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MICHAEL C. DOTTEN, P. C.
PARTNER

December 12, 1990

The Office of the Secretary
Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive, S.W.
Olympia, Washington 98504

Re: Docket No. UT-900726

Dear Sir or Madam:

Enclosed please find the original and 19 copies of the Comments of Fone America, Inc.

Very truly yours,

Michael C. Dotten

Enclosure

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF AMENDING RULES RELATING TO ALTERNATE OPERATOR SERVICES.	)))	Docket No. UT-900726

COMMENTS OF FONE AMERICA, INC.
ON REVISED PROPOSED RULES

Fone America, Inc. files these supplemental comments on the Commission's proposed revisions to the rules pertaining to Alternate Operator Services (AOS) companies and call aggregators. In light of the substantial changes to the Commission's rules from the first draft, and because of numerous questions of implementation, inconsistencies, the pendency of overlapping Federal Communications Commission (FCC) rules, and serious remaining legal issues, we urge that the Commission re-notice the rules for hearing and not adopt the rules in final form at its meeting on December 12, 1990. We believe the final rules would also be better assured of being lawful if they were adopted after the FCC rules are adopted. The Idaho Public Utilities Commission (IPUC) which was considering similar rules, decided at its November 26, 1990 meeting to postpone action on their rules, pending action by the FCC under the Telephone Operator Consumer Services Improvement Act of 1990 (P.L. 101-435), or a statement by the FCC that it will take no action. A copy of the Commission's letter is attached to these comments as Exhibit A. At the very least, one

additional opportunity for technical meetings with the staff should be provided prior to adoption of the rules.

We commend the Commission and its staff for listening to, and reflecting in the revised draft rules, many of the technical comments raised by AOS companies, call aggregators, local exchange companies and carriers. Nonetheless, the revised proposed rules are plagued by many of the same problems afflicting the original proposal, and in several ways, raise a number of new problems identified below.

WAC 480-120-021. Fone America is pleased that the Commission has eliminated the exception for local exchange companies (LEC). This should help create a more "level playing field."

State Regulation Of Interstate Operator Services Is Preempted By Federal Law

Congress recently passed, and the President signed, H.R. 971, the Telephone Operator Consumer Services Act, (the "Act") which regulates operator services companies.[1] H.R. 971, enacted as P.L. 101-435, amends Title II of the Communications Act of 1934 by adding a new section, 47 U.S.C. § 226. The Act provides substantive measures applicable to the AOS industry and requires the FCC to prescribe additional regulations.

The preemption doctrine prohibits state regulation of matters that are exclusively of federal concern. The preemption

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[1]Although the sponsors of H.R. 971 refer to AOSes, the bill itself does not include the word "alternate" in describing operator services companies.

doctrine involves consideration of federal supremacy, commerce clause and primary jurisdiction issues.

As applied to the present circumstances, the preemption doctrine prevents state regulation of interstate operator services. State regulation of interstate operator services is preempted because Congress intended to give primary jurisdiction over interstate operator services to the FCC. Furthermore, to the extent that the proposed WUTC regulations conflict with federal law, the state regulations are preempted by federal law.

1. The WUTC May Not Regulate The Provision Of Operator Services For Interstate Telephone Calls

Congressional intent can be determined from the language of the Act. Two provisions of the Act support the conclusion that Congress intends that the federal government, not the states, will regulate interstate operator services. First, Congress found that "a number of State regulatory authorities have taken action to protect consumers using intrastate operator services." P.L. 101-435 § 2(6). This recognizes the right of states to regulate intrastate operator services, but also implies that the state's right to regulate is limited to intrastate services.

Second, the Act explicitly provides that the posting requirements for aggregators do not have to be met "in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A)." 47 U.S.C. § 226(c)(2). The Act also imposes

restrictions on the provision of operator services for interstate telephone calls. There is no provision limiting the application of the federal law relating to operator services if a similar state law applies. The clear implication is that Congress expects states to regulate aggregators but does not intend states to regulate the provision of interstate operator services. The WUTC's proposed regulations affect interstate operator services. The definition of alternate operator services company includes those entities which provide a connection to "interstate long-distance." WAC 480-129-021. This language exists in the existing regulation. The section on alternate operator services (WAC 480-120-141) relies on the definition contained in WAC 480-129-021 and requires AOSes to comply with WAC 480-120-141 and all other rules relating to telecommunications companies. Thus, the WUTC is attempting to apply other provisions of the regulations to providers of interstate operator services.

