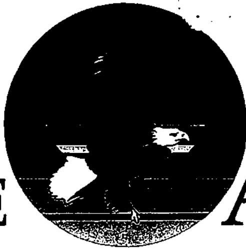


FONE AMERICA, INC.

91 MAR -6 AM 9:57

February 5, 1991

VIA OVERNIGHT

Mr. Paul Curl
Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive, SW
Olympia, WA 98504-8002

RE: Docket No. UT-900726

Dear Mr. Curl:

Enclosed for filing in the above-referenced matter are an original and twenty copies of the Comments of Fone America, Inc..

Copies of Fone America, Inc.'s previous comments in this Docket are attached to each copy of the current comments for ease of reference, as the previous comments are incorporated in the current comments by reference.

Please date stamp the additional copy and return it to us in the envelope provided.

Thank you for your assistance.

Sincerely,

Mark Argenbright
Director, Regulatory Affairs

Fone America, Inc. • 12323 S.W. 66th Ave. • Portland, Oregon 97223 • (503) 620-2400 • FAX (503) 620-8861
Fone America Central • 3200 Broadway, Suite 500 LB#6 • Garland, Texas 75043 • (214) 840-0030 • FAX (214) 278-3607

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

COMMENTS OF FONE AMERICA, INC.

Fone America, Inc. is pleased to continue its participation in this docket and to comment on the renoticed proposed rules. We remain committed to assisting the Commission and its staff in their efforts to finalize a workable and enforceable rule. As a registered telecommunications company, we have a vital interest in the outcome of these rules. Because Fone America is also subject to regulation by the Federal Communications Commission, and by 22 other states, we want the rules to be as consistent as possible with regulations in other jurisdictions.

Fone America shares the Commission's goal of having well informed consumers who are able to make informed choices. We also share the Commission's objective that consumers should have the right to access the long distance carrier of their choice. Based on the concerns that we share with the Commission, and upon our initial and supplemental comments we have previously filed in this Docket, Fone America wishes to provide the following information and alternatives for the Commission's consideration.

In addition to some general concerns, the major areas of discussion will focus on enforcement and compliance responsibility with the rules, definition of "prevailing rates", why LECs should

be included in the definition of an Alternate Operator Services Company, and some of the potential conflicts with the FCC and the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).

I. BURDEN OF COMPLIANCE WITH RULES

WAC 480-120-141(2) of the Commission's proposed rule continues to place the burden upon AOS companies for failure of call aggregators to comply with the requirements of their contacts with the AOS companies and with the AOS companies' filed tariffs, including the requirements of the Commission's rule. The Commission's rule states:

> Failure to secure compliance [by the call aggregators] constitutes a violation by the AOS company.

By placing Fone America and other AOS companies at risk for the acts of non-compliance by call aggregators, the Commission imposes a regulatory burden upon Fone America. The proposed rule simultaneously could impose severe penalties upon Fone America for actions over which it has no control.

At the Open Meeting in which the regulations were proposed for adoption, the Commissioners concluded that the rules needed to be renoticed because of significant amendments. Commissioner Nelson noted as an aside that she was intrigued by a jurisdictional challenge raised in the briefs submitted by the hotel industry, who pointed out that all Call Aggregators are not within the regulatory scope of the WUTC. She also remarked that application of the Washington Consumer Protection Act (CPA) to call aggregators might afford consumers protection from misleading practices, rather than

imposing a suspect regulatory burden on the AOS companies.

Commissioner Nelson's proposal has merit.

The Washington State Consumer Protection Act

In 1961, Washington became the second state to follow the federal lead in enacting a comprehensive consumer protection law. As originally enacted, the Washington Consumer Protection Act, chapter 19.86 RCW ("CPA"), largely emulated the Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (1970). It broadly declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. It also includes provisions prohibiting monopolies and other antitrust activities. See RCW 19.86.030,.040,.050 and .060. In 1970, the act was substantially amended to provide "teeth" to attorney general actions, allowing both injunctive relief and restitution for consumers. RCW 19.86.080. It was also amended to give individual consumers standing to recover for their injuries, including actual damages, treble damages and attorney fees. RCW 19.86.090.

The CPA includes a provision exempting certain regulated industries from liability, specifically naming those within the ambit of the WUTC. RCW 19.86.170. The Telecommunications Act, chapter 80.36 RCW, also contains specific provisions that cross-reference the regulated industry exemption in the CPA. These provisions make certain regulated acts specifically subject to consumer claims, despite the general CPA exemption. RCW 80.36.360; RCW 80.36.530.

