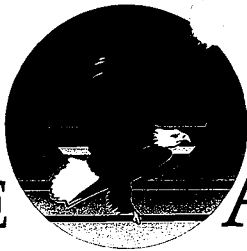

FONE AMERICA, INC.

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

March 26, 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 Reply Comments of Fone America, Inc..

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

Thank you for your assistance in this matter.

Sincerely,

Mark Argenbright
Director, Regulatory Affairs

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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

REPLY COMMENTS OF FONE AMERICA, INC.

There are several consistent themes that run through the comments submitted in response to the renotification of the proposed rules in Docket No. UT-900726. The consensus exhibited by the commentors on several issues demonstrates the logic and merit of their positions which were apparently arrived at based on independent analysis of the proposed rules.

Several commentors addressed the issue of placing the operator service provider in the position of enforcing and being responsible for third party compliance with the Commission's rules. IXCs, OSPs, LECs, and aggregators all commented that putting non-regulators in the role of policing third party compliance is, at best, bad public policy and most likely an illegal delegation of the Commission's authority. It follows that WAC 480-120-141 (2) should be deleted in its entirety. In the alternative, the rule should remove any reference to the OSP being in violation for the actions of parties over which it has no direct control or authority.

The LECs expressed great concern over the costs of policing the activities of the AOS companies, as presently contemplated by the rules. In particular, U.S. West expresses concern that it

might be subject to lawsuits for discontinuing service to those alleged to have violated the law. The same problem could afflict the AOS companies, but on a broader basis, since the AOS companies would be policing more third parties. Furthermore, because of the greater number of call aggregators, the AOS companies' costs of policing compliance by the call aggregators could be expected to be much higher than the LEC's cost of policing the AOS companies. If the cost of policing third party compliance would be a financial burden on companies such as U.S. West (and Fone America believes that it would), the relative burden on the much smaller AOS companies would be even greater.

The issue of prevailing rates was heavily addressed. Most indicate that this is actually ratemaking in a rulemaking process and therefore flawed. Much indication was given that the underlying costs associated with the rates charged to the end user must be considered. Additionally, AT&T in its previous comments, and US West here, and previously, object to being held out as the "market standards".

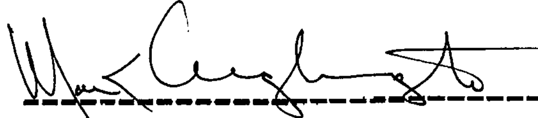
Many expressed concern over the increased costs of doing business that will be experienced as a result of these rules in their current form. Of particular interest is US West's indication that their existing rates, which would become the prevailing rates, would not cover the additional costs associated with these rules. It would seem that the "prevailing rate" concept advanced by staff is rendered unworkable by the rules themselves.

Finally, many commentors, with the exception of the LECs,

expressed the opinion that the LECs should be included in the definition of an AOS. The commentors expressed concern that the consumers should receive consistent information, that consumers should be afforded uniform protection under the rules, and that competitors of the LECs receive equal protection under the law. The LECs have followed the same argument as before, they should not be included because 1) They are not the problem. 2) Their costs would increase. Not one of the LECs has indicated that the consumer's rights and protection would be worsened by including the LEC in the definition of an AOS. On the contrary, GTE indicates that they currently lack the capability to comply with WAC 480-120-141(7)(a) relating to identification, at the operator console, of the originating location of a call for purposes of processing emergency calls. Additionally, GTE does not provide double branding. If universal no coin emergency call processing is a significant Commission concern, would it not better serve the public interest, if LECs in general, and GTE in particular, were included in the definition of an AOS?

Fone America, Inc. looks forward to the upcoming workshops and continuing to assist in the development of rules that are workable.

Respectfully submitted,



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Of Attorneys for Fone America, Inc.

COMMENTS OF MICHAEL C. DOTTEN

ON BEHALF OF FONE AMERICA, INC.

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ON DOCKET UT 900726

DECEMBER 12, 1990

I. I am Michael C. Dotten of the law firm, Heller, Ehrman, White & McAuliffe and I am here today representing Fone America, Inc.

II. Fone America appreciates the opportunity to comment on the revised proposed rules ad is today, filing with the Commission 23 pages of specific comments on the rules. Fone America previously filed opening and reply comments on the original version of the rules.

III. We appreciate the opportunity to work with the staff on the proposed rules. The revised rules remedy many of the problems raised in the initial draft of the rules. However, the revised draft is still plagued with many problems that render the rules unlawful--for the detailed reasons set forth in the comments Fone America is filing today. In the brief time that I have, I would like to focus on a number of critical, unanswered questions posed by the revised rules. Combined with the fundamental problems we see that remain in the rules, we believe that the Commission should postpone final adoption of the rules, renotice the rules for comment, and continue the process of working with the affected parties to eliminate the deficiencies in the rules.

IV. The unanswered questions are:

1. Do the new rules apply to existing tariffs and contracts? The staff commentary says that they should not, but the rules themselves are silent on this point.

2. The revised rules require that bills rendered to the ultimate consumer contain the name of both the billing agent and the AOS company providing the service "where feasible." The rule does not answer the223Hquestiofieasible to whom? If the local exchange company has the ability to print both pieces of billing information does that alone constitute feasibility? Or must the billing agents have the ability to transmit both pieces of information to the LEC before it is "feasible?" Does reasonableness of cost to the AOS company, and hence to the consumer limit feasibility? The rule permits a LEC to seek a waiver of the dual billing identification requirement if it lacks the technical ability to print both pieces of information (in fact no LEC presently has this ability, although U.S. West indicates that it will in January). The rule seems to suggest that the AOS company is subject to sanctions for failure to print both pieces of data on the bill that the LEC generates. Does the Commission intend the AOS companies to be subject to sanctions for matters outside their control?

3. Did Commissioner Pardini's amendments to the rule at

the last meeting intend to permit a call aggregator to charge 25 cents per call for providing access to alternative carriers for use of the payphone or hotel phone?

4. Did Commissioner Pardini's amendments intend to permit the AOS to collect an additional 25 cents for connecting calls to alternative carriers for use of the AOS' system?

5. There is no provision for a call aggregator to apply for aHcharge higher than the 25 cent per call charge. Does the Commission intend that a call aggregator seek higher fair, just and reasonable rates through a filing made by the AOS?

6. If an AOS seeks higher than "prevailing rates", what is the process for doing so? When would the higher rates go into effect?

7. Does the Commission intend to limit AOS companies to collecting the 55 cent "prevailing" charge for intra-state long distance information, even if the AOS company must pay in excess of that amount to the LEC for obtaining the information? Or do Commissioner Pardini's amendments permit the AOS to collect an additional 25 cent charge to compensate it for the use of its equipment and billing costs?

8. For purposes of posting required information at each aggregator's telephone, the revised rule would require one of two

notices--one indicating that charges are at prevailing rates, or the other notice indicating that rates are higher than prevailing rates. If a call aggregator or an AOS company cost justifies a higher fair, just and reasonable rate, does it qualify for the "prevailing rate" notice? What if the call aggregator decides to live with the "prevailing rate" but the AOS company seeks to cost justify a higher rate, orvice-versa, which notice is to be posted?