WAC 480-120-141 imposes a series of requirements on operator services providers. To the extent that these requirements apply to interstate services, these provisions are preempted by federal law. Every provision in the regulation is suspect when applied to interstate calls. For example, WAC 480-120-141(4)(a) requires the AOS to include in all contracts and tariffs the requirement that the aggregator or phone owner post specific notices at each phone. The content of the required notice varies depending on whether the services are provided above the prevailing

rates. To the extent that this requirement is based on rates charged on interstate calls, the state regulation is preempted. Similarly, the state cannot require the AOS to answer 90% of all calls within ten seconds of receiving the call (WAC 480-120-141(5)(d)) in that "all calls" includes interstate calls, which are subject to federal, not state, regulation.

Other provisions of the regulation (e.g. free access to 800 and 950 numbers) apply on a per-call basis. If the call is an interstate call, the state regulations are preempted.

2. Provisions Of The Proposed WUTC Regulations Which Conflict With Federal Law Are Preempted

State regulation is preempted if it is impossible or impractical to comply with both federal and state law. Several provisions of the WUTC proposed regulations are incompatible with 47 U.S.C. § 226.

Both the federal statute and the state regulation require call branding at the beginning of each call. 47 U.S.C. § 226(b)(1)(a), WAC 480-120-141(5)(a). The state regulation defines the beginning of the call as "immediately following the prompt to enter billing information." WAC 480-120-141(5)(a)(i). It is unclear whether this regulation means "no later than immediately following the prompt to enter billing information" or whether it requires the AOS to wait until the prompt to enter the billing information before branding the call. It is possible that the federal law will be interpreted to require call branding before

the prompt for billing information. It is at least impractical, if not impossible, for AOS companies to comply with inconsistent interpretation of what constitutes the "beginning of the call." The state law could be made consistent with federal law by defining "beginning of the call" to mean "no later than immediately following the prompt to enter billing information." By branding the call before the prompt, AOS companies would then be able to satisfy both federal and state law.

WAC 480-120-141(5)(c) prohibits call splashing and the billing of a call other than a billing based on the point of origin. The federal law specifically allows call splashing when the person making the call requests the call to be transferred to another operator services provider and consents to the transfer after being informed that the rate charged for the call might not reflect the rates from the actual place of origin of the call. 47 U.S.C. § 226(b)(1)(H) and (b)(1)(I). The proposed WAC 480-120-141(5)(c) is inconsistent with federal law, at least to the extent that it would apply to an interstate call, because it prohibits something that is specifically permitted by the federal law.

The proposed WAC 480-120-141(4)(d) requires the AOS to ensure that call aggregators that it contracts with provide access to 800 and 950 numbers at no charge. The federal law provides that the AOS shall ensure that call aggregators do not charge more for an 800 or 950 call than for a call through the presubscribed AOS. This provision allows aggregators to charge for interstate 800 and

950 services but caps those charges. The state regulation is inconsistent with the federal law in that it does not allow a charge that the federal law allows. To the extent that the state regulation purports to apply to interstate calls, the regulation is preempted by federal law.

The proposed WAC 480-120-141(4)(a) requires the AOS to ensure that its customers (the aggregators) post appropriate notices concerning rates for operator services and the right to obtain information regarding operator services. The federal law also imposes posting requirements. The state regulation specifies the language of the notice, the federal law just lists the information that must be included. The state regulation provides that the customer may call the operator for instructions on reaching the customer's preferred carrier. The federal law provides that the notice must state that the customer may contact the customer's preferred carrier for information on accessing that carrier's service. The notice required by the federal statute would therefore be different from and contradictory to the notice required by the proposed WUTC regulation. The proposed WUTC notice imposes an obligation on the presubscribed operator services provider that the federal law imposes on the customer's preferred provider.