In 1988, the Telecommunications Act was amended to require certain disclosures relating to AOS companies. RCW 80.36.510 to 530. These provisions require notice to "assure appropriate disclosure to consumers" of alternate carriers. RCW 80.36.520. The law also declares that providing AOS services without disclosure "is a deceptive trade practice." RCW 80.36.510. The statute then states:

> In addition to the penalties provided in this title, a violation of 80.36.510 or 80.36.520 constitutes a violation of chapter 19.86 RCW, the consumer protection act. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

RCW 80.36.530. Thus, failure to provide notification of alternative carriers by a telecommunications company may be specifically subject to consumer claims. Amendments to the Telecommunications Act by the last Washington Legislature expressly provide that the WUTC:

> "may adopt rules that provide for minimum service levels for telecommunications companies providing alternate operator services. The rules may provide a means for suspending the registration of a company providing alternate operator services if the company fails to meet minimum service levels or if the company fails to provide appropriate disclosure to consumers of the protection afforded under this chapter."

1990, c. 247 § 3 (H.B. 2526).

The 1990 amendments went further to fill in the necessary elements to meet a CPA claim when RCW 80.36.530 was amended:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, 80.36.520 <u>or section 3 of this act</u> constitutes <u>an unfair or deceptive act in trade or commerce</u> in violation of...the consumer protection act. <u>Acts in violation of RCW 80.36.510, 80.36.520, or section 3 of this act are not reasonable in relation to</u>

the development and preservation of business, and constitute matters vitally affecting the public interest for purposes of applying the consumer protection act....

1990, c. 247 § 3 (H.B. 2526).

The CPA affords two separate ways of protecting the public. First, the CPA allows a private party to bring a civil action to recover actual damages, treble damages, and costs of the lawsuit, including attorney fees. RCW 19.86.090. Alternatively, the law permits the attorney general to initiate court proceedings to enjoin present and future violations of the CPA, and originally the CPA provided for public enforcement by the state as its only source of relief. RCW 19.86.080. The state may recover costs and a reasonable attorney fee if it prevails, and is also empowered to petition the court for restitution in the form of a court order restoring to consumer victims any money or property, real or personal, acquired by a CPA violator. Id. The CPA requires the imposition of civil penalties against violators. RCW 19.86.140 ($2,000 for each violation of RCW 19.86.020, more for violations of monopoly and antitrust provisions).

A violation of the CPA occurs if there is:

(1) an unfair or deceptive act or practice;

(2) in trade or commerce;

(3) which impacts the public interest;

(4) actual injury to the plaintiff's business or property;

(5) a causal link between the unfair or deceptive act and the injury suffered.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) (the leading case on this issue, consistently applied by subsequent case law).

A private plaintiff can establish the first two elements of a CPA claim (unfair or deceptive practice, occurring in trade or commerce) either by positive proof of those elements or by showing that the defendant violated a statute that contains a declaration that violations of the statute constitute a per se unfair or deceptive act or practice. Hangman Ridge, 719 P.2d at 535. Positive proof as to the first element requires demonstration that the alleged act had the capacity to deceive a substantial portion of the public. Id. As to the second element, trade or commerce includes the sale of assets or services, and any commerce affecting the people of the state. RCW 19.86.010(2); Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987).

Call aggregators are really made up of two distinct customer groups: Hotels and motels and payphones. Since the incidental phone service provided by hotels would seem to leave them outside the definition of telecommunication companies, they are not subject to regulation by the Commission. Because they are not regulated by the Commission, they are not exempt from application of the CPA by virtue of the CPA's general exemption for regulated industries. Although payphone operators are regulated by the Commission, and would otherwise therefore be exempt from the CPA, RCW 80.36.530 expressly makes the CPA applicable to violations of RCW 80.36.510 and 520 (rate posting requirements). Thus, both classes of call

aggregators are subject to the CPA. In the case of payphone companies, it would appear that violation of the Commission's posting or call blocking requirements (or other rules on minimum service levels) would not only be a violation of the Commission's rules, such actions would also be a per se violation of the CPA. Failure to make postings or call blocking by hotels and motels (and similar institutions) could be held to be violations of the CPA, provided that the tests for a CPA violations were met.