9. Does the Commission intend to publish other "prevailing rates" than just those of AT&T or U.S. West? If AT&T or U.S. West reduce their rates for services where they constitute the prevailing benchmark rate, and the other companies have justified a higher rate, or are collecting the old "prevailing rate", does that immediately render AOS or call aggregator's rate higher than the prevailing rate? And if the AOS has posted the notice indicating that its rates are at the prevailing rate, does the reduction in U.S. West or AT&T rates require complete reposting?

10. The revised rules require that the new "prevailing rates" or "higher than prevailing rates" postings begin in 60 days and be completed in 90 days. Do new postings have to be made at locations subject to existing approved tariffs? The staff commentary indicates that the new rules would not affect existing tariffs--but neither the staff commentary nor the proposed rules answer the question whether existing tariffs will be treated as "prevailing rates" for purposes of posting notices.

11. The revised rules require an AOS to reoriginate a call at the request of a consumer when that can be accomplished "with screening". Does this mean that an AOS would be relieved of the obligation to reoriginate if the reorigination to the lEC would permit consumer fraud?

We have carefully reviewed the revised proposed rules to try to determine the answers to the foregoing questions. Definite answers44Htdthe questions are critical because failure to comply with the rules constitute acts that could lead to suspension. Because of these unanswered questions, and because of substantial Federal pre-emption questions and concerns about the lawfulness of the rules, we strongly urge that the Commission defer adoption of the rules until after the FCC has provided notice of its intent, and until after each of the questions raised above can be determined from the text of the rules.

Thank you for the opportunity to make these comments.

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,

/s/ Mark Argenbright
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Manager, Regulatory Affairs
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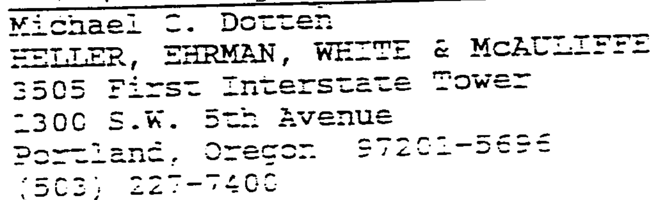
(503) 620-2400



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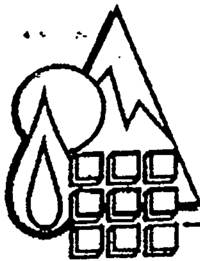

IDAHO PUBLIC UTILITIES COMMISSION

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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

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

REPLY COMMENTS OF FONE AMERICA, INC.

Fone America would like to reiterate its intent to participate fully in this proceeding to ensure that rules that are fair and equitable for the consumer and the industry alike are borne out of this process. Fone is pleased to see a basic broad consensus forming around general goals of the Commission. By incorporating many of the comments filed by parties in this docket, the proposed rules can be adapted to become acceptable, workable guidelines for the industry.

The Commission's basic concerns were echoed by comments submitted by consumers in this Docket. The issues in these comments seem to boil down to access to alternative carriers, rates charged, and information (posting and branding). Fone America continues to take all consumer dissatisfaction seriously. The company does not block access, ensures that rates charged are tariffed rates and that rate quotes are always provided, and spends considerable resources, both human and dollars, in an effort to provide and maintain required posting of information. One of the consumer comments, indicating a problem that had not been resolved, mentioned Fone America (along with another operator service provider). Pursuant to our standard practice, that complaint has

been forwarded to our investigators to determine whether the phone in question is now operating properly. In subsequent correspondence, we will report back to the Commission on our findings and resolution of the problem.

The following responds to the comments filed by other parties by category of issue:

I. Reorigination of calls to other carriers.

Many of the commentors point to the technical limitations involved in the proposed rule. Both AT&T and US West, the entities that the proposed rules advocate as the "standard" by which to judge all other providers, indicate that they can not comply with this requirement. The option advanced by AT&T and others is appropriate. The final rule should require the AOS to instruct the consumer to hang up and redial the preferred carrier using the dialing pattern provided by that carrier.

II. Operator response within 10 seconds on 90% of calls.

The comments identified in Fone America's opening comments bear out the technical limitations to this proposed rule. The Northwest Payphone Association makes a good point in regard to the ambiguity involved in using "...from the time the caller dials "0"." as the starting point for timing the operator response. This section should be removed.

III. Form of bills.

It is obvious from the comments that the requirement to have both the billing agent and the service provider on the bill is technically impossible at this point in time. As the LECs gain

this capability and the cost is reasonable, it would be appropriate to include the carrier name on the bill. US West indicates that it may have this capability in February 1991. Until, and then only where, these capabilities become available, there should be no requirement to have both billing agent and carrier names on the bills.

IV. Rate caps.

In a competitive industry, as AT&T indicates AOS is, rates charged will be governed by costs and the marketplace. Prior to adopting any of the rate related rules, Staff should endeavor to acquire a full understanding of the costs involved in this industry. There seems to be an underestimation of these costs as evidenced by comments submitted in regard to the Small Business Impact Statement. This full understanding can not be developed in a rulemaking process, as pointed out by the Northwest Payphone Association.

For the reasons recited in Fone America's initial comments, the U.S. Constitution and Washington law require that rates be remunerative and that they be carefully developed after opportunity for hearing.

V. AOS and LECs in an enforcement role.

Many comments indicate the basic unfairness of putting the AOS providers and LECs in the enforcement role with regard to other entities complying with Commission rules. The Commission has already adopted, in Docket UT-900733, a lawful and fairer approach to resolving "regulatory gap." In that rule, adopted by the

Commission on October 31, 1990, a LEC is prohibited from providing services to a company whose registration has been suspended. This same approach could be reflected in the Commission's rules relating to call aggregators by requiring the AOS to include in its contracts with aggregators a provision entitling the AOS to discontinue service to an aggregator, found by the Commission to have violated the rules. This places the penalty where it belongs--on the party failing to follow the rules. AT&T argues that an entity should not be penalized for the acts of third parties over which it exercises no management control. Fone America agrees.

The Commission should also recognize that the Telephone Operator Consumer Services Improvement Act of 1990, recently passed by Congress, requires an AOS to withhold payment of any compensation, including commissions, to aggregators blocking 950 and 1-800 access. The Commission should carefully consider whether its own rules would be pre-empted by the Federal legislation.

VI. Access to alternative carriers.

Fone America has never denied access to alternative carriers and works diligently to ensure that its customers do not engage in this practice. There seems to be agreement among the commentors and the federal government that access must be allowed. However, consideration must be given to the existence of fraud as it applies to allowing different forms of access. Additionally, the pay telephone owners advance a legitimate need to have some compensation for providing access to alternative carriers. Both Congress and the FCC have given credence to this argument. The

federal requirement to withhold compensation from aggregators that block 950 and 1-800 access will go far toward curbing the practice of blocking.

