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May 2, 1991

Mr. Paul Curl
Secretary
Washington Utilities and
Transportation Commission
1300 Evergreen Pk. Dr.
Olympia, Wa. 98502

Re: Docket No. 900726

Dear Mr. Curl:

Enclosed are the original and nineteen copies of the Comments of CSI Pay Telephone Investors Limited Partnership to the proposed rules in the above docket. Please accept the same for filing.

Very truly yours,

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By _____
Douglas N. Owens
Of Attorneys for CSI Pay Telephone
Investors Limited Partnership

cc: Albert G. Mancuso

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Amendment of WAC 480-120-021, -106, -138 and -141 relating to telecommunication companies	Docket No. UT-900726 COMMENTS OF CSI PAY TELEPHONE LIMITED PARTNERSHIP

COMES NOW CSI PAY TELEPHONE INVESTORS LIMITED PARTNERSHIP (CSI), and submits its comments on the proposed amendments to WAC 480-120-021, -106, -138 and -141 relating to telecommunication companies. These comments address the version of the proposed rules shown at WSR 91-03-122. If any rules are adopted that differ from those in the notice, CSI reserves its right to challenge the procedure.[1]

INTRODUCTION

CSI is an Oregon limited partnership, a small business within the meaning of Chapter 19.85 RCW, which is engaged in the telecommunications business in the provision of resale telecommunications services via privately owned pay telephones

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[1]The staff issued April 30, 1991 a document described as "changes in the noticed draft," which the staff stated it expected to recommend to the Commission at the May 8, 1991 open meeting. These "changes" have not been published in the Washington State Register. Among the items the staff indicated it expected the Commission to study critically is whether LECs should be included within the AOS definition. CSI believes that if the Commission intends to exclude the LECs from coverage under the portions of the rule that relate to AOS companies, that change should be resubmitted for public comment. Additionally, the changes in the April 30, 1991 revision appear in some cases to be substantial, requiring reissuance of notice under the APA.

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which are available for use by members of the public. CSI has no other telecommunications business which would be a source of revenues which could be used to cross-subsidize services whose rates would be limited by the proposed amendments.

1. **The proposed rules violate constitutional provisions and exceed the statutory authority of the agency; they are invalid.**

RCW 34.05.570(2)(c) sets forth the grounds on which a rule will be declared invalid. Those grounds include that the rule violates constitutional provisions or exceeds the statutory authority of the agency. Both of these limits are transgressed by the proposed rules in this docket.

In *American Network v. Util. & Transp. Comm.*, 113 Wn. 2d 59, 776 P. 2d 950 (1989), the court held that compelling reasons sufficient to show the rules' scheme to be in conflict with the intent and purpose of the legislation, would justify declaring rules to be invalid. In *W. W. Cole v. Util. & Transp. Comm.*, 79 Wn.2d 302, 485 P.2d 71 (1971), the court held that the qualification in RCW 80.01.040 "as provided by the public service laws," required a narrow construction of the grant of power in that section to "regulate in the public interest." The court held that the agency "must be strictly limited in its operations to those powers granted by the legislature." Id. 79 Wn.2d at p. 306.

In determining whether a rule that involved no suspect classifications or fundamental interests violated the Equal Protection Clause and the Special Privileges and Immunities Clause, the court applied the "minimum scrutiny" test of *Myrick v. Board of*

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Pierce Cy. Commrs., 102 Wn.2d 698, 677 P.2d 1152 (1984). This test has three parts: the legislation must apply alike to all within the designated class; there must be a reasonable distinction between those within and those without the class; and the classification must be reasonably related to the purpose of the legislation.

In *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L.Ed. 333, 64 S.Ct. 281 (1944), the court held that ratemaking orders of a regulatory agency must comply with the substantive due process guarantees of the Fifth Amendment. This amendment applies to the states pursuant to the Fourteenth Amendment. The court reaffirmed this principle recently in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 102 L.Ed.2d 646, 109 S.Ct. 609 (1989). Under these guarantees, the court held:

> whether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional overtones. 102 L.Ed.2d at p. 659.

The questions of the level of rate of return that is fair, and the amount of capital on which investors are entitled to earn that return are essentially factual. The regulator is given deference by the courts as to such factual questions, *when there have been determinations made on them*.

Ratemaking orders of a regulatory agency must also be made pursuant to procedures that provide due process of law. *Morgan v. United States,* 304 U.S. 1, 82 L.Ed. 1129, 58 S.Ct. 773 (1937). Such procedures require, at a minimum, an opportunity to know the

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claims of the government and to have a chance to respond to such claims with evidence, before the ratemaking decision is made. Id.

In summary, under these cases a rule involving no suspect criteria or fundamental rights must be within the strict limits of the powers granted by the Legislature and must not contravene the intent and purpose of the legislation. The classification must apply alike to all within the class, there must be a reasonable distinction in fact for the classification and the classification must be reasonably related to the purpose of the legislation. In addition, rates may not be so low as to deny the regulated company a reasonable opportunity to earn a fair return on properly invested capital and the rules may not discriminate against small business. Chapter 19.85 RCW. Rate orders must also be made according to procedures that provide due process to the regulated entity.

a. Applicable statutes.

RCW 80.04.470 provides that it is the Commission's duty to enforce the public service laws.

RCW 80.36.090 requires all telecommunications companies to provide service on demand to those persons and corporations reasonably entitled thereto.