The proposed regulation therefore misstates the law as applied to interstate calls. The notice requirement should be changed to be consistent with the federal notice requirement. To

the extent that the WUTC believes that the federal notice is insufficient, it should modify the notice requirement to explicitly state that the notice applies only to intrastate calls. We note that the revised proposed rules, as in the currently effective rules, define AOS to include companies providing an interstate connection. As discussed in our prior comments, the Commission may not regulate interstate service by AOS companies as the field has been pre-empted by the recent enactment of P.L. 101-435. The scope of this pre-emption will only be clear after the FCC has promulgated the regulations required by the Act. We urge the Commission like Idaho has done, to defer finalizing its rules pending notice by the FCC of its intended process for rulemaking.

WAC 480-120-106--Form of Bills

The Commission's staff has recognized that it is presently not technologically possible to provide both the name of the billing agent and the non-LEC AOS. Apparently U.S. West will soon be in a position to process two carrier exchange codes and provide both pieces of information. However, most LECs will not soon have this capability. As presently drafted, the revised proposed rule would require that the name of the AOS company be printed on every bill, and if feasible that the billing agent also be included. This is just the reverse of present technical abilities. That is, the billing agent's Carrier Interexchange Code (CIC) must be provided, to permit billing--but the AOS company

cannot be accommodated due to the inability of most LECs to process two CIC codes.

Assuming that the revised rule does not intend to require the impossible, and that the name of the provider of service must be specified, where feasible, the question arises: "What defines feasibility?" Is it the ability of the LEC to process both CIC codes, or the technical ability of the AOS via their billing agents to purchase the service at a reasonable cost?

Furthermore, if the technology only allows the billing agent's name and telephone number to appear on the bill, as is presently the case, and the AOS cannot give full authority to the billing agent to investigate, adjust and verify the correct billing because of technological and practical limitations, does the revised rule prevent the bill from providing <u>any</u> telephone number?

Fone America urges that the rule should be revised to require, on the bill, the listing of the service provider's name and telephone number, only if the LEC has the technology in place and the service is available at a reasonable cost.

Presently, the billing agents are listed on LEC bills because it is technologically not feasible to do otherwise. However, it is not desireable to give the billing agent full authority to adjust bills because to do so would perpetuate the distant relationship between the AOS and its end user and eliminate the AOS companies' ability to detect and control consumer fraud on their systems. The Congress recognized this problem in expressly

providing that "In any proceeding to carry out the provisions of this section, the [FCC] shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud." P.L. 101-435, §3(g).

The staff analysis of the rules contemplates a provision for waiving the listing of both the billing agent and the AOS on a bill upon request for a waiver by the LEC that finds the requirement not feasible. However, this provision for waiver is not included in the revised proposed rules themselves. Moreover, the Commission's revisions to WAC 480-120-142, as adopted by the Commission on October 31, 1990, subject the AOS companies to potential suspension for failing to meet the minimum service requirements embodied in WAC 480-120-106. Yet the AOS has no ability to control the LEC's implementation of the new billing requirements, or the ability to require the LEC to apply for a waiver if the LEC does not have the ability to provide information on both the billing agent and the AOS. The rules should make clear that the AOS company cannot be held liable for the failure of the LEC to comply with the rule.

WAC 480-120-138--Pay Telephones

The proposed rule would require without-charge access to 1-800, 950 and 911 calls, and requires access to all interexchange carriers. Commissioner Pardini has proposed amendments to the revised proposed rules which would permit a charge of up to $.25 per message "except those required to be offered without charge."

Commissioner Pardini's amendment did not encompass WAC 480-120-141 (4)(c) which requires the AOS contracts and tariffs with the call aggregator to provide, without charge, access to every available registered interexchange carrier. Presumably this is an oversight that can be corrected.

A second question arises as well. Does the Commission intend to limit the entire compensation for connecting a call to $.25, or to permit the payphone operator (through the coin box) or the hotel (at checkout) to collect $.25 for use of their equipment and the AOS to collect another $.25 for connection of the call?