The statute requires "any telecommunications company, operating as or contracting with an alternate operator service company" to assure proper disclosure of alternative carriers. RCW 80.36.520 (emphasis added). The definition of "telecommunications company" is very broad, and the statute clearly intends to encompass payphone operators since they are "operating as, or contracting with an alternate operator services company." Furthermore, "smart" payphones with store and forward technology fall within the definition of AOS companies because the phone "provides a connection to intrastate or interstate long-distance services." RCW 80.36.520.

Instead of imposing an impossible regulatory burden on AOS companies, the Commission should encourage enforcement under the CPA against companies that refuse to provide consumers with notice required under the law. Less intrusive, more reasonable methods of regulation has been adopted by other state commissions. See Re Alternative Operator Services 95 PUR 4th 411 at 417 (Idaho PUC, 1988) 97 PUR 4th 161 at 175 (on rehearing) (AOS company to include

requirement that customers comply with Commission rules, and that AOS providers advise customers of rules, but AOS not held responsible for customer compliance); Re American Operator Services, Inc., 102 PUR 4th 336 at 344 (Indiana URC, 1989) (new contracts to require postings regarding service by call aggregators, where contracts already signed, AOS to strongly encourage customer to make postings); Re ACC Long Distance Corporation 101 PUR 4th 506 at 512 (Mass. DPU, 1988)(AOS to provide notice to customer that failure to provide notices could result in disconnection of service). It would seem to be in the state's interest to seek direct prosecution against wrongdoers rather than penalize AOS companies which have no direct ability to regulate call aggregators. The burden of proof on the Commission to prove a violation would be the same whether the Commission was seeking to penalize an AOS company that provides service to a wrongdoer, or whether the Commission is either directly penalizing the wrongdoer (where it has jurisdiction) or encouraging the Attorney General's office to use the power of the CPA (where the Commission lacks jurisdiction).

II. DEFINITION OF PREVAILING RATES

Staff indicates that the rates of US West and AT&T are only "examples" of "prevailing rates" that will be accepted as rates that are for the public convenience and advantage and that an entity has the ability to provide "persuasive contrary" evidence for rates that are above those charged by the companies being held out as examples. Fone America's expressed concern, in previous

comments regarding the impact the definition has on posting requirements and the potential for predatory pricing by the companies being used as examples of prevailing rates, nevertheless having an explicit definition of prevailing rates will go far toward improving the workability of the proposed rules. With an explicit definition, using common criteria, future demonstrations before the Commission for approval of different rates would be much more straightforward.

As demonstrated in earlier comments, if rates are to be prescribed, they must be remunerative and therefore based on the individual entity's costs. The following is a list of cost elements that Fone America experiences in providing intrastate operator services in the state of Washington:

1. Property commission costs
2. Network transmission costs
3. Operator center processing costs
4. Validation costs
5. Billing and Collection costs
6. Bad Debt / Reject costs
7. General and Administrative costs

Fone America believes that examination of these elements is necessary and therefore should be included as criteria for the "persuasive evidence" sought by the Commission for determination of rates that are fair, just, and reasonable.

By establishing US West and AT&T rates as benchmarks for intraLATA and interLATA rates, staff is also establishing the seven

cost elements associated with these company's rates, as benchmarks. The specific costs are of interest, but due to the "apples to oranges" nature of a direct comparison of Fone America costs to US West or AT&T costs, the more important element is the percent relationship between the costs and the revenue generated by the "prevailing" rates. With this information the Commission could use a "prevailing" margin to determine whether rates are fair, just, and reasonable.

As a demonstration, Fone America provides the two illustrations contained in Exhibits A and B attached to these comments. Both diagrams show the components of an operator assisted intraLATA call originating in Everett, WA and terminating in Chehalis, WA. Exhibit A depicts the call originating on a Feature Group D (FGD) and terminating on a Feature Group B (FGB). This is representative of the most cost efficient use of the network by Fone America. Alternatively, Exhibit B depicts the call originating and terminating on 800 service purchased from an underlying carrier. This is representative of the least cost efficient use of the network by Fone America.