RCW 80.36.140 requires a hearing before the Commission may determine just and reasonable rates or practices and order such in place of rates and practices by telecommunications companies the Commission determines to be unjust and unreasonable.

RCW 80.36.160 requires notice and hearing before the Commission has power to decide on the division of costs and revenues for jointly provided services. Nothing in 80.36.160 allows the Commission to order the severance of an existing connection between telecommunications companies.

RCW 80.36.186 forbids a telecommunications company providing noncompetitive service to, as to the pricing of such service, give itself any undue or unreasonable preference, and gives the

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commission primary jurisdiction to decide whether any rate, regulation or practice violates this section.

RCW 80.36.200 requires every telecommunications company operating in this state to receive, transmit and deliver, without discrimination or delay, the messages of any other telecommunications company.

RCW 80.36.300 declares state policy to ensure that the rates for noncompetitive services of telecommunications companies do not subsidize their competitive ventures. The section also declares policy to promote diversity in the supply of telecommunications services and products.

RCW 80.36.330(3) requires that prices or rates for competitive telecommunications services must cover their cost. The Commission is required to determine proper cost standards to implement this section.

RCW 80.36.510 is a legislative declaration that the provision of services necessary to nonresidential long distance without disclosing the services provided or the rate is a deceptive trade practice.

RCW 80.36.520 directs the Commission to require that any telecommunications company contracting with an AOS company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an AOS company.

RCW 80.36.522 requires AOS companies to register before serving. The section allows the Commission to deny registration if, after a hearing, it finds services and charges are not for the Public Convenience and Advantage.

RCW 80.36.524 allows the Commission to adopt rules for minimum service levels of AOS companies, providing for suspending registration of any company that fails to meet minimum service levels or to provide appropriate disclosure to consumers of protection under chapter 80.36 RCW.

b. <u>The proposed rules violate statutory restrictions.</u>

1. In proposed WAC 480-120-138(b)(4), the charge for each directory assistance call paid by the consumer is limited to the "prevailing per call charge for directory assistance." In the absence of "persuasive contrary evidence," the rule establishes a presumption that the charges of U S WEST Communications, Inc.

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(USWCI) for IntraLATA and AT&T for InterLATA calls, are the prevailing per call charges.[2] This rule, if adopted, would purport to fix rates charged by owners of pay telephones for directory assistance calls made from such telephones, without any hearing having been given the owners of such telephones pursuant to RCW 80.36.140. Such rate fixing by rule is simply beyond the Commission's statutory authority. The proposal clearly contravenes the intent of the enabling statute, that a hearing be held before rates are fixed. *American Network, supra*.[3]

The same proposed section also violates RCW 80.36.160. Directory assistance is a jointly provided service of several telecommunications companies, including according to the Commission's interpretation of the statute, private pay telephone providers, LECs and interexchange carriers. The proposed rules establish a specific overall revenue for each call, without considering the overall costs of the call in violation of RCW 80.36.160. Those overall costs include the charges the private pay telephone provider must pay to USWCI or AT&T which exceed the

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[2]The April 30, 1991 revisions expand the ban by precluding location surcharges on directory assistance. This change should be reissued for public comment. In the event that opportunity for comment is not provided, the change should not be adopted. It consists of a determination, in advance, that an entire class of charges is unjust and unreasonable, without a hearing having been provided. This determination also violates RCW 80.36.140.

[3]Proposed WAC 480-120-138(5)(b) is a clear rate setting provision. Owners of pay telephones are restrained from charging other than the rates quoted by the connecting AOS company. The connecting AOS company is restrained by proposed WAC 480-120-141(10)(c) - April 30, 1991 "revision" - against having a tariff in which rates vary at the option of a call aggregator.

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"prevailing rate" as defined in the proposed rule. The proposed section also violates RCW 80.36.160 in that it effectively divides the costs of the jointly provided service in a specific way, without having provided the hearing required by statute.

2. Proposed WAC 480-120-138(12) requires all pay telephones *except those of the LECs* to be connected to a public access line. Proposed WAC 480-120-138(18) requires such public access lines to be charged at rates according to the relevant approved tariff. Such public access lines are indubitably noncompetitive services provided by the LECs, within the meaning of RCW 80.36.186.

Public access lines lack some of the capabilities of the lines used by the LECs for their own proprietary pay telephones.[4] The public access line is not, vis a vis the private pay telephone provider, equal access to that enjoyed by the LEC for its own pay telephones. The LECs are not required to impute to the pricing of service provided via their own proprietary pay telephones, the cost of a public access line. The tariffed rate for a PAL is higher than the tariffed rate for a one party business line, although a one party business line provides all the technical capability

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[4]One of these capabilities is the connection to central office equipment that permits an operator to return coins. Some LECs promote their pay telephone service by pointing out that coins are always returned for incomplete calls, and comparing such service to non-LEC pay telephone service. Such advertising is an implicit acknowledgement that the competitive position of non-LEC pay telephone providers is inferior, because of the LECs' monopoly control over access lines and their refusal to provide equal quality access lines to the independent pay telephone operators.