VII. Contracts.

Many comments reveal the cost considerations and general burden of the requirement to file all contracts. The Commission and its staff would also experience the resulting increase in costs and administrative burden associated with this requirement. The proprietary nature of this information is evident from the comments. If the rule is adopted, the Commission must provide safeguards to protect proprietary information.

VIII. Branding of Billing Agent.

Fone America and the other commentors have pointed out the confusion in both branding and billing that could arise because of the existence of multiple billing agents serving various areas of the country. The technological problems seem insurmountable and could cause, rather than eliminate, consumer confusion. This section should not be amended.

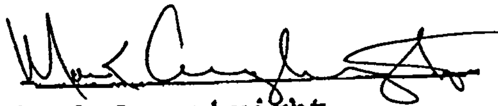
IX. Federal legislation.

Many of the comments suggest that the recent federal laws should be considered in this rulemaking in an effort to avoid duplication or possibly conflicting regulation. Fone America supports this argument and recommends carefully reviewing the "Telephone Operator Consumer Services Improvement Act of 1990" to avoid any Federal pre-emption problems and conflicting regulatory requirements.

X. Conclusion.

Fone America appreciates the opportunity to reply to other parties comments and looks forward to participating in the Staff's interest group meeting on November 8, 1990 to make the final rules fair, technically feasible and of benefit to consumers.

Respectfully submitted,



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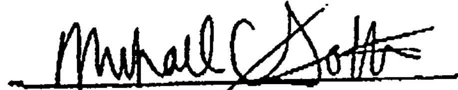

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October 18, 1990

MICHAEL C. DOTTEN, P. C.
PARTNER

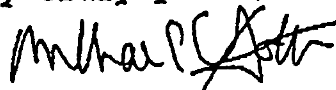
The Office of the Secretary
Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive, S.W.
Olympia, Washington 98504

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

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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.

Fone America, Inc. was registered as a telecommunications company by this Commission on March 23, 1989 in Docket No. 89-2685-AR. Fone America provides both intra- and inter-state services.

Fone America has a vital interest in this Docket, and the companion rulemaking in Docket UT-900733. Fone America shares the Commission's apparent concern that consumers should be provided information from which they can make informed choices when placing long distance calls and when inquiring concerning long distance bills. We also share the apparent objective of the regulations that consumers should have the right to access long distance carriers of choice. Finally, Fone America would like to see consumers' total long distance costs remain at the lowest reasonable level, while obtaining reliable, speedy service.

As presently drafted, however, the proposed rules would defeat these objectives in several ways explained below. As proposed, the rules would also:

1. Violate the U.S. Constitution and fundamental precepts of utility regulation;

2. Potentially intrude in an area of regulation pre-empted by the federal government;

3. Violate various provisions of Title 80 of the Revised Code of Washington;

4. Create consumer confusion and call for changes that are technologically impossible; and,

5. Potentially restore monopoly power over operator services to AT&T and its former affiliates which, in the long term, will prevent improved service and reduced prices made possible by competitive markets.

These flaws in the proposed rules can be remedied and the primary objectives of the rules can be achieved. Fone America wants to work with the Commission in remedying the deficiencies in the proposed rules. It also has an interest in improving the image of the Operator Service Providers or, as the Commission's rules refer to the industry, Alternate Operator Services (AOS). Sharp operating practices by marginal industry members and dissatisfied consumers are harmful to Fone America and the other members of the industry. The companies like Fone America, and others, seek to provide speedy, reliable and economic service to the consumer. We also seek to provide efficient service and protection from long distance fraud to our call aggregator customers. Properly conceived and implemented, the Commission's rules can accomplish those objectives.

The first step the Commission should take to remedy the

deficiencies in the rules is to remove the ratemaking provisions from the rules. As demonstrated below, the Commission may not adopt the proposed ceilings on operator services, directory information services and call aggregator compensation outside of a hearing in which the cost of providing those services is specifically examined.

Fone America welcomes the opportunity to present evidence on whether its charges are just, fair and reasonable. The Commission may have the impression that AOS companies are reaping huge profits at the unnecessary expense of the consumer. As the following comments demonstrate, Fone America (and presumably certain of the other AOS companies) provide useful services not performed by other telecommunications companies. Furthermore, because of the high capital costs associated with entry into the AOS industry and low margins, most of the providers are not earning returns comparable to other regulated utilities (in fact most are presently operating at a loss). These facts cannot be adduced in a rulemaking context where the opportunity to present witnesses and exhibits does not reasonably exist. Fone America doubts that the Commission would want to devote one (or several) of its decision meetings to obtain the level of detail necessary to determine the appropriate rates for AOS and call aggregator services. Removing the ratemaking issues from this rulemaking would give the Commission the appropriate forum for the staff, public counsel and intervenors to test the reasonableness of existing AOS rates.

I. The United States Constitution And Washington Law Require That The Commission's Rules Not Deprive AOS Companies Of An Opportunity To Earn A Reasonable Return On Their Investment

AOS companies are engaged in a competitive industry. The Commission's Small Business Economic Impact Statement accompanying this rule recognizes that there are 17 AOS companies operating in the State of Washington, and at least 50 pay telephone companies. Competition is generally thought of as a substitute for utility regulation. Utility regulation has historically been thought of as necessary to protect the consumer from monopolies which can price their products to customers without regard to competition. Rate and service standard regulation is generally thought of as unnecessary when a competitive market gives customers (and the end consumer) market choices. Those market choices, over time, will tend to drive prices down and increase the quality of the services provided. The inefficient and most expensive AOS providers will be forced out of business. In turn, competition will force the surviving companies' prices down.

The Commission staff may be impatient with the fact that market forces have not driven AOS and call aggregator rates down to the level of the dominant market forces--AT&T and U.S. West. But market forces are already pushing inefficient AOS companies out of business. The economics of the telecommunications industry is driven by volume. As calling volumes increase for remaining AOS providers, the costs per call will also come down. Eventually this will permit AOS rates to also decline. When such total costs can decline to the level of those companies that built their systems when they were monopolies (like AT&T and U.S. West) is presently unknown. But, as demonstrated below, call

aggregators and AOS companies provide services that the dominant carriers do not provide.

Contrary to conventional regulatory thought, the Commission has chosen, in its proposed rules, to price-regulate an already competitive industry. It has chosen to use a benchmark method of regulation that caps AOS providers' rates at those charged by AT&T and U.S. West for InterLATA and IntraLATA directory service, respectively. The draft rules also cap operator service charges at the "prevailing operator service charges in the relevant market." In the absence of persuasive contrary evidence, U.S. West and AT&T charges are again presumed to be the prevailing charges. Assuming, without conceding that rate regulation makes sense in this competitive market, the method for doing so contained in the proposed rules violates the Fourteenth Amendment to the United States Constitution. The method of rate regulation chosen fails to even consider the Commission's obligation to permit Fone America and the other AOS companies the opportunity to earn a reasonable return on the substantial investments those companies have made to render the regulated service.