Upon examination of Exhibit A, several cost components (A through H) are designated. They are described as follows:

A. Cost of call aggregator commission: This cost ranges from 34 percent to 38 percent of total call revenue.

B. FGD Origination cost: This has a cost of $.0638 per minute.

C. Long Haul carrier transmission cost: This has a cost of $.011 per minute.

D. Local loop usage cost: This has a cost of $.0055 per minute.

E. Fone America processing cost: This represents the cost elements 3 through 7 outlined above.

F. Local loop usage cost: This has a cost of $.002 per minute.

G. Long Haul carrier transmission cost: This has a cost of $.0025 per minute.

H. FGB Termination cost: This has a cost of $.043 per minute.

The cost elements represented by item E above can be demonstrated as follows:

Operator processing cost:	$.50 per call
Validation cost:	$.065 per call
Billing & Collection cost:	$.24 per call
Bad Debt / Reject cost:	8.5 percent of call revenue
G & A cost:	15 percent of call revenue

By making the assumption that the call represented by Exhibit A had a duration of 5 minutes, was operator assisted, and rated at the highest Fone America tariffed rate for this call, a comparison between revenue and costs can be made.

Gross Call Revenue:

Location surcharge	$1.20
MTS charge	$1.51
Operator service charge	$1.50

TOTAL CALL REVENUE	$4.21

Call Cost:

Call Aggregator commission (assume 37 percent)	$1.56
Network Transmission cost	$0.64
Operator processing cost	$0.50
Validation cost	$0.065
Billing & Collection cost	$0.24
Bad Debt / Reject cost	$0.36
G & A cost	$0.63

TOTAL COST	$3.99
	=======
NET REVENUE	$0.22
	=======

This represents a margin between revenue and cost of 5.2 percent. Again, this illustration uses the network transmission costs associated with the most efficient use of the network. It is now possible to look at this same call using the "prevailing" rate of US West and the currently proposed $.25 location surcharge for determining revenue for the call.

Gross Call Revenue:

Location surcharge	$0.25
MTS charge	$1.39
Operator service charge	$1.25

TOTAL CALL REVENUE	$2.89

Call Cost:

Call Aggregator commission (assume 37 percent)	$1.07
Network Transmission cost	$0.64

Call Cost (continued):

Operator processing cost	$0.50
Validation cost	$0.065
Billing & Collection cost	$0.24
Bad Debt / Reject cost	$0.24
G & A cost	$0.43

TOTAL COST	$3.18
	=======
NET REVENUE	($0.29)
	=======

It becomes clear in this example that the "prevailing" rates would not be remunerative for Fone America.

To continue, the cost components (A through F) in Exhibit B, which represents the same call using a different method of origination and termination, can be described as follows:

A. Cost of call aggregator commission: This cost ranges from 34 percent to 38 percent of total call revenue.

B. Carrier expense for 800 origination: This has a cost of $.1056 per minute.

C. Local loop usage cost: This has a cost of $.0176 per minute.

D. Fone America processing cost: This represents the cost elements 3 through 7 outlined above.

E. Local loop usage cost: This has a cost of $.012 per minute.

F. Carrier expense for 800 termination: This has a cost of $.090 per minute.

The cost elements represented by item D above can be demonstrated as follows:

Operator processing cost:	$.50 per call
Validation cost:	$.065 per call
Billing & Collection cost:	$.24 per call
Bad Debt / Reject cost:	8.5 percent of call revenue
G & A cost:	15 percent of call revenue

By making the same assumptions concerning call revenue as in the analysis of Exhibit A, a comparison between cost and revenue can be made.

Gross Call Revenue:

Location surcharge	$1.20
MTS charge	$1.51
Operator service charge	$1.50
TOTAL CALL REVENUE	$4.21

Call Cost:

Call Aggregator commission (assume 37 percent)	$1.56
Network Transmission cost	$1.12
Operator processing cost	$0.50
Validation cost	$0.065
Billing & Collection cost	$0.24
Bad Debt / Reject cost	$0.36
G & A cost	$0.63
TOTAL COST	$4.48
NET REVENUE	($0.27)

This represents a margin between revenue and cost of a negative 6.4 percent. Using the prevailing rates in this example results in a margin between revenue and cost of a negative 26.6

percent. Clearly, the proposed rate cap in this example only worsens a less than breakeven situation.

For obvious reasons, Fone America does not use the access and transmission arrangement depicted in Exhibit B except on the rare occasion, but neither does Fone America use the access and transmission arrangement depicted in Exhibit A 100 percent of the time. The cost to Fone America for access and transmission, in the aggregate, would fall somewhere in between these two extremes. While there is a range of costs associated with access and transmission expense, costs for Billing and Collection, Validation, and operator time remain constant, independent of rates charged or transmission method used.