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required by a private pay telephone.[5]

The proposed rules limit the retail charges of the dependent competitors of the LECs to charges for the LECS' local pay telephone service that were set sixteen years ago, without imputation of PAL rates.[6] See, Cause Nos. U-75-40, U-75-50. This combination of factors, namely requiring dependent competitors to be connected to a lower quality access line than the LECs' own pay telephones use, at a higher wholesale rate than the apparent cost of the LECs' own service,[7] and restricting the private competitors' retail charges to those of the LECs set sixteen years ago without any imputation of the bottleneck facility rate, gives the LECs an undue advantage resulting from their provision of the noncompetitive public access line, in violation of RCW 80.36.186. The Commission has completely failed to fulfill its statutory duty to determine whether such an advantage exists, before adopting

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[5]Excluding the functions that are possible only on a LEC's proprietary pay telephone line.

[6]Although there is absolutely no discussion in the proposed rules or the SBIS of the source of the twenty-five cent maximum charge to be imposed on the non-LEC pay telephone providers, that charge is equal to the statewide charge for sent paid local calling from a coin operated telephone, that was set in 1975. CSI is not aware of any other source for this number. Proposed new section WAC 480-120-xxx, in the April 30, 1991 "revisions," is a rate limit on pay telephone providers that are call aggregators, for local calls. No hearing has been held on whether twenty-five cents is reasonable for local calls.

[7]There is no evidence in the docket of the cost of the LECs' proprietary pay telephone lines; the tariffed 1FB rate represents a proxy for such cost in that it does not contain the discriminatory additur that is imposed only on pay telephone competitors of the LECs.

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rules that institutionalize the advantage. A similar violation of RCW 80.36.186 is found in the proposed WAC 480-120-138(9) which excuses LECs' pay telephones from the requirement imposed on the private pay telephone competitors, to be able to return coins to the caller in case of an uncompleted call, if the phone is coin operated.

The Commission acted quite differently on a similar subject when the interests of interexchange carriers were at stake. In Cause No. U-85-23, Eighteenth Supplemental Order, 80 PUR4th 80 (1987), the Commission determined that it was necessary to require the LECs to impute the tariffed charges for the bottleneck switched access facilities, into the pricing of their own retail toll line of business. Those bottleneck facilities included the access lines.

In U-85-23, the Commission characterized access charges and residual retail charges as division of revenues for jointly provided toll. It is equally true that the subject matter of the proposed rules includes the division of revenues for jointly provided service.

The Commission's failure to require imputation of PAL tariffed rates by the LECs in their pay telephone pricing, and its proposed restriction of non-LEC pay telephones' rates also would subject the dependent private pay telephone operators to an anticompetitive price squeeze. This price squeeze would violate RCW 80.36.330,

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which requires that competitive service prices cover cost.[8]

Private pay telephone operators must compete with the LECs, which pay site owners commissions of up to 30% of gross revenue generated by the pay telephone. In addition to paying competitive commissions, according to the proposed rules the private pay telephone operators must pay the LECs a discriminatory public access line charge. No such charge is imputed to the pricing of the services provided the public by the LECs. Because no separate accounting is required, the Commission has no way of knowing whether the fees the LECs now (since competition forced them to) pay site owners allow the LECs' pay telephones to cover their costs at current user rates.

The competitive pay telephone services provided by the LECs, including operator services and the convenience of having pay telephones at locations used by the traveling public, may well be effectively cross-subsidized by monopoly services of the LECs. Such a cross-subsidy would violate the procompetitive policy of RCW 80.36.300, which requires the Commission to promote diversity of supply of telecommunications services and products, and outlaws the

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[8]The Commission has not yet classified pay telephone service as competitive, and the Commission may therefore take the position that the provision of RCW 80.36.330 cited in the text does not apply. The provision of connection to long distance companies via a pay telephone is competitive, as defined in the statute. As a matter of common sense, equity and basic antitrust principles, the Commission should require that competitive services provided by the LECs including pay telephone services cover their costs. and it should acknowledge that the entire pendency of this rulemaking is because these services are competitive. See, legislative finding and declaration at RCW 80.36.510.

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cross subsidization of competitive ventures of regulated telecommunications companies, by their noncompetitive revenues. It is up to the Commission to guard against such cross-subsidies, yet the proposed rules exacerbate the problem, if it exists. No effort has been made by the Commission to determine if such cross-subsidies exist.

Another violation of RCW 80.36.300 appears in the proposed WAC 480-120-138(18) which purportedly delegates the governmental law enforcement power to the LECs and the AOS companies.[9] These companies as horizontal competitors of, as well as vertical suppliers to,[10] the private pay telephone providers, have a built-in conflict of interest in this function. This attempted delegation also clearly violates RCW 80.04.470, which provides that it is the *Commission's* duty to enforce the public service laws.

It is no answer to this charge to claim that the Commission has historically required the LECs to enforce their tariffs. No court of record has approved any such practice in the case of a disconnection of competitors for alleged regulatory violations as distinguished from a failure to pay for services rendered, in which

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[9] The April 30, 1991 proposed "revisions" distinguish between LECs and AOS companies as "phone police." AOS companies must refuse to serve aggregators after the *Commission* has found such aggregators to have "knowingly and repeatedly violated" the Commission's rules. The LECs can disconnect aggregators without any advance Commission determination that rules have been violated.

[10] Some AOS companies have vertically integrated into the retail pay telephone market, and are therefore horizontal competitors of their pay telephone customers. The same is obviously true of the LECs.

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the LECs were the accusers, without a prior hearing before a neutral decisionmaker. Also, the proposed rule requires the LECs and AOS companies to enforce matters in addition to their tariffs.