The Commission can either permit free market regulation of prices, or it can engage in conventional cost of service regulation which considers the regulated utility's capital investment and expenses and then set rates so that the utility has the opportunity to earn a reasonable return on its investment. The Commission has no constitutional or statutory authority to set rates which would almost certainly be non-remunerative.

A. Constitutional Requirements

Public utilities are entitled to a reasonable return on the capital investment used for the utility service. Rates that do not provide for a reasonable return are confiscatory and violate due process. U.S. Const. amend. XIV; see, e.g., Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of West Virginia, 262 U.S. 679 (1923); State ex rel. Pacific Tel. & Tel. v. Department of Pub. Serv., 19 Wash.2d 200, 142 P.2d 498 (1943) (hereinafter cited as "PT&T").

Bluefield expressly rejected a ratemaking scheme that failed to account for the utility's costs at the time of the ratemaking proceeding. State regulators had approved rates based on outdated costs of capital improvements.[1] Recognizing that the outdated cost estimates did not reflect the utility's capital investment, the Supreme Court held that the approved rates were confiscatory and, therefore, violated the Fourteenth Amendment.[2]

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[1] The Supreme court explained that the lower court erred in approving those rates because it did not consider actual costs:

> It is clear that the court . . . failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war, and failed to give weight to cost of reproduction less depreciation on the basis of 1920 prices.

Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n, 262 U.S. at 692.

[2] The court explained,

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public . . . A rate of return may be reasonable at one time and become too

The Washington Supreme Court embraced the reasoning of Bluefield in PT&T, supra. There, the court held that an improper method of ratemaking violated procedural due process. PT&T, 142 P.2d at 512-514.

PT&T involved state regulation of telephone rates. A trial court had determined that the Department of Public Service had erred in fixing a just and reasonable rate. The Department appealed.

In analyzing the approved rates, the Washington Supreme Court recited the general rule that rates are confiscatory and unconstitutional if they do not yield a fair return on the value of the utility's property. PT&T, 142 P.2d at 508.[3] "[T]o be valid a rate must be determined upon a legal rate base, and . . . the regulatory authority, in establishing a rate or approving one already made, must consider all essential elements that enter into the matter of ratemaking." Id., 142 P.2d at 510 (emphasis added). Considering the proper rate base was constitutionally mandated:

> '[T]he propriety of a method used is always open to review and criticism when the validity of the result is the subject of inquiry. And it appears that, though administrative orders will not be enjoined for mere error in method or reasoning, nevertheless if the entire process

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> high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n, 262 U.S. at 693.

[3] PT&T's authority for this proposition was Smyth v. Ames, 169 U.S. 466 (1898). The Washington Supreme Court added, "The doctrine of the Smyth case has been consistently followed by the supreme court and by state courts, including the courts of the state of Washington." PT&T, 142 P.2d at 508.

is pervaded by the employment of an improper method so that the result is controlled thereby, then the Supreme Court will condemn the commission's action as a violation of the due process clause from the procedural standpoint without inquiring into the question of substantive confiscation.'

PT&T, 142 P.2d at 511-12 (emphasis added), quoting, Pacific Tel. & Tel. v. Thomas, 13 P.U.R. 337 (Multnomah County, Oregon Circuit Court 1934), aff'd sub nom. Pacific Tel. & Tel. v. Wallace, 158 Or. 210, 75 P.2d 942 (1938).

With these due process constraints in mind, the PT&T court turned to the action of the Washington Department of Public Service. Because that body had failed to consider certain property as part of the telephone utility's rate base, the court held that its order approving the rates was void.[4] As to the proper rate of return, the court held that whether the rate of return is confiscatory varies depending on current business conditions, but the rate of return must be determined on the basis of present day conditions. PT&T, 142 P.2d at 530.

The regulatory scheme proposed by the WUTC in this case is plagued by many of the same problems that led the courts in Bluefield and PT&T to find that the ratemaking was unconstitutional. A cap on rates, arbitrarily based on existing rates of other utilities, would fail to consider present day business conditions. Bluefield held that such ratemaking violates due process; PT&T echoed the same rule.

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[4] The court also held that department's depreciation calculations violated applicable statutes, PT&T, 142 P.2d at 520, and that the department erred in failing to consider a licensing agreement in calculating the rate base, id., at 523.

The infirmity in Bluefield was the fact that the regulatory body established rates based on that utility's costs of several years earlier. The WUTC proposes to base rates on the outdated rates of different utilities. PT&T held that procedural due process requires that the regulatory body consider all elements of the rate base in establishing rates. The arbitrary cap proposed by the WUTC considers none of those elements.

Imposing a rate ceiling based on other utilities' rates that were set under different business conditions not only ignores the requirement of basing rates on current business conditions, but also fails to tie rates to the utility's cost of providing service. Rates set pursuant to such a cap would be unconstitutional.

B. Statutory Requirements

1. Washington Statutes Require That Rates Be Based On Costs

Washington statutes require that telecommunication companies' rates must be just, fair and reasonable. RCW 80.36.080. This provision assures not only protection to the consumer, but also protection to the utility.

Washington statutes also prohibit non-remunerative rates in several sections. See RCW 80.04.110. A tariff which results in a rate below long run incremental cost shall be rejected by the Commission. RCW 80.04.130. The Commission must reset telecommunications rates if the charges are insufficient to yield reasonable compensation for the services rendered. RCW 80.36.140. Why is the legislature so concerned about utilities, in general, and telecommunications utilities, in

particular, having compensatory rates? Because the legislature has concluded that sharp practices and inadequate consumer service will result if companies are "on the edge" and unable to earn a fair return on investment.

By placing a cap on operator service and directory information rates based on AT&T and U.S. West rates, the proposed rules completely disregard the costs of an AOS company in providing service. The rules attempt to establish a surrogate for setting AOS costs in the form of the proposed rate cap. Such a cap is arbitrary and capricious, and based on absolutely no record (and hence, cannot be claimed to be based on substantial evidence). There is no way to demonstrate that the rate is just, fair, and reasonable, or remunerative because the cap completely disregards the cost structure of the affected utility. In fact, since AT&T's rates are subject to flexible price listing and since U.S. West has not been before the Commission for a company initiated traditional rate case since divestiture, the Commission cannot even safely conclude that the operator and directory information rates of AT&T and U.S. West meet the statutory tests that must be satisfied in Washington.

The Commission may be of the belief that this unconventional way of setting rates is permitted by the Legislature's provision for alternative regulation of telecommunication companies (RCW 80.36.135), or perhaps by the newly enacted provisions relating to "competitive telecommunications companies" (RCW 80.36.330 and .350). However, these alternatives require that a telecommunications company petition to be

regulated in these new ways (RCW 80.36.135 (3)) or that they be classified as competitive telecommunications companies after notice and hearing (RCW 80.36.330(1)). Furthermore, even under such alternative regulatory approaches, the result must "produce fair, just and reasonable rates for telecommunications services." RCW 80.36.135(3)(f). Even under banded rates, "the minimum rate in the rate band shall cover the cost of the service." RCW 80.36.340.

