the Commission had likewise declined to include a bad debt factor in calculating per-call costs. The Court there held that the Commission had been prudent and reasonable when it decided that the available data were not reliable enough to warrant an educated guess about future bad debt levels. That reasoning applies here.

Going well beyond the WorldCom pleadings before the Commission, the IXCs now claim that monthly call volumes are at most 116 calls. They did not present that figure to the Commission and may not rely on it now. 47 U.S.C. § 405(a). Even if the IXCs' reliance on that newly minted number is not simply barred, they have not explained how they derived it or exactly what it represents, such as data for a quarter, a year, or some other time period. Moreover, the figure is based only on RBOC data, which do not fairly reflect call volumes for those payphones that remain eligible for per-phone compensation, which are largely independent-owned smart phones. To be sure, it appears as though overall payphone call

volumes have fallen in recent years, but so has the number of payphones deployed. On the existing record, the Commission reasonably declined to adjust the call counts in the post-Intermediate Period. It would be entirely appropriate for the IXCs to submit new data in the course of a new rulemaking proceeding – such as the recently initiated rulemaking to re-determine per-call costs.

ARGUMENT

I. AT&T HAS SOUGHT REVIEW ONLY OF THE RECONSIDERATION ORDER, WHICH IS NOT REVIEWABLE.

The Commission modified the call count figure in the *Fourth Payphone Order* and it denied reconsideration of the new figure in the *Reconsideration Order*. *Id*. ¶ 16 (JA 817). Yet AT&T has sought review only of the *Reconsideration Order* and not of the underlying order. This Court has a well established rule that "an order which merely denies rehearing of another order is not itself reviewable." *Southwestern Bell Telephone Co. v. FCC*, 180 F.3d at 310-311, quoting *Microwave Communications, Inc. v. FCC*, 515 F.2d 385 (D.C. Cir. 1974); *Beehive Telephone Co. v. FCC*, 180 F.3d at 317-321. That position was pressed forcefully (and successfully) in both the *Beehive* case and the *Southwestern Bell* case by AT&T, represented in those cases by the same firm that represents it here.

The Court in some circumstances will reach back to review an earlier order, when "the petitioner's intent 'can be fairly inferred' from the petitions or documents filed more or less contemporaneously with it." *Frederick W. Martin v. FERC*, 199 F.3d 1370, 1372-1373 (D.C. Cir. 2000). In this case, no such inference is possible. *See*, *e.g.*, *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 312-314 (D.C. Cir. 2000).

On the contrary, *Beehive* and *Southwestern Bell* are foursquare with this case. As the Court found in *Southwestern Bell*, "[t]he petition for review names only the Reconsideration Order and only that order is appended to the petition. The docketing statement that [AT&T] filed again mentions and attaches only the Reconsideration Order. Finally [AT&T's] preliminary statement of issues to be raised both begins and ends by referring to the Reconsideration Order." 180 F.3d at 313. Moreover, the *Reconsideration Order* also took several new actions, such as the cost allocation, which directly affected AT&T. Thus, AT&T's seeking review of the *Reconsideration Order* did not necessarily implicate the *Fourth Payphone Order*. In short, because AT&T "can point to nothing from which its intent to appeal from the [*Fourth Payphone Order*] can fairly be inferred," it is clear that the only order before the Court is the *Reconsideration Order*, and it is equally clear that the decision to deny reconsideration is not reviewable.

WorldCom's submission during the reconsideration phase of data concerning reduced payphone call volumes in the post-Intermediate Period does not bring the *Reconsideration Order* within the rule that a reconsideration order is reviewable where the petition for reconsideration "is based upon new evidence or changed circumstances." *Southwestern Bell*, 180 F.3d at 311. The Court made clear both in both *Southwestern Bell* and *Beehive*, 180 F.3d at 318-319, that the new evidence rule concerns evidence that could not have been discovered until after issuance of the underlying order. The data at issue do not fit that description. Even if they did, they would make the *Reconsideration Order* reviewable only to the extent that it applied the 148 call figure beyond the Intermediate Period. The order would still be unreviewable insofar as the Commission applied the figure to the Interim and Intermediate Periods.

II. STANDARD OF REVIEW.

Under the Administrative Procedure Act, the Court may reverse the agency's decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court's review under that standard "is necessarily deferential." The Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

III. THE COMMISSION'S ESTIMATE OF THE NUMBER OF CALLS WAS REASONABLE.

The IXCs raise three arguments attacking the call count figure. First, they claim that the Commission was obligated by law to use a weighted average rather than a simple average. Second, they claim that the Commission improperly relied on the data on which the call count is based. Third, they claim that the Commission had an improper motivation in choosing the call count. We address each claim in turn.