Although Commissioner Pardini is correct to recognize that without charge access is unfair to call aggregators who must pay for the equipment used to provide the service, the cap he proposes will fail to adequately compensate many call aggregators. If this rate is also to be "fair, just and reasonable", by what specific mechanism does a call aggregator seek a rate higher than $.25?

The staff analysis attempting to justify caps on (or no) fees for use of call aggregator equipment is contradictory. First, the staff observes that some commentors state "that the market is so saturated that there are often several separately-owned and separately-served pay telephones within a few hundred feet." The staff then discusses "locational monopolies". The entire staff discussion suggests that the free market could be made to work.

Instead of capping rates or requiring no-charge access to all interexchange carriers, the charge for such access should be disclosed in all consumer requests for rate information. Where there are alternative payphones within a short distance, the consumer could choose to go to another payphone if the location surcharge was too high at one location, just as the consumer may enter a neighborhood market and decide to go elsewhere if the prices are too high. On the other hand, in remote locations, where calling volumes are low, the payphone provider may need to have a higher location surcharge to recover its costs because it doesn't see sufficient volume to justify the placement of the phone at the rates that might prevail in high volume areas. Without the higher charge, the payphone operator might simply not place the phone at all, and the consumer would be denied access entirely. Is it better regulatory policy to cap all messages at $.25--with the result that many locations will not be compensatory and phones may be removed, resulting in less consumer choice, than to permit consumers to make choices based on quoted rates?

The staff argues that the Commission "does not, and need not, assure each telephone provider an opportunity to make a fair return on its investment." This is true only so long as the Commission does not assert the right to regulate--directly or indirectly--the rate the telephone provider charges. Once it does attempt such regulation however, it must allow some means by which

the regulated entity can have the opportunity to earn a reasonable return on its investment.

WAC 480-120-141 (9) (c)

The revised proposed rule would prohibit additional charges for directory assistance. It is unclear whether Commissioner Pardini would permit the addition of a $.25 charge in excess of the AT&T or U.S. West "prevailing charge" for directory assistance. The rule would seem to restrict Fone America to charging $.55 for an operator-assisted intrastate directory assistance call--while its currently tariffed rate is $.75 per call. Yet even that rate is inadequate to fully compensate Fone America for its costs. Fone America incurs the following costs in providing directory assistance service: Payment to the LEC for querying the data base--$.55; transmission/access charge--$.15-$.20; average of 40 seconds of operator time--$.40; switching costs--cost of the switch divided by the number of calls over the switch that month; validation charge--8 percent, averaging $.05 per call; and bad debt costs. Even when the directory assistance call is transferred to the LEC, the cost to Fone America exceeds $.55 per call.

The rule is unclear whether the "prevailing" charge would include the per call charge charged by the LEC over the public access line.

WAC 480-120-141--Alternate Operator Services

The final sentence of the revised proposed rule is unclear. To be enforceable, a rule should be clear on its face. As presently written, the rule says that AOS companies providing service to correctional facilities are exempt from any of the provisions of the rule that may be inconsistent with RCW 9.73.095--except that the AOS may not charge rates higher than the prevailing charges for operator services. Two aspects of the rule are unclear. In what regard does the rule not apply to prison services and how is a prevailing charge ceiling to be calculated?

In addition, as discussed further below, Fone America objects to rate caps based on "prevailing rates" because: 1) such rates are not related to Fone America's costs and may be non-remunerative (as discussed on pages 3 through 15 of Fone America's October 19, 1990 comments); 2) without a steady point of reference, such "prevailing rates" are too uncertain to be readily complied with, and therefore are not standards which should be used to penalize perceived non-compliance, and 3) the means of applying for alternative rates are not specified in the rules.

WAC 480-120-141 (1)

Fone America previously commented that customer lists constitute proprietary information and should automatically be accorded protection from competitors. The staff analysis of this section says that customer lists could be protected according to existing Commission rules. The protection should be automatically

provided and the rule should state that all such customer lists will be treated as proprietary, citing the appropriate confidentiality provisions of the Commission's rules.