This requirement violates RCW 80.36.090's mandate to telecommunications companies to provide service on demand. The proposed rules set up the LECs as arbiters of who is "reasonably entitled" to service under RCW 80.36.090. The proposed delegation also violates RCW 80.36.140 which clearly declares that it is the *Commission's* duty, if it believes a telecommunications company's practices are unjust and unreasonable, to provide a hearing and after hearing, to make findings and fix just and reasonable practices by order. This procedure cannot lawfully be "shortcut" by a rule that requires a LEC to disconnect its competitor, subject to an after the fact appeal by the competitor to the Commission.

Placing the police power, associated with the nonjudicial remedy of disconnection, in the hands of LEC pay telephone providers will likely reduce the diversity of supply of pay telephone services in Washington, in violation of RCW 80.36.300. Disconnection by the LEC obviously cuts off the income the non-LEC pay telephone providers would use to finance their after-the-fact appeals to the Commission, as well as itself stimulating the premises owner to terminate the pay telephone provider's site contract due to nonperformance.

An ancient question is posed by this scheme: "Who guards those who guard?" If LEC-provided pay telephones are presubscribed to an AOS company because that is the site owner's choice, who insures

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that the LEC pay telephone is properly placarded?[11] Does the LEC enforce the placarding rule against itself, and take its own pay phone out of service if the condition is not corrected within five days of the receipt of written notice? Does the LEC write itself a notice? Does the LEC charge its own pay phone operation for the tariffed premises visit charge, if it investigates a complaint that the LEC pay phone is not properly placarded? What is the effect of such a charge? Is the LEC a "peace officer" entitled to arrest pay telephone operators for alleged violations of tariff or Commission rules? The remedy of disconnection is not set forth as a punishment for violation of a Commission rule in any statute. These conundra and illegal discriminations against non-LEC pay telephone providers are presented by this proposal.

3. The requirement in proposed WAC 480-120-138(10) that all pay telephones provide access to all interexchange carriers where such access is available, coupled with the restriction in proposed WAC 480-120-141(3)(f) against charging more than twenty-five cents for consumer access to local exchange, 1-800 or interexchange carrier service, is a specific division of revenues and costs from jointly provided service among two or more

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[11]CSI is informed, and believes, that the staff's interpretation is that not only must the non-LEC pay telephone provider submit to the dubious mercies of its competitors as "phone police" under the proposed rules, it must also pay these competitors the tariffed charges for premises visits if the LECs investigate complaints about non-LEC pay telephones. The April 30, 1991 "revisions" confirm this belief by proposing to codify at WAC 480-12-138(18), this discriminatory and anticompetitive provision.

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telecommunications companies.[12] No hearing has been provided by the Commission before ordering such division, as required by RCW 80.36.160.

Under the proposed division, the LECs are permitted to keep all of the access revenues they bill the interexchange carrier for the call, and the private pay telephone providers suffer all of the loss due to fraudulent calls to the 10XXX access codes. LECs are not unconditionally required to provide antifraud screening, under the proposed rules.[13] This is an additional undue preference in the provision of a noncompetitive service by the LECs, that also violates RCW 80.36.186. The SBIS completely ignores this significant cost. The rule's impact on small businesses, already staggering even by the staff's own admission, is greatly understated. The rules do not comply with the requirements of the Regulatory Fairness Act, chapter 19.85 RCW, to minimize or mitigate discriminatory impacts on small business.

4. The proposed WAC 480-120-141 first subsection (10) and second subsection (10) [sic] illegally attempt to regulate the rates charged by pay telephone providers without following the

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[12]The April 11, 1991 proposed "revisions" would apparently permit location surcharges, as long as the amount of the surcharge did not vary according to the option of the call aggregator. This change would in theory meet the objection that the rules accomplish a specific division of revenue without a hearing having been provided.

[13]The April 30, 1991 proposed "revisions" provide for allocating fraud losses, only where the originating line is subscribed to outgoing or incoming call screening. The requirement to provide access to all carriers is not conditioned on the availability of such screening.

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procedure set out in RCW 80.36.140. Instead of filing its complaint and providing a hearing to the pay telephone provider on the justness and reasonableness of its charges, the Commission proposes by rule to regulate the amount *billed* by the entity hired by the pay telephone company to provide billing services, attributable to the pay telephone provider's charge to the customer.

The "safety valve" in the proposed rule, for a demonstration by the AOS company that a greater amount than the "prevailing rate" is just and reasonable, is insufficient to remedy the Commission's lack of power to make rates for one company by regulating another company. The proposed "safety valve" is also illusory because the entity hired to provide billing services, will have no standing to litigate the reasonableness of the charges of the private pay telephone provider to the customer.[14]

The "safety valve" proposal also illegally reverses the burden of proof in such a theoretical rate case. Before the "prevailing rates" may legally be used as the basis of comparison, *they* must be proven just and reasonable for the services provided. *State ex rel. Model Water & Light Co. v. Dept. of Pub. Ser.,* 199 Wash. 24 (1939); *State ex rel. Puget Sound Power & Light Co. v. Dept. of*

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[14]The April 30, 1991 proposed "revisions" insert a new concept into the rate restriction in proposed WAC 480-120-141(11): the relevant market. No definition of this term appears in the proposed rules. It is unclear whether the rules contemplate an analysis of the relevant market before a provider's rates are deemed limited to those of USWCI or AT&T without a demonstration of need for higher rates to meet the statutory requirements of just and reasonable rates.