A. The Commission Reasonably Used A Simple Average.

The IXCs claim that the Commission committed reversible error by taking a simple average of the call volume data points in the record rather than weighting the data by the number of payphones represented by each data point. Br. at 19-22. They claim that using a simple average was wrong because it "gave undue weight" to the independent PSP data and "insufficient weight" to the RBOC data, which represented more payphones. Br. at 20. That argument fails for two reasons.

First, the record shows that a simple average reflects a fair balance of the payphones that were actually eligible to receive compensation, especially during the Interim Period. In the *First Payphone Order*, the Commission ruled that the BOCs could not begin collecting per-phone

compensation until their payphones had been taken out of their regulated rate bases. *See First Payphone Order* ¶ 127 ("the new compensation system can be implemented [with respect to LECs] only upon the discontinuance of the regulatory system under which they now recover their costs of providing payphone service"). That did not happen until about six months into the Interim Period. *See id*. ¶ 60 ("LECS will not be required to terminate . . . certain subsidies . . . until April 15, 1997"). Thus, for about half of the Interim Period, independent PSPs were the only PSPs entitled to per-phone compensation. At the same time, independent PSPs owned about half as many payphones as LECs. The IXCs' repeated invocation of the "fact" that the RBOC payphones account for 85 percent of all payphones (Br. at 4, 17, 19, 20, 22) is not true.[3] Recently published FCC data show that LEC-owned payphones accounted for about 67 percent of total payphones in 1997. That proportion has dropped steadily to a figure of about 57 percent in 2003. *See* Trends In Telephone Service at 7-9 Table 7.6 (available at http://www.fcc.gov/Bureaus/Common_ Carrier/Reports/ FCC-State_Link/ IAD/trend803.pdf). A simple average figure in those circumstances is about right. A weighted average in those circumstances would not be, and would, as the agency feared, "underestimate the volumes for independent PSPs." *Reconsideration Order* ¶ 20 (JA 819).

Similar reasons make a simple average appropriate for the Intermediate and post-Intermediate Periods as well. As explained above, beginning at the end of the Interim Period, IXCs were supposed to track calls and pay compensation on a per-call basis. Call tracking

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[3] It is true that in the allocation context the Commission reported that the BOC data accounted for 85 percent of payphones. *Reconsideration Order* ¶ 51 (JA 828). That figure appears to have been in error; it probably came from the proportion of total payphones – both BOC and independent – that are located within the BOCs' service territories.

required the LEC switch to transmit the ANI information needed to indicate to the IXC that a call came from a payphone. For the hardwired "dumb" phones typically deployed by LECs, that information was readily available without any additions to the LEC switch. Transmitting the data from "smart" phones, however, required the LECs to install the Flex ANI software that enabled transmission of the data. In many cases, installation of Flex ANI was delayed, *see Coding Digit Waiver Order*, 13 FCC Rcd at 5025-5050, and even today, although most payphones are connected to switches that enable call tracking, some (about 100,000, according to the IXCs, Br. at 29, although they do not explain where that number comes from) remain attached to switches that cannot perform that function. Those phones remain entitled to per-phone compensation. Such payphones are almost always "smart" phones, which are owned disproportionately by independent PSPs.[4] *See Reconsideration Order* ¶ 42 (JA 826). Thus, even in the Intermediate Period and beyond, the payphones that receive per-phone compensation are largely independent PSP phones. In that circumstance, an average that gives equal weight to LEC and independent payphones may be necessary to ensure that independent PSPs will be accurately compensated. Weighting would have resulted in a call figure that failed to reflect reality with respect to independent PSPs and was not "broadly representative" of all payphone owners. *Reconsideration Order* ¶ 19 (JA 818).

Second, even if a simple average were somehow inaccurate as a matter of statistics, the IXCs' argument rests on the premise that the law requires use of a weighted average. But the IXCs do not cite a single case establishing such a rule, and the APA does not incorporate the

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[4] Even to the extent that LECs have smart phones, those phones tend to have higher-than-average call volumes. *Reconsideration Order*, ¶ 42 & n.80 (JA 826).

laws of statistics. In fact, the Court has suggested that weighted averages are not the exclusive permissible tool when an agency must contend with multiple data points. *See Association of Oil Pipelines v. FERC*, 83 F.3d 1424, 1433-1434 (D.C. Cir. 1996). The real question is whether the Commission's analytical method was reasonable *given the regulatory problem before the agency*. In the circumstances here, use of a simple average was reasonable.