2. Washington Statutes Permit Rate Reductions Only After Adjudicatory Hearings

Washington law contemplates that rate reductions can only come about after an adjudicatory hearing. RCW 80.36.140. The Commission very recently interpreted RCW 80.36.140 as calling for "adjudicative proceedings." WUTC v. Lewis River Telephone Company, Docket UT-900344, Notice of Hearing, October 12, 1990. If the Commission believes that existing AOS rates for operator services and directory information services, and contract rates paid to call aggregators are excessive when compared to the actual costs of providing service, the appropriate mechanism may be to initiate a complaint proceeding pursuant to RCW 80.04.110. An order may issue only "after notice and hearing as in other cases" (i.e. after an adjudicatory hearing).

The Legislature has given the Commission authority to engage in an abbreviated formal investigation and fact-finding procedure as an alternative to an adjudication, but the Commission may do so only if it "is not necessary to fully develop the facts relevant to the proceeding and the positions of the parties." RCW 80.36.145. The abbreviated

procedure may not be used as a substitute for a complaint proceeding without the concurrence of the respondents. RCW 80.36.145(2)(a).

Finally, a portion of the Commission's rule establishes standards which could not possibly be met with existing state-of-the-art equipment (if at all). To the extent that the Commission is ordering "betterments" (i.e. repairs or improvements to, or changes in, any telecommunications line), such an order may only be issued after a hearing. RCW 80.36.260.

Fone America raises these objections to the proposed rules, not because the Company fears close scrutiny of its operations. To the contrary, Fone America is concerned that the "fast track" rulemaking course that the Commission is on will prevent any careful look at AOS cost structures, services and rates. The rulemaking approach may never afford Fone America an adequate opportunity to be heard in a meaningful way. It is for this reason that Fone America urges the Commission to separate the ratemaking provisions from the proposed rules.

C. <u>The Proposed Rules Would Unconstitutionally Impair Contract Obligations</u>

Legislation may not impose a substantial and unjustified burden on existing contracts. U.S. Const. art. I, § 10; Wash. Const. art. I, § 23.[5] This proscription applies to any form of legislative action, including delegated legislative activity such as administrative regulation. <u>See</u> <u>Ruano v. Spellman</u>, 81 Wash.2d 20, 505 P.2d 447 (1973)

[5] The contracts clauses of the United States and Washington Constitutions have substantially the same effect. <u>Ruano v. Spellman</u>, 81 Wash.2d 820, 505 P.2d 447 (1973).

(interpreting constitutions of the United States and the State of Washington). The WUTC's proposed regulations run afoul of the contracts clauses of the state and federal constitutions because they would impair commission contracts between Fone America and call aggregators.

To determine whether legislative activity results in an unconstitutional impairment of contracts, courts engage in a two-step analysis. The first question is whether the legislative action results in a substantial impairment of contractual rights. Only if the impairment is substantial can the legislative action be unconstitutional. E.g., Allied Structural Steel Co. v. Spannus, 438 U.S. 234, 244-45 (1978).

In Allied, the Supreme Court held that the modification of a basic term of a pension contract amounted to substantial impairment. Ruano held that the submission of an initiative measure resulted in unconstitutional impairment for the sole reason that it diminished the value of existing contracts.

The potential impairment of Fone America's existing commission contracts with call aggregators is very substantial. As was the situation in Allied, the proposed rules modify and effectively nullify a basic term of the contracts; in this case, the consideration. By limiting the total allowable compensation to 25 cents per call, the value of the commission contracts would diminish considerably and likely would be eliminated. Fone America would have to breach all of its existing contracts with call aggregators if it were to comply with the

proposed rules. Ruano found less drastic diminution in value to be substantial impairment.

Once it is established that a substantial impairment would result, courts then determine whether governmental interests justify the impairment. Allied Structural Steel Co. v. Spannus, 438 U.S. at 247. The state has the burden of showing justification. United States Trust Co. v. New Jersey, 431 U.S. 1, 31 (1977) (holding that state failed to carry burden of justifying impairment).

In Allied, the legislation affecting pension plans did not justify the impairment because it did not serve a broad societal interest, it did not operate in an area previously subject to state regulation, and it "worked a severe, permanent and immediate change in [contractual] relationships -- irrevocably and retroactively." 438 U.S. at 250.[6] The WUTC's interest is similarly deficient. The proposed rules do not serve broad interests of society; the AOS companies permit the consumer to choose an alternative to the AOS and the pricing for the service has not been demonstrated to exceed costs. Aggregator call commissions is not an area that Washington has actively regulated in the past. Of greatest significance, however, is the fact that these

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[6] The Ninth Circuit has suggested that the Supreme Court has retreated from Allied on the question of the degree of deference courts should give to state legislatures in ascertaining justification for the impairment. See State of Nev. Employees Ass'n v. Keating, 903 F.2d 1223 (9th Cir. 1990). The analytical framework of Allied nevertheless remains intact. Id., at 1226 (analyzing whether substantial impairment existed and whether impairment was reasonable and necessary to serve important public purpose; holding that the state had not shown sufficient justification).

proposed rules would cause a severe, permanent and immediate change in the contractual relationships between Fone America and call aggregator. Their contracts, negotiated with the expectation of a reasonable return, would suddenly be worthless. In sum, the proposed rules would substantially impair existing contracts without commensurate benefit to governmental interests. Caps on aggregate calling commissions would, therefore, be unconstitutional.

II. General Comments on Regulations

A. Introduction

Prior to discussing the specific contents of each of the rules, Fone America believes that it might be helpful to the Commission to describe how it functions with respect to each of the general subject areas contained in the Commission's rules:

1. Provider Identification Issues;
2. Access to Alternative Long Distance Carriers;
3. Quality of Service Issues; and
4. Rates

1. Identification Issues

The Commission's rules require the posting of information on or near phones serviced by the AOS company which would advise consumers of the identity of the AOS company and the billing agent who bills for the company. As the Commission is well aware, in the past, a number of Fone America's pay phone customers failed to affix the required notice to their telephones even though instructed to do so by Fone America. At

considerable expense, Fone America has been policing this requirement more diligently and in general supports the requirement that consumers have notice. The Commission should be aware that there will be a substantial cost of complying with the new posting requirements which will require the replacement of all existing consumer notices. The Commission's economic impact statement that accompanied the rule failed to consider that labor and overhead costs will be incurred to assure that the new notices are affixed and maintained. Labor costs associated with this function will be far more substantial than the 50¢ per notice printing charge that the Commission's impact statement recognized.

Call Branding.

Fone America agrees that the consumer has the right to know the name of the company processing the call. It is already Fone America's practice to immediately announce that the consumer has reached Fone America and (unlike AT&T) to advise the consumer, other than through the electronic "bong," that the consumer has the option of entering a credit card number or obtaining the assistance from a Fone America operator. Fone America's method permits the consumer to avoid an operator assistance charge. The exact text of this notice is:

> Please enter your credit card number or dial "0" for a Fone America Operator.
>
> Thank you for using Fone America.