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Public Works, 181 Wash. 105 (1935).

As discussed above, there is no ground to believe *a priori* that the prevailing rates, rebuttably presumed by the proposed rules to be USWCI's and AT&T's rates, are reasonable for the services provided. It is also clear that there is ground to believe *a priori* that such rates are unreasonably low, even for the entities in whose tariffs or price lists they appear. The Commission may not lawfully use such rates as the basis of comparison, and place the burden on the proponent of higher rates, to prove rates higher than "prevailing" are just and reasonable.

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c. <u>There is no authority for the rules in Chapter 91, Laws of 1988 or Chapter 247, Laws of 1990.</u>

At its open public meeting September 11, 1990, the Commission responded to industry oral comments seeking moderation of the timing or impact of the proposed rules, by citing Chapter 247, Laws of 1990 as an expression of a legislative "mandate" for the proposed rules. Nothing in that statute purports to authorize the ratemaking by rule that is proposed in this rulemaking. Nothing in that statute or in Chapter 91, Laws of 1988, codified as RCW 80.36.510 through RCW 80.36.524, purports to allow the Commission to delegate the police power or to regulate the rates charged by pay telephone providers by regulating the amounts billed on behalf of such providers by AOS companies.

RCW 80.36.522 authorizes the Commission to consider, in determining whether to allow registration of an AOS company,

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whether its services and charges are for the "public convenience or advantage." This term is not defined. The Commission has historically eschewed determinations of the reasonableness of rates in making decisions on entry, because rates are otherwise required to be just and reasonable. But even assuming that the charges of the *AOS company* for *its services* may be considered in such a registration proceeding, nothing in that legislation authorizes the Commission to, as the rules propose, forbid the AOS company to charge on behalf of a pay telephone provider, an amount greater than a figure set in the Commission's rules without the provision of notice or hearing to the pay telephone provider.

d. <u>The rules discriminate against small business.</u>

According to the SBIS, the proposed rules discriminate against small business. The estimated impact per $100 of sales is vastly greater on small than on larger businesses. Under RCW 19.85.030(1), the Commission is required to reduce the discriminatory impact of the proposed rules on small business. The proposed rules fail to mitigate or minimize their crushing impact on small business identified in the SBIS, which as discussed above, is understated. This failure renders the rules invalid.

e. <u>The rules are unconstitutionally vague.</u>

1. The rules do not allow a consistent classification between "alternate operator services companies" and "call aggregators." The proposed WAC 480-120-121 definition defines "Alternate operator services company" (hereinafter "AOS company") in terms of the function of providing a connection to intrastate or

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interstate long distance or to local services from locations of call aggregators. Depending on the definition of "call aggregator," the set of entities included in the AOS company classification may or may not include pay telephone operators.[15]

"Call aggregator" is defined as "a person (that term is not defined in the rule) who in the ordinary course of its operations makes telephones available for intrastate service to the public or to users of its premises, *including but not limited to hotels, motels, hospitals, campuses, and pay telephones*." [emphasis added.] This definition is ambiguous when read with the definition of AOS company because: (1) it is unclear how a "person" can *be* a pay telephone; (2) the definition assumes a call aggregator has "premises" (which would exclude pay telephone operators) but it includes pay telephones in the class of named call aggregator entities. If call aggregators are limited to those entities that have "premises" at which telephones are made available, pay telephone operators are not included, and they would therefore be defined as AOS companies, but otherwise pay telephone operators may be call aggregators and not AOS companies.

CSI is informed, and believes, pursuant to discussions with the Commission's staff, that the staff has adopted informal interpretations of these definitions that should be made part of the proposed rule and be subject to notice and comment pursuant to the Administrative Procedure Act. The APA encourages, and the

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[15]The April 30, 1991 proposed "revisions" do not eliminate this ambiguity.

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Public Records Law requires, that any substantive interpretation of general applicability be adopted in a rule. RCW 34.05.220(4); RCW 42.17.250(1)(d); RCW 42.17.250(2). The staff's interpretation demonstrates the ambiguity of the proposed definition.

CSI is informed, and believes, that the staff's "bright line" of demarcation between an AOS company and a call aggregator that is a pay telephone operator, is the existence or nonexistence of "store and forward" technology in the pay telephone. This characteristic is not mentioned in the rule, and the SBIS refers obliquely to the issue but it does not distinguish between call aggregators and AOS companies on this point.[16]

2. Proposed WAC 480-120-141(4)(a)(ii)'s declaration that it is a violation of the Commission's rules to charge more than the prevailing rate on an instrument placarded pursuant to that section, fails adequately to inform a reasonable person of the prohibited conduct.[17] The proposed rule provides "In the absence of a determination by the Commission as to the prevailing rates, the rates at which service is offered by USWCI for intraLATA service and AT&T for interLATA service will be accepted as the prevailing rates."

There is no indication of when or how the Commission intends to make such a determination, in order to permit a pay telephone

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[16]The April 30, 1991 proposed "revisions" add a definition of "operator services" to proposed WAC 480-120-021, but the definition does not eliminate the ambiguity discussed above.

[17]This provision was eliminated by the April 30, 1991 proposed "revisions."