WAC 480-120-141(2)

It is reasonable to require Fone America and other AOS companies to withhold payment of compensation for violation of the Commission's rules. However, it is unreasonable for the Commission to require the AOS to police compliance by the call aggregators for two reasons: First, to the extent the rule empowers the AOS to make findings of fact and conclusions of law regarding compliance with the Commission's regulations, it is an unconstitutional delegation of authority to the AOS. Second, the rules would penalize the AOS for acts of third parties over which it has no control. This constitutes not only the impermissible delegation of a power, but the unlawful imposition of a regulatory burden. The WUTC has the exclusive power and the exclusive burden of regulating third parties subject to its regulation. It cannot impose the uncompensated burden of regulating third parties, with the attendant costs, and potential penalties, without statutory authority. Whether even the legislature has the ability to penalize AOS companies for the acts of third parties over which the AOS has no control is an open question. Presumably it is for this reason that the Telephone Operator Consumer Services Improvement Act of 1990 limits the policing obligations of AOS companies to the withholding of payment from call aggregators that fail to comply

with specific regulatory requirements of the Act, but stops short of imposing penalties on the AOS companies if they are unable to obtain compliance.

The rule should be rewritten to provide:

> Each AOS company shall include in its tariffs and contracts with all aggregators the requirement that the call aggregator will comply with applicable provisions of this rule. Upon notification by the Commission or if the AOS reasonably believes that a call aggregator, to which the AOS provides service, is failing to comply with applicable rules, the AOS will withhold payment (on a location by location basis) of any compensation, including commissions, from the call aggregator. Such a failure and subsequent withholding will be reported to the Commission and will continue until the AOS receives written authorization from the Commission to resume payments to the call aggregator.

WAC 480-120-141 (4)--Postings

As presently drafted, the rule leaves many unanswered questions for an AOS company seeking to comply with the letter of the rule. The rule requires one of two postings on the telephone instrument. If the call aggregator charges rates that are at or below the "prevailing rate," then it posts a more favorable notice. If, on the other hand, the rates exceed the "prevailing rate," then another notice is posted which calls attention to that fact. Aside from requiring reissuance of all existing postings (at substantial cost), the rule has the following defects:

1. First, the "prevailing rate" has no definite reference point. In the absence of a determination by the

Commission, the reference point becomes the AT&T or U.S. West rate which will be accepted as the prevailing rate. However, what if the AOS makes a filing demonstrating that the U.S. West or AT&T rate is not remunerative? If the Commission approves a higher rate, is that rate the "prevailing rate" for that specific AOS company? This point is important because it decides what notice must be posted and whether the AOS company is in compliance with the Commission's rule.

2. The Commission has adopted, as a reference point, the rates of dominant carriers who have the ability to cross-subsidize their operator services. Over time, these companies would have the ability to engage in predatory pricing by reducing the "prevailing rate" to levels that proved non-compensatory to the AOS companies for the only services which they provide, and which are not subject to cross-subsidies. In turn, such a filing would make a posting that was previously in compliance with the rule suddenly in violation. In the end, the competition would be eliminated, and the monopoly carriers could then raise their rates. This is entirely contrary to the competition which the Federal courts have sought to inject into the telephone system.

3. The carriers that are proposed to be used as the reference points have costs which are certifiably lower than their smaller competitors. For example, Fone America pays approximately $.05 per call to validate credit cards, AT&T pays $.01-$.02 for each call. Fone America pays a billing charge of approximately

$.34 to the billing agent for each and every call, while AT&T pays only $.04-$.06 per call. Establishing these dominant carriers as having the "prevailing rates" will result in rate caps which are demonstrably non-compensatory to their competitors. If, to get the more favorable posting, an AOS company must have rates as low or lower than the non-compensatory rates, the Commission will de facto have violated the constitution and statutes recited on pages 3 through 15 of Fone America's opening comments in this docket.