After the consumer has inserted the billing information, the recorded message thanks the consumer for using Fone America (or a live operator does likewise if operator assistance has been chosen by the

caller). Fone America has not, in the past, identified its billing agent because to do so would substantially increase costs. The different billing agent employed depends on the existing billing arrangement between the billing agent and the LEC that would ultimately deliver the bill. As a result, the proposed rule would require a data search (the process for which does not currently exist) of Fone America's computers which would slow down completion of the call. Such slowing has two effects:

(i) First, it delays the connection time which the rules seek to shorten to 10 seconds per call (which for other reasons explained below is impossible due to delays caused by the phone instrument and LEC connection time.)

(ii) Second, this additional connection time increases Fone America's costs which, ultimately must be passed on to the consumer. Fone America pays between 4.5¢ and 12.5¢ per minute to the LEC and/or interexchange company as an access charge.

In addition to these cost considerations, there are capital cost implications associated with implementation of the rule. Just to place the second Fone America brand in the prerecorded announcement cost the company, at a minimum $25,000 for its Portland center alone. Similar costs could be expected to be incurred for additional branding to identify the billing agent. In addition to the capital cost, Fone America would incur data processing costs determining the appropriate brand and additional access time costs for the data gathering time.

For these service efficiency and economic reasons, Fone America has not previously provided billing agent information as part of the "brand" and urges the Commission to carefully weigh whether such a requirement would not defeat equally desirable cost reduction and service goals that the Commission has in this rulemaking.

b. Identification on Bill

The Commission's rule would require that both the billing agent and the AOS company be identified on the consumer's bill. Fone America endorses the concept, but has no control over compliance with the requirement. Currently, Fone America uses two billing agents in Washington State; ZPDI (Zero Plus Dialing, Inc.) and INTEGRETEL. When these billing agents send billing information to the local exchange companies on electronic medium, they only include the carrier interexchange code (CIC) for the billing agent. Fone America has been told that U.S. West and GTE are not capable of processing two CICs. If the Commission wishes to have both the billing agent and the AOS company on the bill, it should require the LECs to make the printing of such information possible. However, there should be an exception for AOS providers to bill where the LEC fails to, or is unable to comply for whatever reason.

Fone America would find it desirable to have its name printed on the consumer's bill in order to prevent consumer frustration and misunderstanding, but also as an affirmative means of getting Fone America's name before the consumer public. AT&T already enjoys this advantage because of billing arrangements set up with the local exchange

companies when AT&T was the long distance carrier monopoly. This is one area, among others, in which the AOS companies have not been given a level playing field with AT&T and the other long distance carriers. We welcome the Commission's proposed reform and hope that it can be accomplished by the local exchange companies.

2. <u>Access to Alternative Long Distance Carriers</u>

The second general area of the Commission's rulemaking relates to providing consumers access to alternative long distance carriers. Fone America's contracts prohibit its customers (call aggregators) from blocking access to alternate long distance carriers.

When a consumer who fails to, or is unaware of how to dial the alternative carrier's access number calls from a phone automatically connected to Fone America, and wants to place a call through an alternative carrier, Fone America will always honor the consumer's request, without charge to the consumer, in one of two ways:

a. If the consumer is placing the call from a telephone with specialized equipment, the operator can reoriginate the call through the LEC or AT&T with a few keystrokes. This is the preferred method as it is the quickest for Fone America (and hence the least costly) and is the speediest for the consumer as well. This also assures proper billing and avoids consumer redialing.

b. A second method is used when the phone instrument is incapable of accepting the electronic means. In that case, the consumer is given dialing instructions on how to reach the alternative carrier. Those dialing instructions come up on the Fone America operator's screen

and the operator provides the information as quickly as possible. Again, Fone America has the economic incentive to connect the call to the alternative carrier as quickly as possible, because it must pay 4.5¢ to 12.5¢ per minute in access charges to the LEC and/or interexchange carrier (IXC) with no opportunity of recouping any of those costs.

The Commission's proposed rules would require Fone America, in all instances, to reoriginate calls to another carrier upon request by the caller and without charge. In many instances, this simply cannot technically be accomplished. Furthermore, the proposed rule fails to recognize that for Fone America to connect the caller to an alternative long distance carrier directly would require the Fone America connection to continue. This would have the potential for Fone America to continue to incur 4.5¢ to 12.5¢ per minute in origination charges from the LEC and/or IXC for the duration of the entire call with no potential for offsetting revenue to Fone America. That is why Fone America electronically redirects the call to the LEC or AT&T or gives dialing instructions to the consumer. In addition, this method of "reorigination" would cause the consumer to pay erroneous long distance charges. For example, take the case of a call originating in Seattle through Fone America's Portland operator center, with the call destination of Spokane. If Fone America "reoriginated" the call to, for example, AT&T, the consumer would pay the long distance charges associated with a call from Portland to Spokane-a much longer distance than the direct line from Seattle to Spokane. Fone America's system is established electronically so as to prevent the consumer from ever

having to pay for such indirect "call splashing." However, if the call is transferred to the alternate long distance carrier through Portland, there would be no way for the consumer to avoid such a charge. In addition, when the call is handed off, the consumer looses the option of avoiding operator assistance charges from the alternate carrier.

The Commission's rules should assure that AOS companies do not block access to alternative carriers. They should not require them to complete the connection to the alternative carrier themselves and incur unnecessary costs both for the consumer and for the AOS company.

3. Free Access To 800 Numbers and Interexchange Carriers

The Commission's rule also requires pay telephone operators to provide access, without charge, to "800" numbers and interexchange carriers. This is unfair because it essentially "appropriates" pay phone operators' equipment without compensation. Very often these pay phones are in remote locations where other companies would not otherwise have located the phones. The phones are a service to the general public. If rates are not compensatory, the pay phone operators could be expected to remove the phones from remote locations and the consumer would be deprived of choice. Furthermore, Fone America pays access charges to facilitate interexchange and "800" calls. Providing for no charges for this service is similarly an appropriation of Fone America's services and equipment without just compensation.

Finally, the Commission should be aware that Fone America (and presumably, other AOS companies) are the only shield that prevents telephone fraud against certain call aggregators. Calls to alternative

long distance carriers which originated with "1-800" and "950" do not pose problems. However, if a consumer wishes to be connected to AT&T, the only means for obtaining this access is to dial "10XXX". In some LEC territories, after such a call is placed, the line does not disconnect and the consumer can dial "1" and place long distance calls without providing a billing number. When the bills are rendered, they are sent to the phone owner (the pay phone operator or the hotel) with no method of collection from the consumer. This method of telephone fraud can be overcome if the call is reoriginated with the electronic assistance of Fone America or by giving dialing instructions for making "0 +" calls.

Many of the local exchange companies would have no ability to provide the level of service that Fone America and various of the other AOS companies provide to consumers wishing to use alternative long distance carriers. This is one area where Fone America's expensive computer assisted equipment provides superior service for consumers (and necessarily, cost to Fone America.) Fone America would be happy to provide technical assistance to the Staff in understanding the limitations of equipment and the present routing of Fone America's

calls. These technical issues should be discussed at the Staff's planned workshops on the rules.