The Commission found, and the IXCs do not dispute, that during the Interim and Intermediate Periods "RBOC payphones were predominantly 'dumb' payphones deployed in lower volume areas, while independent PSPs were predominantly 'smart' payphones deployed in higher volume areas." *Reconsideration Order* ¶ 20 (JA 819).[5] In that situation, the use of *any* average call figure – weighted or otherwise – would tend systematically to overcompensate RBOCs and undercompensate independent PSPs, and *no* average figure could achieve the "correct" compensation for any individual payphone or payphone provider. But a call figure that weights the RBOC data more heavily would increase the degree to which independent PSPs are undercompensated. That outcome is in tension with several aspects of the statute governing payphone compensation

First, the statute requires that payphone owners be "fairly compensated for each and every completed . . . call using their payphone." 47 U.S.C. § 276(b)(1)(A). Employing an averaging scheme that results in systematic undercompensation of independent PSPs does not fulfill that directive. Second, undercompensation of independent PSPs tends to undermine the

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[5] The lower call volume associated with dumb phones is a legacy of the prior regulatory regime, under which payphone service was cross-subsidized by other LEC services, and the LECs had an incentive to install payphones without regard to the revenue they would generate. Smart phones tend to be newer phones installed by independent PSPs with economic incentives to install them where they will generate large call volumes.

statutory goals of "promot[ing] the widespread deployment of payphone services to the benefit of the general public" and "promot[ing] competition among payphone service providers." 47 U.S.C. § 276(b)(1). A principal method by which Congress envisioned the emergence of competition in this traditional monopoly area is through the development of independent, *i.e.*, non-BOC, competitors. That goal would not be achieved if independent PSPs were systematically undercompensated. Likewise, payphone deployment in high-volume areas – the market niche typically served by independent PSPs – would be reduced if those phones were unable to generate the expected revenue. That is why the Commission was properly concerned that the call volume number not "underestimate the [call] volumes for independent PSPs." *Reconsideration Order* ¶ 20 (JA 819).

The Commission faced essentially two choices: it could choose a call volume number that tended to undercompensate the independent PSPs, or it could choose a number that might overcompensate some LECs. There was no "average" solution that would achieve the "right" level of compensation. In such circumstances, the agency must choose an analytical methodology that will best balance the interests at stake. The Court has made clear that such a choice falls within a broad range of discretion. *See MobileTel, Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997) ("only the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision"). The Commission chose to use a simple average, giving *some* weight to the BOC data (which, after all, accounted for three of the seven data points), but did not skew the result toward the lower BOC figure. That approach was reasonable in the circumstances, especially given the inherent uncertainty of data in this area, where it is difficult, and sometimes impossible, for PSPs to know how many completed coinless calls are placed from their phones.

The IXCs accuse the Commission of taking inconsistent regulatory approaches (Br. at 21-22), but it is the IXCs themselves who have been inconsistent. They did not challenge the 131 call figure established in the *First Payphone Order* even though that figure was derived by the very same simple average method as the current 148 call figure. Indeed, throughout the proceedings on review, the IXCs urged the Commission to re-institute the 131 call count figure. *See* Sprint Corp.'s Petition for Reconsideration and Clarification at 4 (FCC "should revert to the original estimate of 131 calls") (JA 574); Br. at 21 n.3.[6] But they cannot have it both ways, and their implicit admission that a straight average is acceptable for a lower number must bind them to the position that the same methodology may be legitimately applied to different data. Given the IXCs' failure to challenge the earlier number, the Commission properly found that it was not "obligated to now revisit [the simple average] this methodology." *Reconsideration Order* ¶ 18 (JA 818).

In any event, the IXCs are wrong that the Commission has acted inconsistently. The claim is that the Commission used BOC and non-BOC data in calculating the call figure, but it used only BOC data in determining the allocation of the per-phone compensation payment among the various IXCs. The "inconsistent approaches," they argue, render the "decision to use an ordinary average" arbitrary. Br. at 21-22.

The IXCs did not raise such a claim before the agency, and they accordingly may not raise it in Court. 47 U.S.C. § 405(a). Even if they are not procedurally barred, the IXCs have

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[6] Worse, in the course of proceedings to determine the average cost per call – where a high call figure would lead to a low per-call cost – the IXCs argued that the average payphone carried between 20 and 45 percent *more* calls than the RBOCs and independent PSPs had estimated. *See Third Payphone Order*, 14 FCC Rcd at 2611 ¶ 144.

not explained how the use of different types of data in the two processes makes the use of a simple average to determine call volume arbitrary. At bottom, however, there was no inconsistency because the purpose for which the data were used in each case was different from and independent of each other.