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operator to inform itself as to the maximum rate that may be charged *before charging the customer,* without violating the Commission's rules. Violation of the Commission's rules by an officer, agent or employee of a public service company is a crime, and subjects a such a person to arrest. RCW 80.04.385, RCW 80.04.470. The rule does not permit a reasonable person to know, in advance of acting, whether the rate, if it exceeds the USWCI or AT&T rate, is ground for a criminal charge.

The proposed rule, in the absence of the contemplated Commission determination of the factual question of what rate prevails, also purports to subject pay telephone operators to a conclusive presumption on a factual issue supporting a potential criminal charge. The "prevailing rates" are conclusively presumed to be the subsidized rates of the pay telephone operator's competitors, USWCI and AT&T. This is an unconstitutional denial of the right to a trial by jury in a criminal case guaranteed by the Sixth Amendment to the United States Constitution and Art. I, §22, Washington Constitution. *State v. Price,* 59 Wn.2d 788, 370 P.2d 979 (1962).

f. <u>The rules are preempted by provisions of the Communications Act of 1934.</u>

Proposed WAC 480-120-138(18) purports to subject private pay telephone operators' telephones to disconnection at the hands of the LEC, if the LEC in its sole discretion determines that the pay telephone is being operated in violation of the tariff, commission rules pertaining to pay telephone service or other requirements

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contained in these rules, including *inter alia,* the restrictions on charges to consumers for intrastate directory assistance and telecommunications service. Such disconnection would also have the effect of disconnecting the private pay telephone operator's telephone from its access to interstate telecommunications.

The state's asserted power through tariffs or rules to require complete disconnection of customer premises equipment providing access to interstate telecommunications for acts by a pay telephone provider that purportedly violate state law but are not in violation of any federal law or F.C.C. regulation, is preempted by the Supremacy Clause. In *North Carolina Utilities Comm. v. F.C.C.,* 552 F.2d 1036 (4th Cir. 1977), the court held that states lacked power to deny interconnection of terminal equipment that met an F.C.C. registration requirement, pursuant to state tariffs or rules banning interconnection of non-carrier provided equipment except under tariffed connecting arrangements. The court held that the state retained its ratemaking authority, but that the state could not cut off access to interstate communications through banning interconnection of equipment that was used to make both interstate and intrastate calls.

47 U.S.C. §201 requires every common carrier telephone company to provide interstate service on reasonable demand. No state law can deprive pay telephone operators of rights to interstate telecommunications services secured to them by the Communications Act of 1934.

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The proposed rules' prohibitions against charging more than the prevailing rate for directory assistance or more than twenty-five cents above the prevailing rate for any access to interexchange communications, have no counterparts in federal law.[18] In P.L. 101-435, 104 Stat. 986 (1990), to be codified at 47 U.S.C. §226, Congress directed the F.C.C. to adopt rules to implement the Telephone Operator Consumer Services Improvement Act of 1990. Nothing in the Act, or in the implementing rules adopted April 9, 1991 by the F.C.C., restricts the rates to be charged by pay telephone operators to the extent contemplated by the proposed WUTC rules. The only restraint in the federal rules on call aggregators' rates is that a call aggregator may not charge a higher rate to a consumer for a call made via an "800" or "950" access code, than is charged for a call handled by the presubscribed AOS company. 47 CFR §64.705(5)(b). The proposed rules are invalid due to preemption under the Supremacy Clause because they condition the connection of terminal equipment to the interstate network on compliance with state rate policies. *North Carolina Util. Comm., supra.*

g. <u>The proposed rules unconstitutionally delegate the police power to private entities.</u>

In addition to the violation of Washington statutory law discussed above, the purported delegation of the law enforcement power to private profit making companies that compete with pay

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[18]The latter prohibition was eliminated by the proposed "revisions" of April 30, 1991.

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telephone providers subject to the police power in WAC 480-120-138(18) and WAC 480-120-141(2), violates the due process guarantees of both the Washington and United States constitutions. In *Eubank v. Richmond,* 226 U.S. 137, 57 L.Ed. 156, 33 S.Ct. 76 (1912), the court declared unconstitutional an ordinance that permitted neighboring property owners to control the setback requirements for building on a lot. The court held:

> ..there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power. 57 L.Ed. at p. 159.

To the same effect, and relying on *Eubank,* is *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928).

The proposed rule clearly contains the vice identified by the Supreme Court in *Eubank* and *Roberge*. Other owners of property, namely the LECs and the AOS companies, are permitted to control pay telephone operators' use of their property. See also, *State ex rel. Kirshner v. Urquhart,* 50 Wn. 2d 131, 310 P.2d 261 (1957); *Wagner v. Milwaukee,* 177 Wis. 410, 188 N.W. 487 (1922).

The provision in the proposed rule is more pernicious than those in the cited cases, because here the competitors of the private pay telephone operators are given the unilateral power to exercise the nonjudicial remedy of disconnection before a hearing. No prior review of the truth of any claims of violations by pay telephone operators, is required by a neutral decisionmaker, before the LECs are given the power, under color of state law, to put

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their competitors out of business.[19] The right to operate a lawful business is a property right.