4. The Commission's rules require new postings within 60 days following adoption of the new rules and completion of the postings within 90 days, but the Commission has not specified the procedures which an AOS company must follow to justify collection of rates that exceed the AT&T and U.S. West rates. The staff's analysis of the rules states that the new pricing provisions will not apply to existing tariffs. Does this mean that the 60 day rule does not apply to existing tariffs which may have higher rates than AT&T and U.S. West rates? If the existing tariffs are <u>not</u> grandfathered, would the Commission's rules permit alternative rates to go into place prior to the posting?

5. The rule does not address a circumstance in which the aggregator is charging higher than prevailing rates, but the AOS company is charging prevailing or lower rates. In such a circumstance, which company is in violation?

If in the long term, the Commission intends to permit the more favorable posting to companies that demonstrate that their

rates do not exceed fair, just and reasonable rates, then the Commission's rule should specifically so state.

Given the problems with the revised proposed rule, Fone America recommends that the text for posting contained in the existing rule remain in place until the details of the new rule can be worked out.

WAC 480-120-141 (4)(b)(iii)

The rule should make clear that the rule is satisfied with a posting that states: "access to an alternative carrier can be obtained by dialing your carrier's appropriate code number." Otherwise, it would be literally impossible to post a notice broad enough to encompass dialing instructions for all alternative carriers.

WAC 480-120-141 (4)(c) and (d)

If the Commission intends the $.25 rate cap to apply, these sections need to be made consistent with Commissioner Pardini's amendments to delete "without charge" access.

WAC 480-120-141(5)(a)

The revised proposed rule changes the definition of the beginning of a call from branding purposes. Fone America currently provides its initial brand prior to the prompt to enter billing information. The cost of providing this capability was $50,000. Fone America made this investment because it felt that placing the initial brand prior to the prompt to enter billing information was the most effective way to ensure that the consumer would actually

hear the brand. Most AOS companies do not have the capability of providing this service. To require the branding to take place immediately after the prompt would be confusing to the consumer, and would potentially allow the consumer to input the billing data over the top of the brand, thereby possibly missing the brand and/or defaulting to a live operator and being charged at an operator assisted rate. If the Commission is concerned that the consumer hear the brand twice during the call, then either method would provide the consumer with adequate information, with information prior to the branding being more favorable to the consumer.

Additionally, the Commission's revised proposed rule contains the text of the brand. As a brand cannot be state specific, this may prove to be inconsistent with the requirements of other states or with the requirements of the FCC's new rules. The text of the brand should not be specified.

WAC 480-120-141(5)(c)

This section of the rule requires an AOS to reoriginate a call when it can be accomplished "with screening." Fone America understands this to permit an AOS not to reoriginate if the means of doing so would permit potential consumer fraud. Is this understanding correct? In such circumstances, the AOS would simply refer the consumer to the dialing instructions provided by his/her preferred carrier. It is unrealistic to require the AOS to

maintain a comprehensive list of all dialing instructions for all available carriers from all locations.

WAC 480-120-141 (9) and (10)

These provisions are inadvisable for the reasons discussed above. Permitting dominant carriers to define rate levels may permit substantial predatory pricing. Furthermore, capping the call aggregator's rates through the AOS company's tariff may result in non-remunerative rates to call aggregators without any possible means of the call aggregator getting direct relief from the Commission. Furthermore, like the enforcement provisions, these rate provisions place the AOS companies in the position of having to regulate the call aggregator's rates. Failure to permit the call aggregator to vary the charges they collect completely ignores the individual cost structures of various call aggregators.

If the $.25 charge is intended to be an absolute cap, and not specifically a limitation of location surcharges, then the proposed rule will assure that call aggregator rates are completely non-remunerative and insufficient to pay for their equipment. If the rate is non-remunerative, it is unclear who must apply for a higher, fair, just and reasonable rate. Is it the call aggregator or the AOS company? If it is the AOS company, why should the regulatory burden fall on the AOS company? This provision has all of the same failings as the regulatory burdens identified above.