In allocating the total per-phone cost among the IXCs, the Commission had to determine the percentage of overall payphone traffic each IXC carried. That percentage was used to assign each IXC its proportionate share of per-phone compensation. To make such a calculation, the Commission needed data that were representative of the number of payphone calls routed to IXCs. The BOCs own the majority of payphones, which (not surprisingly) account for a high percentage of payphone calls. But there is no reason to believe that the proportion of coinless calls routed to any given IXC differs systematically or significantly between BOC and independently owned payphones. Thus, for the purpose of an allocation, the BOC data alone are fairly representative of the entire industry.

By contrast, the Commission found that BOC payphones and independently owned payphones tend to carry different volumes of compensable calls. As discussed above, the independent payphones tend to be "smart" phones placed in high-volume locations, while the BOC phones are more often "dumb" phones in relatively low-volume areas. *Reconsideration Order* ¶ 20 (JA 819). Thus, with respect to coinless call volumes, BOC data alone are *not* representative of the entire industry. It therefore would have been arbitrary to exclude independent PSP data from the call count estimate even though it was appropriate to rely only on BOC data for the allocation calculation.

B. The Commission's Reasonably Relied On The Available Data.

The IXCs next contend that the Commission improperly relied on the data placed in the record by various payphone providers. The data were inaccurate, the IXCs assert, and reliance on them was accordingly arbitrary. Br. at 22-25. In fact, in the circumstances presented, the Commission properly relied on the data that were in the record.

It is important to keep in mind that actual call count data do not exist for the Interim Period and at least part of the Intermediate Period. Before the IXCs implemented call tracking, it was not possible to maintain precise records on the number of coinless payphone calls that had been completed and were thus eligible for compensation. And before the LECs installed Flex ANI on their switches, it was not possible to track completed calls from smart phones. During that time, there was no practical way to determine with certainty how many payphone calls had been completed. Thus, with respect to all of the Interim Period and some part of the Intermediate Period, it is literally not possible to obtain precise counts of completed payphone calls. Even today, no single entity possesses accurate completed call data. A PSP receives a quarterly report from each IXC specifying the number of calls that particular IXC completed for the quarter, but many small IXCs do not fulfill their reporting obligations. At the same time, an IXC knows only the number of calls it carried from a given payphone and does not know the volume of calls routed to other IXCs from that phone. The Commission was forced to rely on estimates. "Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information." *APCC*, 215 F.3d at 56, quoting *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 474-475 n.18 (D.C. Cir. 1974).

The agency did not abuse that discretion here. It found that the call volume data presented by the PSPs was "the most accurate *available* indication of average monthly dial-around call volumes at independent payphones." *Reconsideration Order* ¶ 19 (JA 818) (emphasis added). Moreover, after having studied "all of the call volume estimates, . . . and the various criticisms of each estimate," the Commission determined that the estimates "appear to be accurate numbers for the submitting company and none . . . [appears] to be so errant that we can exclude it on that basis." *Fourth Payphone Order* ¶ 13 (JA 438).[7] Importantly, no other party "attempted to provide data that even purports to represent an accurate estimate of monthly call volumes from a broadly representative sample of payphones." *Reconsideration Order* ¶ 19 (JA 818). Indeed, the Commission expressly pointed to Sprint, which has its own payphone operations, for criticizing other companies' call estimates while declining to provide its own, which one may presume are higher than the ones submitted.[8] *Ibid*. The Court has been particularly deferential toward the Commission where parties with relevant data withhold it and subsequently challenge the agency's use of other data in its order. *See Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1233 (D.C. Cir. 1999).

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[7] The IXCs argue that even the RBOCs lacked faith in the data because they urged the Commission to stick with 131 calls. Br. at 22 n.4. But they cite an RBOC submission made in August 1997 – five years before the *Fourth Payphone Order* – that predates the RBOCs' submission of new data to the agency. In March 1998, as the RBOCs were developing new data, they informed the Commission that the new data showed that "the Commission's estimate of 131 compensable dial-around and access calls significantly understates the actual number of such calls." Letter of March 24, 1998 from Michael K. Kellogg to Rose M. Crellin at 2 (JA 299).