3. Service Quality Issues

The Commission proposes a new subsection to its rules which would define public convenience and advantage. The section requires AOS companies to provide service that equals or exceeds that provided by the dominant carrier in the relevant market as to "availability, technical quality and response time and which equal or exceed industry standards and variety or which are particularly adapted to meet unique needs of a market segment." These standards are: 1) unnecessarily subjective 2) may be technically impossible for AOS companies to meet 3) financially unobtainable and/or 4) limited by existing LEC and long distance carrier practices. If the Commission wishes to impose service standards on the AOS companies, those service standards should be identified in the form of objective criteria. They should also be mindful of the limitations that LEC and long distance carriers place upon AOS companies, and further mindful that if additional costs are imposed on AOS companies, these companies must ultimately recover those costs from consumers.

One area in which the Commission has provided an objective standard is simply unobtainable. The Commission's proposed rules would require an AOS company to "assure that a minimum of 90 percent of all calls shall be answered by the operator within ten seconds from the time the caller dials "0". WAC 480-120-141(5)(d).

This standard is unobtainable for virtually any AOS provider. For example, a call placed in Seattle at a pay phone permits inter-digit timing of typically six to eight seconds in order to allow the consumer to determine whether he or she wishes to input any additional digits before connecting the call. Up to an additional six seconds may be taken at the LEC central office before the call is connected to the tandem. It may also take an additional eight seconds to connect the call from the LEC's tandem to Fone America. Thus, up to 20 seconds could have elapsed from the time of completion of dialing until Fone America, or other AOS companies, get the connection. Some of this time has been intentionally built into the total network by all associated companies in order to give the consumer adequate time to dial. Shortening the period the consumer has to dial would substantially increase the number of misdialed calls, and hence decrease consumer satisfaction. Thus, a ten second connection requirement is simply impossible for Fone America to obtain, not because of inadequacies in its own equipment, but because of the vagaries of telephone sets, LEC central office switch gear and tandem connection time. Because AT&T was responsible for installation of much of this equipment, AT&T maintains a number of direct trunks into the tandem lines, and can therefore out-perform other service providers. If AT&T is used as the standard for determining quality, the AOS companies would, of necessity, fail to meet Commission's quality standards.

The approximate average time from completion of dialing to connection to Fone America is currently 14 seconds. Fone America would

be willing to accept standards which require Fone America to answer a call within ten seconds of the time the call is connected to its switch.

Since an AOS company could lose its registration as a result of failure to comply with the Commission's standard of quality, those standards should be 1) objective and 2) technically and financially obtainable.

4. Rate Issues

For the reasons specified in the first portion of these comments, the Commission should remove all rate issues from this proceeding. However, the Commission should understand why using AT&T and U.S. West costs as a means of pricing AOS services is not only unlawful, but also unfair, and in the long run, perhaps counterproductive. AT&T and the Bell affiliates built their telephone system as a monopoly over a period of nearly 70 years. Because these companies were not faced with competition, they were able to establish redundant networks and to obtain a market share which permitted them to achieve substantially lower unit costs. The breakup of AT&T did not sever many of the physical connections which AT&T enjoys with many of the "baby Bells". Hence, the superior connection service and the associated volume of calls remain a major factor. Furthermore, AT&T and the "baby Bells" have had many years to amortize equipment investments. New entrants, like Fone America, have had to recently make major capital expenditures for switches and computer equipment in order to provide reliable service to its customers and consumers. It is no surprise that AT&T and U.S. West can provide service at lower cost than the AOS

companies presently can. However, as the new AOS companies achieve greater market share, and competition forces inefficient AOS companies out of the market, the remaining AOS companies will be able to distribute their fixed costs over a larger number of calls and therefore reduce the unit cost of providing their services.

If the Commission's rules cap rates at the level of "the dominant provider," this assures that monopolists will continue to enjoy a financial advantage because the AOS companies will never be permitted to get on their feet. If the AOS companies are permitted to price their services in order to earn a reasonable return on investment, they will be able to continue to attract capital and make necessary improvements to their systems. Such improvements will result in increased operating efficiencies, reduced costs and better service to the public. Since the breakup of AT&T, the quality of long distance service has improved dramatically because AT&T has been forced to compete with alternative long distance carriers and upgrade its system through the installation of more fiber optics and with commensurately less reliance on satellite communications (with the resultant echo.) If the Commission's proposed rules are promulgated in final form as proposed, they will force many AOS companies out of business. This will reduce competition for operator services, leaving the LECs to monopolize the market. This is not in the consumers' long range interest because it will retard efficiency improvements and prevent cost competition.

III. Specific Comments on Proposed Rules

Fone America's comments on the rules, section by section, follow:

WAC 480-120-021--Glossary

The proposed rules expressly exempt LEC's from the rule. This creates double standards. The LEC's should be exempted only on a section by section basis.

WAC 480-120-141 5(a),(c),(d) and (e) would just as reasonably apply to operator services provided by an LEC. This would produce consistency in the way calls are branded, and the quality of services. For the reasons stated elsewhere in these comments, Fone America opposes 5(d) and (e).

WAC 480-120-106--Form of Bills

For the reasons specified in Section II of these comments, the LEC may be unable to provide information pertaining to both the AOS and the billing agent. Fone America would prefer that such information be provided to avoid consumer confusion and to simplify settling of billing disputes. If the LEC is unable to perform this function for some reason, the AOS companies should not be penalized by prohibiting LECs from carrying out the billing function.

Fone America supports the new requirement that the billing agents provide updated lists of the AOS companies for which it provides billing services to the LEC.

WAC 480-120-138 (4)--Pay Telephone--Local and Interstate

For the reasons specified in Section I of these comments, the ratemaking provisions of the proposed rule should be removed from the rulemaking. Fone America provides inter-LATA directory assistance service. Costs to Fone America run between $1.40 to $1.50 per call. Fone America must pay an access charge, a data access charge, perform validation, and billing and collection functions to provide directory assistance. Since the LECs provide a variety of services, they may subsidize directory assistance through pricing for other services. Fone America and the other AOS companies have limited means to provide for such cross-service subsidies. Therefore, this service, as all other services, should be priced on the cost of providing the service, not based on the charge made by another provider who may not be recovering its own costs for the service. By tying AOS tariffs to prices charged by the dominant service providers, the Commission could inadvertently permit the dominant carriers to underprice certain services that are the only services provided by the AOS companies and thereby put the AOS companies out of business while the dominant carriers subsidize such practices through overpricing other services not subject to Commission direct regulation.

WAC 480-120-138 (12)(a)

Rate provision--remove from rulemaking. As discussed in Section II above, requiring the disconnection from the LEC of a pay phone that does not allow without charge access to interexchange carriers in effect is the taking of private property for a public use without just

compensation, a violation of the 5th Amendment to the U.S. Constitution. Requiring such uncompensated service for emergency calls might be found to be within the police power of the state as a reasonable condition of permitting the pay phone operator to engage in the commercial activity. But requiring such uncompensated service to connect the caller to commercial services, would not pass constitutional muster.