Call Aggregator commissions, along with G & A expense and Bad Debt/Reject expense are the variable cost elements in this example. However, Call Aggregator commissions, being the largest cost element, will suffer the greatest reductions when an operator service provider is forced, via the proposed rate cap, to reduce costs in a effort to make the rates remunerative. The above two examples assumed that the Call Aggregator commission percentages remain at present levels. In reality, the Call Aggregators commissions would have to be reduced significantly to accommodate the rate caps because they are the only variable cost over whish the AOS has much control.

Call Aggregator commission is a cost that is established via a competitive process whereby operator service providers compete against each other, including AT&T, MCI, SPRINT, and US West, to

attract the call aggregators and the traffic they represent. This competitive process would also suffer under the proposed rate caps as operator service providers, that can not force the rates allowed under the rate caps to cover costs, will exit the marketplace. The Call Aggregator commission is a cost element to the operator service provider and represents the revenue element to the Call Aggregator with which he/she must cover costs. Under the proposed rate cap, this revenue element for the Call Aggregator would be significantly reduced and result in the Call Aggregator not being able to cover costs and ultimately leaving the marketplace. The implication for the consumer is less choice.

The Commission has previously indicated that the additional availability of telephone instruments provided by Call Aggregators is in the public interest. Therefore an exodus of Call Aggregators would be detrimental to the public interest due to the reduction in availability and the regression of the marketplace toward it's original monopoly status.

Hopefully this demonstration points out that there are various "rates" involved in the provision of operator services with one entity's revenue being a cost to another. This interrelationship between revenue and cost must be considered. Arbitrarily holding out US West and AT&T rates as examples of prevailing rates without an understanding of the relationship between those rates and the costs each company incurs to provide them is a mistake.

Fone America is also aware of the staff's position that the Commission "does not, and need not, assure each telephone provider

an opportunity to make a fair return on its investment." Again, Fone America would like to remind staff that 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.

Fone America encourages staff to consider the development of a "prevailing margin" to be coupled with a demonstration of costs similar to the examples above. This would then provide a specific mechanism whereby an operator service provider could come before the Commission for approval of rates that are fair, just, and reasonable.

III. INCLUDING LEC IN DEFINITION OF AOS

By including the local exchange carriers in the definition of an alternate operator services company, consumers will be assured of receiving consistent information. LECs in fact do "provide a connection to intrastate long-distance and to local services from locations of call aggregators." Simply because the LECs do not perceive themselves as "causing problems" is not just cause to limit the information available to the consumer. If consumers do not receive consistent posting information and call branding, their ability to make an educated consumer choice is severely impaired. Consumers will be better off if the LECs are included in the definition.

Exclusion of the LECs also provides them with a competitive advantage. Because the LECs provide operator service and pay telephones in direct competition with other operator service

providers and call aggregators, these competitors will be at a disadvantage with their largest and financially strongest competitors.

Without inclusion of the LEC in the definition, it becomes unclear as to what form of posting the LEC will place on its pay telephones that are presubscribed to a variety of operator service providers. Again, the consumer will suffer from inconsistent and/or unavailable information.

IV. CALL BRANDING

WAC 480-120-141 (5)(a)(i) defines the beginning of a call, for branding purposes, as immediately following the prompt to enter billing information. If this definition of the beginning of a call is to be used, then Fone America requests that an allowance be made for those companies that, like Fone America, provide their initial brand immediately PRIOR to the prompt to enter billing information. There are consumer advantages to this positioning of the initial brand. The consumer is made aware of the operator service provider being used earlier in the telephone call and the possibility of the consumer entering the billing information "over" the initial brand is eliminated.

In item (ii) of this section, staff proposes specific language to be used in the branding process. It is important to understand that this branding can not be done on a state specific basis. Any "script" will impact interstate calls as well as intrastate calls in other states. Fone America agrees that the information contained in staff's proposed "script" is important and must be

imparted to the consumer. However, there are "scripts" already being used that perform the same function. The proposed "script" should be used as an example of a proper method of branding a call rather than an exact method. Alternatively, a provider of operator services should be allowed to use a different "script" with approval of the Commission.