[8] The IXCs misrepresent what the Commission was talking about when it criticized Sprint, and claim that in fact no IXC "has access to . . . data" on the number of calls from a given payphone. Br. at 24. It is clear that the Commission was referring to Sprint's capability to get data due to "the substantial experience it has providing payphone service through its LEC operations" throughout the country. *Reconsideration Order* ¶ 19 (JA 818).

In the circumstances, the IXCs' complaints that the data "lacked statistical validity" are not well taken. Br. at 23. The Commission used the best data it had available, and under the *Industrial Union* case, there is no error in its doing so. Nor did the data points lack explanation. Intervenor APCC, an independent PSP trade group, for example, submitted a multi-page description of the methodology it used to conduct its study, describing how the data were collected and what was done to it. Letter of March 26, 1998 from Robert F. Aldrich to Magalie Roman Salas, Secretary, FCC (JA 304). To be sure, APCC did not claim that its survey "met scientific standards of statistical validity," *id*. at 1, but that does not render the data useless or reliance upon them arbitrary. *See APCC*, 215 F.3d at 58 (rejecting challenge to reliance on data that "could be subjected to various challenges"). Peoples Telephone Co., an independent PSP, advised that its data were collected "from a representative sample of payphones in Peoples' nationwide operations to determine the completed call profile of a typical payphone. The payphones were selected randomly and contain a wide range of locations, including truck stops, convenience stores, public facilities and hospitals." Comments of Peoples Telephone Co., Inc. at 6 n.8 (JA 259). Communications Central, Inc., another independent PSP, explained that its call estimate represented "the average number of calls carried by a typical CCI payphone." CCI Comments at 8 (JA 231).[9]

Even if the derivation of the data had not been explained, it would have been reasonable for the Commission to rely on them. First, no one had challenged the original estimate of 131 calls (and the IXCs argued that the Commission should retain that estimate), which was based on

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[9] The IXCs' reliance on *City of New Orleans v. SEC*, 969 F.2d 1163 (D.C. Cir. 1992), is misplaced. That case rejected an agency's failure to assess the data at all. Here, the Commission had before it various ways of assessing the data, and it did so, finding that "the various criticisms of each estimate" were not well founded. *See APCC*, 215 F.3d at 58.

data points provided by the same parties that provided the new estimates. The Commission found that "[t]here is no suggestion that any of the companies used a different methodology for its 1997 call volume study than the same company used" to generate the earlier data. *Fourth Payphone Order* at n.34 (JA 438). In other words, the IXCs had agreed that the earlier estimates were accurate enough, and they were produced by the same methods as the new numbers. The Commission was not "aware of methodologies that would result in a better estimate than empirical observation." *Id*. ¶ 13 (JA 438). Moreover, the numbers made sense inherently – the Commission expected the independent PSP numbers generally to be somewhat higher than the BOC figures, and that is exactly what the data showed. Thus, "all of [the numbers] appear to be accurate numbers for the submitting company and none of [them] seems . . . errant." *Id*. ¶ 13 (JA 438). Nor were the estimates very far apart; the Commission found that "they do not vary by significant orders of magnitude and fall within a relatively narrow range." *Id*. ¶ 13 (JA 438). There was no error in the Commission's using "the most accurate *available* indication of average monthly dial-around call volumes." *Reconsideration Order* ¶ 19 (JA 818) (emphasis added). This case falls into that "not infrequent" area where "the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from facts and probabilities on the record to a policy conclusion." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 52 (1983).

The IXCs also contend that the Commission "arbitrarily turned a blind eye to the PSPs' economic incentive to distort the estimates." Br. at 23. The Commission did assess "the various criticisms" of the estimates, one of which was that the estimators had an incentive to overestimate, but it rejected them. *Fourth Payphone Order* ¶ 13 (JA 438). It found that the estimates "fell within a relatively narrow range" and, on the basis of the agency's experience,

that the numbers "appear to be accurate." *Ibid*. Given that these were the only available data – Sprint withheld data from its own payphone operations – and the Commission had to derive *some* number, the IXCs' complaint is not well founded.

Moreover, it is far from clear that the PSPs had an incentive to overstate the numbers. Many of the estimates – particularly the independent PSP estimates – were submitted in the wake of the Court's remand in *Illinois*, when the Commission was engaged in determining an average cost per call.[10] At that stage of the proceedings, and in making that calculation, the *lower* the volume of calls, the *higher* the cost per-call would be and thus the *higher* the per-call compensation rate. *See* Comments of Peoples Telephone Co., Inc. at 6 (JA 259) (attempting to demonstrate that coinless calls make up a small proportion of total calls); Comments of Communications Central Inc. at 8-9 (JA 231-32) (setting forth estimates of per-call costs derived by dividing total costs by total calls). Even the company that submitted the highest data point, Telaleasing Enterprises, Inc., argued that the Commission should use the lower figure derived by APCC. *See* Comments of Telaleasing Enterprises, Inc. at 2 (JA 286). Telaleasing would have no incentive to overestimate its call volume in that circumstance.