As discussed above, once the public access line is disconnected, the site owner will be impelled to declare the pay telephone provider in breach of its contract, and secure another operator, which would probably be the LEC.[20] Even if the pay telephone operator ultimately prevails in the after-the-fact hearing, after incurring the cost to appeal its disconnection by its competitor, the victory will probably be Pyhrric.[21] Under these circumstances, the provision of a subsequent hearing pursuant

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[19]A similar denial of due process is in the state-authorized confiscation by the AOS company, of all compensation, including that required by the pay telephone operator to cover out of pocket expenses generated by public use of its property, upon the AOS company's "reasonable belief" that the pay telephone operator is violating the Commission's rules. The post-confiscation appeal does not cure this defect in the rule because only reasonable belief, not actual violation of law, isrequired by the rule to justify the taking. This confiscation also violates the proscription in Art. I, §16, Washington Constitution, against the taking of private property for private use. The confiscation is also contrary to the purpose of the statute, assuming that an aggregator had violated the Commission's rules. The AOS company that may have carried many calls originated at the location if a pay telephone operator blocks access to "800" or "950" access codes, is unjustly enriched. The consumer, is supposed to benefit from the statute, receives nothing.

[20]Immune from the nonjudicial remedy of disconnection of its own service for alleged but unproven violations, the LEC will have a powerful marketing advantage after disconnecting its competitor.

[21]The defending LEC would be permitted, under the Commission's failure to require separate accounting for the competitive pay telephone line of business in the proposed rules, to charge the cost of defending its actions before the Commission on the complaint of an injured competitor, "above the line." The monopoly residual ratepayers will therefore bear these costs, while the stockholders of the competitive pay telephone provider must finance the appeal from the unilateral disconnection, under the rules.

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to the APA does not meet due process requirements.

It is often said that "hard cases make bad law." In this case, the Commission is apparently considering the creation of some extremely bad law, in response to consumer complaints. These complaints have not been shared by the Commission with the pay telephone providers, other than the fewer than one dozen written comments in the rulemaking docket file submitted by persons describing themselves as users of pay telephone services.

The staff's contention that telecommunications companies have historically been required by the Commission to enforce their tariffs, does not vindicate the Commission's authority to adopt the proposed rules delegating the police power to private companies. No court of record has considered the issue of the authority for the historical practice.

In fact, the historical role of the tariff is that of a proposal by the regulated monopolist, which proposal is considered by the Commission in its exercise of legal responsibility to balance the interests of investor and ratepayer. The investors involved in this balancing are those of the *tariff-filing utility*. The effective tariff is considered to reflect that balance. Obviously, the interests of non-LEC pay telephone providers' investors are not reflected in the tariff the Commission proposes in these rules to require a LEC or an AOS company to file.

In *W. W. Cole, supra,* the court held that the Commission had no jurisdiction to consider impacts of proposed tariff revisions on unregulated competitors of a gas distribution company. Whether

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that decision would be reaffirmed today in the telecommunications field, after significant legislative change, is open to question. But it is clear that the role of the tariff as an instrument of state policy to manipulate the competitive marketplace through the mechanism of the monopoly utility's tariffs regulating disconnection of service to the utility's competitors, is of recent, rather than ancient, vintage.

There is no precedent for the proposed delegation of the police power in the historic doctrine that the tariff is incorporated into the implied contract between the ratepayer and the utility. It is correct to say that the public utility lacks the power to deviate from its tariff; that is not the same as saying that the public utility is responsible to enforce the tariff, or to enforce Commission rules and requirements that are not in the tariff. In any case, the paradigm of the utility-ratepayer tariff enforcement model has little applicability to jointly provided service by more than one telecommunications company where the companies are competitors, which is the subject of the proposed rules.

g. <u>The rules operate to deny private pay telephone operators the equal protection of the laws.</u>

Under *Myrick, supra,* pursuant to the "minimum scrutiny" analysis, in order to prevail under the Equal Protection Clause, an opponent of the rules must show that the rules do not operate alike on all members of the class, that there is no reasonable basis to distinguish between those in and those out of the class, and the

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basis of distinction does not reasonably relate to the purpose of the legislation.

RCW 80.36.090 requires every telecommunications company to provide service on demand to those reasonably entitled to such service. RCW 80.36.200 requires every telecommunications company to receive, transmit and deliver the messages of other telecommunications companies without delay or discrimination. The Commission's jurisdictional basis for purporting to regulate rates and services of pay telephone providers is apparently that they are "telecommunications companies" as defined in RCW 80.04.010.

The proposed rules create a subclass of telecommunications companies and subject that subclass to different treatment than is accorded other subclasses. The proposed rules single out non-LEC pay telephone operators as one type of pay telephone telecommunications company and direct connecting telecommunications companies, namely the LECs, to disconnect service to individual members of that class, upon the unilateral determination by the LEC that the pay telephone operator has violated a Commission rule and has not corrected the condition. The rule does not apply alike to all members of the class because the LECs' pay telephone operations are exempt.

The LECs are not, on the other hand, required to disconnect other connecting telecommunications companies such as interexchange carriers or other LECs with whom they interchange traffic, when they unilaterally determine that such companies have violated a Commission rule or tariff provision.

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The rules also single out non-LEC pay telephone operators as a subclass and require that they inform their customers that their charges for services may be higher than "normal." The LECs are not required under the rules to advise their own local exchange customers that the LECs' own rates for basic residential or business service may be "higher than normal." Rates for identical local exchange service vary among the LECs, and even in some areas among exchanges for the same LEC. If the state is to define "normal" telecommunications rates as USWCI's and AT&T's rates and require that consumers be warned if they are going to pay higher than "normal" rates, there is no reasonable basis to single out those providers who serve in a nonresidential setting, to be subject to this requirement.

h. <u>The proposed rules confiscate the property of pay telephone operators in violation of the constitutional guarantee to substantive due process of law.</u>

The proposed rules contain an absolute ban on independent pay telephone providers' charging more for directory assistance than whatever is determined to be "the prevailing rate," and presume such rate to be USWCI's for intraLATA calling and AT&T's for interLATA calling in the absence of "persuasive contrary evidence." On its face, this rate setting is confiscatory because the independent pay telephone providers must pay USWCI and AT&T more than those companies' retail charges, for DA the independent pay telephone providers resell. This is because US WEST and AT&T charge the independents for billing and processing customer records associated with the call, as well as simply the charge for the DA

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information.