Miscellaneous Remaining Concerns Regarding the Proposed Rules

The staff discussion accompanying the revised proposed rules indicates that the rate provisions of the rules will not affect existing contracts and tariffs "without an appropriate proceeding." The rules themselves should make this clear so that there is no implication that the AOS companies would be in violation of the rules (and hence subject to sanctions, including suspension of registration) under WAC 480-120-142 for honoring the terms of existing tariffs and contracts. The rules should also specify the type of proceeding contemplated, the timing of such a proceeding and the procedures that will be used, particularly to justify a rate other than the "prevailing rate."

As discussed above, the AOS companies are put in the position of enforcing the Commission's regulations as to call aggregators, and are subjected to enforcement penalties for violations of the rules by the call aggregators. The Commission has adopted a different approach in imposing regulatory obligations on the LECs. WAC 480-120-138 (18) specifies that violations of the rules will subject pay telephones to disconnection. Although the LEC has the responsibility "to assure that any subscriber taking service pursuant to these rules" meets all of the terms and conditions within the rules and tariffs, WAC 480-120-138 (19) provides a hearing to pay phone providers who are not connected or are disconnected due to violations of the rules. Unlike the AOS companies, a failure by the LECs to secure compliance by the call aggregators is not deemed to be a violation by the LEC. Instead,

the disconnection takes place, potentially followed by a hearing. Although, for the reasons stated above, Fone America believes that an AOS may not be sanctioned for wrongful acts by third parties outside its control, the rules, as presently written, are also unlawful because they discriminate between LECs (which are not subjected to liability for third party acts by call aggregators) and AOS companies (which are subjected to liability for third party acts by the same call aggregators). This disparity violates both the Due Process and Equal Protection requirements of the United States Constitution. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 3254 (1985) (Equal Protection Clause requires "all persons similarly situated to be treated alike"), citing Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982).

A factor to be considered in determining whether a regulation which imposes a penalty on a strict liability basis violates due process is whether the regulation penalizes a person for a transgression which the person cannot control. See Morissette v. United States, 342 U.S. 246, 72 S.Ct 240,246 (1952) (recognizing that the premise for "public policy" regulations is the ability of the regulated person to avoid the occurrence of a prohibited act). WAC 480-120-141(2) imposes strict liability on an AOS company for the infractions of its customers, even if the AOS company has made every effort to ensure the compliance of its

customers. This regulation violates due process. The provision penalizing AOS companies that failure to secure compliance by call aggregators should be deleted.

Based on the foregoing comments, Fone America urges that the Commission postpone adoption of the proposed rules pending: 1) the promulgation of the FCC's AOS rules and 2) the refinement of the Commission's proposed rules to make them consistent, lawful and fair.

Dated this 12th day of December, 1990.

Respectfully submitted,

Mark Argenbright
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FA.700

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DEAN J. (JOE) MILLER, PRESIDENT
PERRY SWISHER, COMMISSIONER
RALPH NELSON, COMMISSIONER

November 27, 1990

Mark Argenbright
Fone America, Inc.
13323 SW 66th Ave.
Portland, OR 97223

RE: Idaho PUC's Operator Service and Pay Telephone Rulemaking--Case No. 31.D-R-89-1

Dear Mr. Argenbright:

At the decision meeting of Monday, November 26, 1990, at which the Commissioners were scheduled to consider comments to the Commission's proposed rulemaking addressing operator service providers and pay telephones, IDAPA 31.D.9 and -.10, I informed the Commissioners that I had spoken with Mr. Curt Schroeder of the FCC the week before. Mr. Schroeder told me that the FCC should decide by mid-December whether to reissue its existing rulemaking addressing operator service providers or start the process anew in response to the recently enacted federal statute.

Given the uncertainty of the FCC's rulemaking addressing operator service providers and the undesirability of inconsistent state and federal rulemaking of the area, the Commissioners decided to postpone their decision on the Idaho Commission's proposed operator service provider and pay telephone rules pending action by the FCC under the recently enacted federal legislation or a statement by the FCC that it would take no action.

Sincerely,

Michael S. Gilmore
Deputy Attorney General

MSG:vld/M-1902

EXHIBIT A
PG 1 OF 1

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