The IXCs argue once again that the Commission improperly treated the call estimate figures differently from the call allocation data (Br. at 23-24), but once again their argument overlooks dispositive differences between the two situations. It is true that the Commission rejected Sprint's proposed method of allocating per-phone compensation among the IXCs in (small) part because of IXC incentives to under-report the number of calls they handle.

[10] That does not appear to be the case with respect to the BOC data, but the IXCs do not challenge the Commission's reliance on the BOC data.

Reconsideration Order ¶ 46 (JA 827). But in the allocation area, the Commission had other, better methods of performing its administrative task, including readily available data of direct relevance. In the area of call estimates, by contrast, the Commission did not have any other data or method to estimate call volumes. The Commission had to use the only data that were available.

C. The IXCs' Charges Of Improper Motives Are Unavailing.

The IXCs charge that the Commission approached the task of determining call volume with a predetermined "target figure for per-phone compensation rather than [trying] to calculate a more accurate call volume estimate." Br. at 25, 26 ("the Commission was motivated to reach a pre-determined compensation figure").

This Court is generally unwilling to try to read an agency's mind looking for improper motivations. "It is fundamental that '[a]gency opinions, like judicial opinions, speak for themselves.' *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). Rendered at the conclusion of all the agency's processes and deliberations, they represent the agency's final considered judgment upon matters of policy the Congress has entrusted to it." *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999). Application of that rule is especially apt in this case, where the IXCs' "evidence" of an improper motive is completely unconvincing.

Sprint proposed before the agency that per-phone costs be recovered not by allocating all the costs among all the IXCs proportionately, but by allowing each IXC to determine how many calls it received from a given payphone and to render payment accordingly. *Reconsideration Order* ¶ 41 (JA 825). The Commission rejected that view in a lengthy discussion at paragraphs

42 through 46 of the *Reconsideration Order*.[11] One of the Commission's reasons for rejecting Sprint's proposal was that it failed to "guarantee that the independent estimates of the various carriers will amount to the $35.224 we have found that each PSP is entitled to per-phone." *Id.* ¶ 46 (JA 827). The IXCs' point to that single statement as proof of the Commission's intent to manipulate the call count data to ensure that PSPs would recover a pre-determined amount.

The IXCs' reading of that sentence is obviously wrong. The Commission conducted extensive rulemaking proceedings to determine the costs of a telephone call. It conducted additional proceedings to determine the volume of coinless calls placed from payphones. The amount to which a PSP is entitled is simply the mathematical product of the call volume and the call cost. Both of those numbers have changed over time, due to both improved analyses and the availability of new data. The overall compensation amount – the product of multiplying the cost by the volume – likewise has changed over time. When it expressed concern that the Sprint proposal would fail to recover what the Commission had determined PSPs were entitled to, the agency had *already conducted* the analysis of total per-phone compensation nearly a year earlier in the *Fourth Payphone Order*, and it rejected the Sprint plan in part because total compensation under Sprint's plan could fall short of what was necessary to ensure full and fair compensation. That rationale betrays no improper motivation, and no reason to overturn the call count.

IV. THE COMMISSION'S DECISION NOT TO IMPOSE A LOWER CALL COUNT FOR THE POST-INTERMEDIATE PERIOD WAS REASONABLE.

The IXCs challenge the Commission's rejection of their request to reduce the call count estimate for time periods after the Intermediate Period. Br. at 27-36. The gist of the claim is that

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[11] The IXCs do not challenge the Commission's disposition of the cost allocation issue.

the Commission improperly ignored data showing that call volumes had declined, and that it should have adjusted the count downward to accommodate the new data. There was no error because the parties did not present the Commission with data sufficiently specific to justify any specific adjustment factor.