WAC 480-120-141--Alternate Operator Services.

The first paragraph of the rule sets the "prevailing charges" cap. This is a rate provision and should be removed from the rulemaking.

WAC 480-120-141(1)

Fone America has no objection to providing contracts to the Commission so long as: 1) a list of those entering into a master contract can be provided (when the contract is on file) 2) the list is treated as proprietary information and kept under seal, and is unavailable to Fone America's competitors and 3) 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).

WAC 480-120-141(2)

By placing Fone America at risk for the acts of non-compliance by call aggregators, the Commission imposes a regulatory burden upon Fone America and potential penalties upon Fone America for actions over which it has no control. Furthermore, a call aggregator might have no

incentive to cooperate in making postings, despite Fone America's best efforts. To penalize Fone America for the failings of its customers would be as unfair as penalizing an electric or gas utility for failure of an interruptible customer to disconnect during curtailment.

A less intrusive, more reasonable method 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 be reasonable to require Fone America to investigate violations, request compliance and to have provisions in its new contracts permitting it to terminate contracts with its call aggregator customers if they fail to comply with the Commission's rules.

WAC 480-120-141(4)

As discussed above, Fone America does not dispute the reasonableness of requiring customers to post notices and the like. However, 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.

The revised posting requirement makes all existing posting materials obsolete. As indicated above, the Commission's Economic Impact Analysis failed to consider the labor costs associated with reposting the notices--a cost far more substantial than the reprinting if the AOS companies are required to police the placement of the new posting materials. A less onerous burden would be to require all new placements to contain the new material and that when Fone America visits an existing location, it will supply new postings to call aggregators. Since Fone America currently employs two billing agents in Washington State, and since who the billing agent will be depends on which LEC the caller receives his or her bill from, posting of the names of both billing agents will increase costs and could well cause more confusion than it eliminates.

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

This is a ratemaking provision that should be removed from this rulemaking. Fone America has no objection to a limitation that rates may not exceed tariffs, if, and only if, AOS tariffs can contain remunerative rates, including any permitted surcharges.

Again, the use of the word "allow" imposes a policing obligation on an AOS concerning a customer over which it may not have control. See comments re: WAC 480-120-141(2). This provision also seems to conflict with WAC 480-120-141(9)(c) which permits a 25 cent surcharge.

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

Branding of the billing agent will, as demonstrated above, impose substantial costs including software costs ($25,000 for Fone America's last branding change), technical barriers, and additional access charges--each of which must ultimately be recovered from the consumer. Additionally, the Commission should change the word "completion" to "connection". Otherwise the rule could be interpreted to require the second branding to come at the close of the call, something that is technically impossible.

WAC 480-120-141 (4)(c) and (5)(c)

While Fone America, Inc. is in agreement with the intent and spirit of proposed WAC 480-120-141 Alternate Operator Services, as explained above, Subsection (5)(c) requires the provision of a service that can be technically impossible, depending on the other requested carrier and the telephone instrument the call is being originated on. The only option available from any operator service station to "reoriginate" a call is to redirect the caller to the LEC or AT&T. Connection to all other carriers must be completed by informing the caller of the proper dialing instructions for the requested carrier and directing the caller to hang-up and dial accordingly. If the Staff's intent is to have the operator station actually originate access to the requested carrier and then to "bridge" the caller onto that access, they are ignoring the costs and the technical requirements involved. In this scenario, the AOS provided must have the ability to be provided originating and terminating access at no charge. Without this ability,

the AOS provider would be billed for network access time for the entire duration of the call, while providing this connection at no charge. Fone America, Inc. is unaware of any access arrangement that would facilitate this requirement.

Additionally, this requirement seems to contradict proposed Subsection (6) which prohibits the transfer of a call to another carrier which cannot or will not complete the call, unless the call can be billed in accordance with Subsection (6). A call "reoriginated" in the manner the rules seem to propose will not be rated from the true point of origination.

As explained above, Fone America requires its customers not to block access to alternate interexchange carriers and provides dialing instructions to the caller on the means by which alternate interexchange carrier access can be achieved. The rule should simply require that such instruction be provided on request. It is not reasonable that Fone America could lose its certification based on something that cannot be accomplished from a technological perspective.

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

As discussed in Section 3 of these comments, it is technically impossible to assure that a minimum of 90 percent of all calls will be answered by the operator within 10 second of the time the caller dials "0". The phone instrument itself, the LEC's central office switch and the LEC's tandem will cause delays along the way. As with other provisions, it would be unreasonable, arbitrary and capricious to revoke a certificate for the failure of an AOS to meet a technically impossible

standard. However, it is reasonable to impose the ten second rule once the call is connected to the AOS's switch.

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

Fone America presently engineers to the one percent level of blockage. However, this may be an unnecessarily expensive standard over time, particularly if AT&T or U.S. West are used as the measure of adequacy. The Commission should change the rule to require that, upon notice by the Commission, steps will be taken to alleviate an excessive blockage rate. Furthermore, if the Commission orders "betterments," that should only be done after hearing. RCW 80.36.260.

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

As discussed above, by tying the definition of "public convenience and advantage" to the dominant carrier standard "at a minimum" the Commission may be imposing standards that are impossible for competing carriers to meet. AT&T and U.S. West have a number of technological advantages which are still unavailable to competitors that stem from their prior monopoly position. Furthermore, by failing to provide objective standards, the AOS providers will never know whether their service is adequate. In the absence of objective standards, Fone America recommends that, beginning with the third line, the section read:

> "services that are reasonable comparable to the services offered by the dominant carrier in the relevant market or which are particularly adapted to meet unique needs of a market segment or which are unavailable from a dominant carrier."

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

This is a ratemaking provision that should be removed from this rulemaking.

WAC 480-121-040

Consistent with the above comments, the definition of "public convenience and advantage" should be disentangled from the "dominant carrier" standard. Otherwise, monopoly providers would always be able to keep potential competitors out of the marketplace. This would not yield "public convenience and advantage," it would merely yield unchanging technological standards and defeat innovation.

SUMMARY

Fone America agrees with the Commission's apparent attempt to ensure that consumers are given the opportunity to know with whom they are transacting business, the option to choose an alternative, and the ability to exercise their choice prior to incurring charges. The Commission must take care in this process not to create a regulatory scheme that is counter-productive to these goals or contrary to law and due process.

This is a new competitive industry that is making technological advances on a continuing basis. The benefits and services to be developed and enjoyed are comparable to other recent technological advances in the telecommunications industry, such as fiber optics. It would be unfair to the providers and consumers to cut short the life of legitimate companies involved in this industry while they are in their early development stages.

Based on the foregoing comments, Fone America strongly urges the Commission to remove the ratemaking provisions from its proposed rule. We also commend the Commission for seeking solutions to consumer confusion and dissatisfaction. Fone America pledges its best efforts to work with the Commission staff to make the final rule workable, and of benefit to Washington's consumers.

Respectfully submitted,

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