V. CONFIDENTIALITY OF LISTS

WAC 480-120-141(1) of the Commission's draft rule would require AOS companies to file a current list of all the customers it serves at least every six months, together with their locations and telephone numbers. Fone America has no objection to providing its customer lists to the Commission provided that the list is treated as proprietary information and kept under seal, and is unavailable to Fone America's competitors and all companies are treated equally. See Re Alternative Operator Services, 97 PUR 4th 170 at 172 (Idaho PUC, 1988)(Idaho established proprietary customer list screening), Re Alternative Operator Services, 101 PUR 4th 484 at 494 (Georgia PSC, 1988). The Commission's rule should assure that the lists will be handled in the confidential manner.

VI. POSTING INFORMATION

WAC 480-120-141 (4)(a)(i), (ii) provide for specific notices to be posted on telephone instruments dependent on what rates are charged from that particular instrument in relation to the "prevailing" rates. Aside from the inherent problems with the definition of prevailing rates, the additional expense and burden of this requirement are not outweighed by the benefits.

The current disclaimer that is required for posting is very similar to what is being proposed now. Is this existing disclaimer not effective? If it is not effective, will the proposed disclaimers correct the specific failings of the current disclaimer?

Without a specific definition of "prevailing rates", this proposed posting requirement becomes arbitrary and discriminatory.

Additionally, an AOS should not be penalized for failure of the customer to meet these requirements. The failure of a customer to make necessary postings should simply be cause for termination of the contract.

VII. CHARGE FOR SENT-PAID ACCESS

Notwithstanding the above arguments concerning holding the operator service provider ultimately responsible for the actions of call aggregators, or possible conflicts with the TOCSIA, WAC 480-120-141 (4)(f) directs that the AOS will not allow its customer to charge consumers more than $.25 for access to the local exchange, 1-800, or interexchange carrier service. In the case of pay telephones this charge would be collected on a sent-paid basis, not through the provider of operator services to that pay telephone. It would be more appropriate for this to be a requirement under WAC 480-120-138, as the provider of operator service has no control or knowledge whatsoever over what a call aggregator collects on a sent-paid basis.

Again, WAC 480-120-141(4)(e) uses the word "allow" in regard to rates charged by a call aggregator. This imposes a policing

obligation on the AOS concerning a customer over which it may not have control. See comments re: WAC 480-120-141(2).

VIII. ECONOMIC IMPACT STATEMENT

Cost factor number 3 concerns the impact of having new posting materials printed and displayed. The ultimate analysis places the annual cost to an Intermediate OSP at $2,400.00.

This cost is significantly understated. Because any notices for pay telephones require the name, address, and telephone number of the pay telephone owner to be present, the ability to take advantage of "mass quantity" printing rates is eliminated. All notices must be company specific. Fone America's investigation indicates that printing costs for pay telephone placards, in lots of 75, would be approximately $2.25 per placard, excluding one time set-up charges of $100.00 per account. Printing costs for tent cards, which are used in hotel/motel rooms, would be approximately $1.10 per tent card, excluding a one time set-up fee of $200.00. There will also be considerable expense to mail the materials to the call aggregators for placement. Just as the OSP will incur the expense of printing the notices because it is ultimately responsible for compliance with the required content of the notice, the OSP is also going to incur expense auditing each and every location to ensure that the posting materials are in place before the deadline.

Assuming the need for 3200 pay telephone placards for 42 accounts and 4200 tent cards, printing costs, including set-up charges, would be $16,220.00. Mailing expense for 100 mailings at

$6.50 each would be $650.00. The remaining cost for compliance can be estimated by assuming that contractors would be hired at $35.00 per hour, with a contractor being able to audit 20 instruments per hour. Auditing 7400 instruments would require 370 hours. This would cost $12,950.00. This brings the total estimated cost to $29,820 or 1.9 percent of the assumed revenue.

It should be noted that this estimation does not take into account the need to maintain an inventory of posting materials and the changes to the posting requirements that may take place when changes are made to the definition of prevailing rates.

Ignored in the economic impact statement is the cost to the OSP for bearing the responsibility for its customers' compliance with the rules. Assuming a base of 5,000 instruments, a need to physically audit just 1 percent of that base each month, and an audit expense of $35.00 per audit, results in an annual cost of $21,000.00. It should also be noted that this does not account for potential legal expenses incurred enforcing the required contracts or reviewing existing contracts to determine enforceability.

The economic impact statement attempts to estimate the impact on the COPT of the $.25 cap on the location surcharge. While not making a statement one way or the other in regard to the accuracy of the estimate, Fone America wonders if staff believes that Small COPTs and Large COPTs can survive a 18.28 percent and 7.5 percent reduction in revenues, respectively.