As the IXCs' brief acknowledges, this claim was pressed in comments submitted by WorldCom in support of its petition for reconsideration. Br. at 27. WorldCom attached to its petition some newspaper articles describing a general decline in payphone usage. It asked the Commission to "adopt an annual percent decline factor that would be applied to the call count figure established for the Interim Period." WorldCom Petition for Clarification and Reconsideration at 2 (JA 591). WorldCom based the request on data generated by its own network purporting to show that call volumes had declined 16.7 percent per year since 1998. *Ibid*. Yet, in the next paragraph, WorldCom appeared to suggest that 10 percent would be an appropriate adjustment factor. Later, WorldCom urged the Commission to apply a 9 percent annual adjustment. WorldCom Inc.'s Comments on Petitions for Clarification and Reconsideration at 2 (JA 718). Later still, after reiterating that its own data showed an average yearly decline of 16.7 percent, WorldCom presented in the same pleading data from an RBOC showing that call volumes had declined only 2.7 percent. WorldCom Inc.'s Replies to Comments on Petitions for Clarification and Reconsideration at 7-8 (JA 796-97).

The Commission rejected WorldCom's petition. The Commission explained: "WorldCom has not provided us with sufficient argument or data to create anything approaching a reasonable factor: in its petition, it simply asks for some 'annual percent decline factor,' and provides an example of 10%, then subsequently alleges in its comments that the decline is on the order of 2.7% a year. We could not reasonably adopt some sort of decline factor on this record

and will not do so at this time." *Reconsideration Order* ¶ 22 (JA 819). On the record presented, that conclusion was reasonable.

In closely analogous circumstances, where parties asked the Commission to include a "bad debt" factor in calculating the cost of a payphone call, the Court upheld the agency's decision not to include such a factor. As here, the Commission found that there was probably some degree of bad debt, but that the data corroborating it were "not reliable enough to predict accurately future levels of bad debt." *APCC*, 215 F.3d at 55. The Court affirmed, finding that "[p]erhaps the FCC could have formulated some best-guess figure for bad debt, but we cannot require an agency to enter precise predictive judgments on all questions as to which neither its staff nor interested commenters have been able to supply certainty." *Id* at 56. The Court held that "it was prudent and reasonable for the Commission to decide that, on balance, the existing bad debt data was not reliable enough to warrant any educated guess as to future bad debt percentages. It may not have been the only decision it could have made, but it was a reasonable one under the circumstances." *Ibid*. That reasoning applies here.

The centerpiece of the IXCs' claim is that "overwhelming data" before the Commission show that the monthly per-phone call volume today is "at most" 116 calls. Br. at 28, 30. No such analysis was presented to the Commission, and 47 U.S.C. § 405(a) bars the IXCs from relying on it now.[12] Even if the IXCs are not barred from relying on that figure, it would not

[12] That is so even though the IXCs' figure of 116 calls is purportedly based on data that were already before the Commission because those data – the RBOC call data – were collected and analyzed for the entirely different purpose of determining the IXC per-phone allocation. If the IXCs had wanted the Commission to use such data to determine the call count, they had the obligation to raise the matter specifically. The burden is not on the Commission to pick through the data and come up with the IXCs' claims, but on the IXCs to make their arguments clear. *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

have provided a sound basis for the Commission to implement a specific call count reduction percentage.

The number appears to be derived from data submitted by the RBOCs in connection with the Commission's allocation of per-phone costs among the IXCs, and accordingly represents calls placed from RBOC telephones. Br. at 28 & n.5. But the IXCs have not explained how they derived the number, or even what it represents – data for one quarter, or one year, or some other time period. Payphone usage is often seasonal and variable, so even if the number were accurate, it does not necessarily represent a true picture of call volume and is thus of limited usefulness. Moreover, the number is based only on RBOC data. As explained above, however, the BOCs and independent PSPs rely largely on different types of payphones and different business strategies, which typically yield higher call volumes for independents. One would expect that BOC operations, based on "dumb phones," would have a different rate of change in their call volumes from independent PSP operations. The Commission thus could not draw any firm conclusion about overall industry per-phone volumes from the RBOC data alone.[13] Moreover, as explained above, independent PSPs are disproportionately likely to be paid per-phone compensation because tracking of calls from "dumb" phones does not require the installation of Flex ANI on the LEC's switch.[14] Accordingly, the Commission could not, on the

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[13] Even with respect to the RBOC data itself, there may be wide variation among companies. The IXCs rely on some kind of aggregate BOC number, but the SBC data relied on by WorldCom before the agency showed only a 2.7 percent overall decrease in call volume – and in several quarters call volumes rose by as much as 12 percent. *See* WorldCom Reply Comments at 7 (JA 796).