IX. CONFLICT WITH FCC RULES

On October 17, 1990 the President signed into law, the Telephone Operator Consumer Services Improvement Act of 1990. P.L. 101-435. The Act deals with a number of matters currently before this Commission in its rulemaking including posting requirements, branding requirements, rate provisions, call blocking prohibitions and other matters. In particular, the statute requires the Federal Communications Commission to initiate a rulemaking within 60 days of enactment, and to prescribe a final rule within 210 days of enactment. The final rules must take effect within 45 days of their adoption.

Even before passage of the Act, the FCC had begun an OSP rulemaking. 55 FR 29639 (July 20, 1990). In order to carry out their requirements under the Act, the FCC issued a Further Notice of Proposed Rule Making to modify their earlier draft rules to more closely correspond to the requirements of the Act. 56 FR 402-01 (January 4, 1991). Comments on the proposed rules were due on January 22, 1991 and reply comments were due on February 6, 1991.

Because of the nature of the AOS business, it is impossible to know whether a call coming into an AOS is intra- or inter-state in all instances, just as it is impossible to know whether a consumer will be placing a long distance call intra- or inter-state. For these reasons, it is essential that the same posting requirements, call branding requirements, blocking requirements and rates apply under either this Commission's or the FCCs rules.

As demonstrated in our earlier comments, where Congress has given express direction, as it has in the Act, and a Federal agency such as the FCC has the authority and obligation to promulgate rules to reflect the Act, state regulation is pre-empted and the states may not adopt rules that are in conflict with the Federal rules.

One way in which the Commission's proposed rules are in conflict with the Act and the FCC rules concern rate caps. WAC 480-120-138(a)(4) would permit the charge for sent-paid, access to local exchange, 1-800 and interexchange carrier service charges to not exceed 25 cents. But the Commission's rules would not apparently permit an AOS to charge for calls reoriginated to another carrier.

The Act, and the FCC's rules expressly provide that a call aggregator must insure that:

> no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

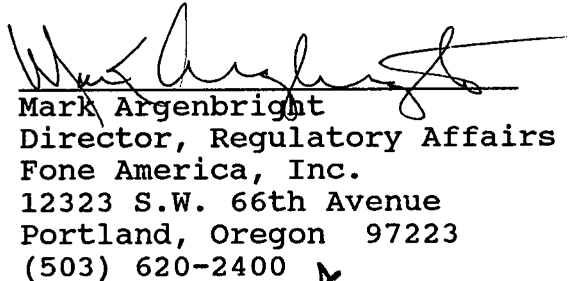
FCC proposed amendment to 47 CFR §64.705 (b).

A second inconsistency arises because the Commission's rule prohibits a sent-paid charge to reach the operator because of the Commission's apparent concern that this is how many emergency calls are placed. Yet the Commission would, as discussed above, permit the charge for sent-paid, access to local exchange, 1-800 and interexchange carrier service charges, not to exceed 25 cents. But since the Commission's rule permits no charge for "0" calls placed

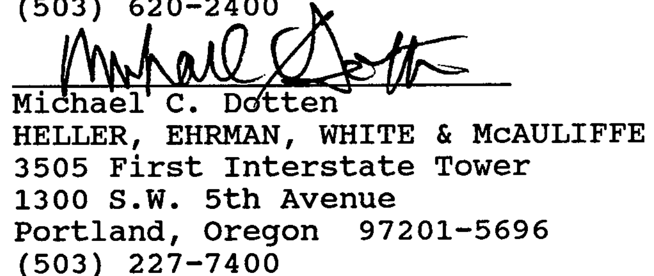
using the presubscribed AOS, the Act and the FCC's rules would permit no charge for 800, 950 or any other access code number.

The inconsistency in the two draft rules poses an impossible dilemma to call aggregators and AOS companies. The FCC rules also call for call branding requirements and posting requirements that appear to be different, on their face than the Commission's rules, and potentially inconsistent. For that reason, Fone America urges the Commission to continue its rulemaking and its investigation into the best means by which to protect consumers, but to await the FCC's adoption of its own rules on a final basis before final promulgation of the Commission's rules to assure that the Commission's rules are not pre-empted for unintended (or intended) inconsistencies.

Respectfully submitted,



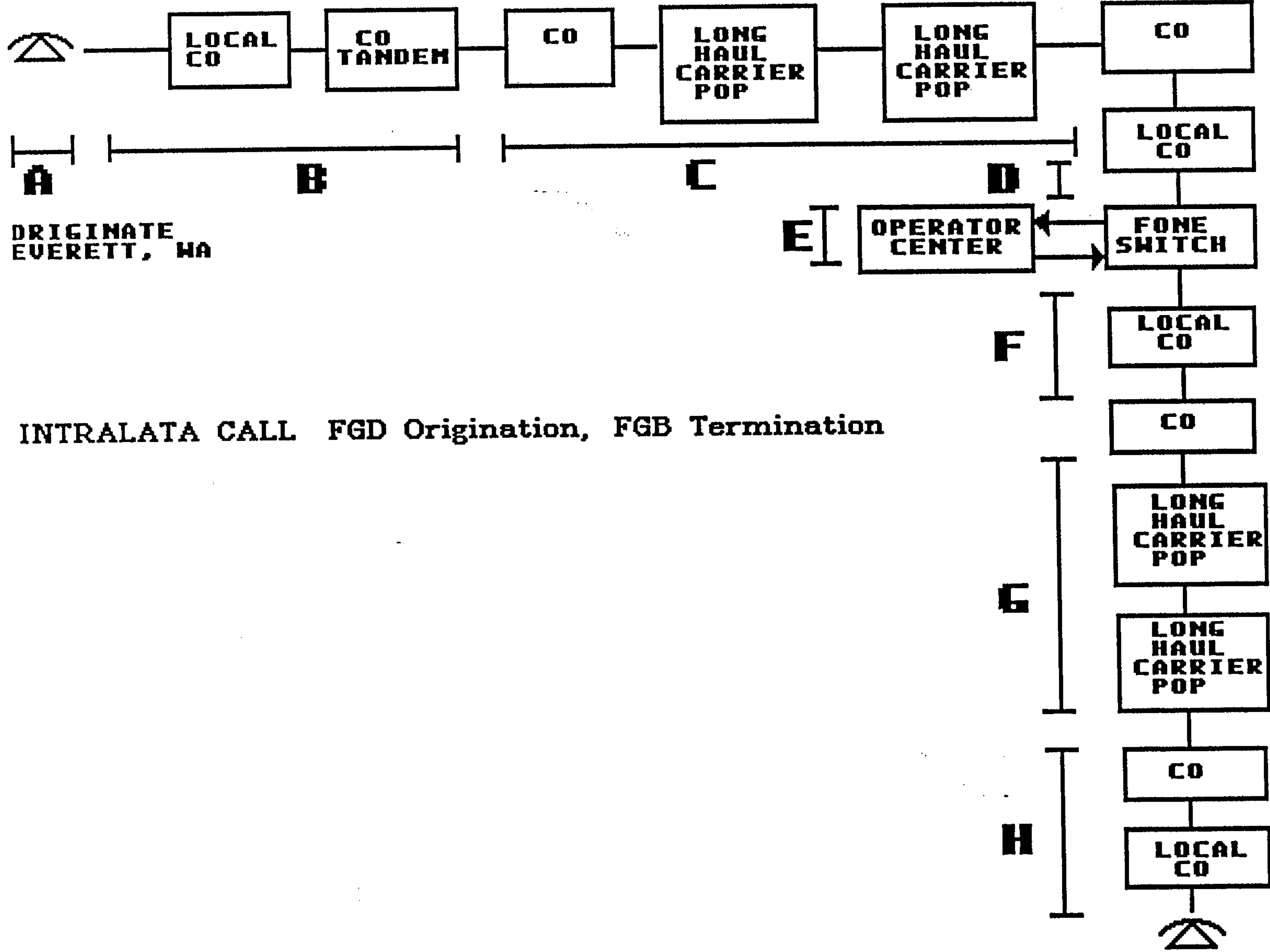
Mark Argenbright
Director, Regulatory Affairs
Fone America, Inc.
12323 S.W. 66th Avenue
Portland, Oregon 97223
(503) 620-2400



Michael C. Dotten
HELLER, EHRMAN, WHITE & McAULIFFE
3505 First Interstate Tower
1300 S.W. 5th Avenue
Portland, Oregon 97201-5696
(503) 227-7400

Of Attorneys for Fone America, Inc.

EXHIBIT "A"



INTRALATA CALL FGD Origination, FGB Termination

EXHIBIT "B"

INTRALATA CALL Originating and Terminating on 800 Service