[14] The IXCs are thus wrong that the BOC data are "comprehensive evidence" of all payphone call volumes. Br. at 31. As explained above, the data were adequate to calculate allocation percentages because there is no reason to believe that BOC and non-BOC payphones direct calls to different IXCs at different rates. But that use of the data does not apply to call counts.

basis of RBOC data alone, derive a satisfactory call count adjustment factor. There is nothing "baffling" about the Commission's action, Br. at 30; the agency was not required to make an "educated guess" in the circumstances. *See APCC*, 215 F.3d at 56.

The IXCs also contend that all PSPs – both BOC and non-BOC – admit that payphone call volumes have dropped. Br. at 32-33. The Commission acknowledged that "it is entirely possible that monthly call volumes per payphone have declined," *Reconsideration Order* ¶ 22 (JA 819), but a general sense of decline helps the Commission little in determining a specific amount by which to lower the call count. Indeed, many of the statements from PSPs on which the IXCs now rely at pages 32-33 of their brief (which they did not rely on before the agency) indicate that overall payphone call volume has declined. But so has the number of payphones deployed. Statistics recently published by the Commission's Wireline Competition Bureau indicate that the number of LEC-owned payphones declined nearly 40 percent from 1997 to 2003, and the total number of payphones by about 30 percent over that period. Thus, a decline in the overall volume of payphone calls does not necessarily indicate a similar drop in per-phone volume. Rather, as the market becomes more competitive, PSPs, particularly the BOCs, are shedding their low volume phones and concentrating on the highest producers. *See* Trends In Telephone Service at 7-9, Table 7.6 (we provided an electronic link to the report on page 20). The Commission has previously found that the number of coin calls has fallen even as the number of coinless calls has risen. *Third Payphone Order*, 14 FCC Rcd at 2618. Given the uncertainty, the proper course to adjust the numbers would be for the IXCs to petition the Commission to conduct a new rulemaking. The PSPs did just that with respect to per-call costs, and the agency recently initiated a new rulemaking proceeding on the issue. *See Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, FCC Order No. 03-

265 (rel. Oct. 31, 2003). In the *Third Payphone Order*, the Commission determined the per-call cost as a function of per-phone volume, so it makes sense that the two should be addressed together.

Ultimately, this whole argument with respect to prospective payments is overblown. Although the IXCs complain of "massive overcompensation," Br. at 36, relatively few payphones are still compensated on a per-phone basis because call tracking is now in effect for most phones. "At this point," the Commission found, "the vast majority of payphones now transmit the appropriate coding digits." *Reconsideration Order* ¶ 4 (JA 815). The actual prospective significance of the call count, relative to the size of the industry as a whole and the inherent margins of uncertainty in this area, is quite small.

The IXCs next claim that "[t]he Commission's own reasoning confirms that the 148 call volume estimate is improper for use in the Post-Intermediate period." Br. at 34. The charge is that the Commission switched from the 131 call number to the 148 call number on the basis of new data that overlapped the Interim Period, which means that the Commission found that "it is improper to rely on stale data." *Ibid*. Because the Commission found it improper to rely on aging data in one area, the argument goes, it cannot rely on such data in another. The argument fails because the Commission found that it should rely on the *best data available*, which for the Interim and Intermediate Periods were the newly supplied call volume figures. For the post-Intermediate Period, *the Commission did not have better data* that would have supported a reliable estimate. Soliciting such data, as the petitioners suggest, would be appropriate in a further rulemaking proceeding, but the Commission was entitled to rely on the record as it stood.

Finally, the IXCs argue that the call volume estimate "undermines incentives" for LECs to install Flex ANI software on their switches. The claim is that because LECs are

overcompensated by virtue of the per-phone call estimates, they will lose money if they install the software and are compensated per-call rather than per-phone. Br. at 36. Again, the argument was not raised before the Commission and cannot be raised now. 47 U.S.C. § 405(a). But it is wrong in any event because the LECs are *required* by the Commission to install Flex ANI (unless they obtain a waiver of the requirement). Moreover, the absence of Flex ANI affects mostly independently owned phones, and not LEC-owned phones. Most LEC phones are dumb phones that are hard-wired to the switch, which passes along the ANI information for those phones even without the special software. There is no incentive for a LEC to delay installation of the software.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review, insofar as it seeks review of an unreviewable order. The Court may take that action without the benefit of oral argument, as it is at this point a matter of black letter law. Insofar as the Court should find the *Reconsideration Order* to be reviewable, it should deny the petition for review on its merits for the reasons stated.

Respectfully submitted,

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

AT&T CORPORATION, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	))))))))))))	NO. 03-1017

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 11871 words.

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