The proposed rules also confiscate pay telephone providers' property by requiring that each instrument provide access to all interexchange carriers, including those such as AT&T, that are reachable only by 10XXX codes in equal access end offices. The confiscation occurs because there is a certainty that without LEC-provided protection against fraud, the pay telephone operators will be required to pay for service obtained by those who know how and are willing to defraud them by using 10XXX access codes.

No deference will be accorded the Commission's determination on rate matters in the rule, when the rules are reviewed in court. The Commission has made no findings on the fair rate of return for pay telephone providers, or the amount of capital properly invested on which the return should be earned.

i. <u>The proposed rules set rates without providing procedural due process of law, and create a procedure that will result in additional such illegal rate settings.</u>

Under *Morgan v. United States, supra,* the Commission may not lawfully set rate limits without, at a minimum, giving notice to the regulated company of the government's claims, the evidence supporting the claims and an opportunity to test those claims by submitting rebuttal evidence and argument before the decision is made. The proposed rules set rate limits for directory assistance calls made from a private pay telephone.[22] No hearing has been

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[22]The only determination left for the Commission under the proposed rules for directory assistance charges is what in fact is the prevailing rate. Given the market dominance of USWCI and AT&T, that inquiry's result is a foregone conclusion.

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held, and no disclosure of the claims of the government has been made, and no provision of an opportunity to respond with rebuttal evidence has been given. This procedure violates the requirements of the Fourteenth Amendment.

In addition, the rules create a process by which the rates of pay telephone providers will be regulated indirectly, through the mechanism of limiting the charges that may be *billed* by AOS companies that are hired by private pay telephone operators. No provision is made in the rules for the giving of notice and an opportunity to respond to the pay telephone operators, before such orders may be issued. This procedure also violates the Fourteenth Amendment.

j. The proposed rules compel argumentative speech by pay telephone providers, in violation of the First Amendment.

The proposed rules in WAC 480-120-141(4)(a)(i) compel pay telephone operators at whose instruments charges will be made that exceed those of USWCI and AT&T[23], to post statements of a specified size and style of type, that the charges at the instrument may be higher than "normal." Such a statement is not a disclosure of rate information as is required by RCW 80.36.510. Instead, it is a required statement of an argumentative proposition. CSI does not agree that the charging of cost-based rates, even if those are higher than competitors' potentially cross-subsidized rates, is the charging of "higher than normal" rates.

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[23]The April 30, 1991 "revisions" broaden this requirement to apply to all pay telephones presubscribed to an AOS company.

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CSI's rights under the First Amendment are violated by the requirement to make an argumentative statement with which CSI disagrees. In *Pacific Gas & Electric Co. v. PUC,* 475 U.S. 1, 89 L.Ed.2d 1, 106 S.Ct. 903 (1986), the Supreme Court overturned as offensive to the First Amendment, a California PUC order that would have required a utility to include in its billing envelopes, the written messages of a third party. The court held that "The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees." [emphasis the court's] 89 L.Ed. 2d at p. 12. The court held that the requirement was not narrowly tailored to meet compelling state interests, and was not a permissible content-neutral time, place and manner regulation.

The requirement in the proposed rules to advocate a position with which pay telephone providers disagree is also prohibited restraint of protected speech, in the compulsion of argumentative speech with which the speaker disagrees. The requirement is not narrowly tailored to meet compelling state interests. While the state may have a compelling interest in disclosure of rate information, the required statement is not narrowly tailored to meet that interest. The Commission could eliminate this violation of the First Amendment by requiring that the statement say "Rates at this instrument may be higher than the rates charged by USWCI or AT&T, although no determination has been made by the WUTC that USWCI's and AT&T's rates are just and reasonable for the service provided at this instrument."

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The required statement is not content-neutral. A specific point of view that rates are "higher than normal" is not content-neutral. The regulation is not therefore a permissible time, place and manner regulation.

2. CSI Pay Telephone Investors Limited Partnership's interests are directly and adversely affected by the proposed rules.

CSI's interests are directly and adversely affected by the proposed rules. CSI intends to seek immediate judicial review if the proposed rules are adopted. CSI's interests are within the zone protected by the statutes and constitutional provisions previously cited. If the rules are adopted, CSI will be at imminent risk of being put out of business by the unilateral acts of its competitors, acting under color of state law. Such direct impact and imminent threat of further impact gives CSI the interest required for judicial review. CSI respectfully submits that the proposed rules are invalid, and that the Commission should not adopt them.

CONCLUSION

CSI participated in the Commission's industry meetings, and has prepared its comments from a strong concern that the Commission is considering an illegal course of rulemaking. Significant terms in the rules are ambiguous. Illegal ratemaking by rule is the centerpiece of the proposed rules. Unlawful delegation of the police power is proposed, without any reason being given. Discriminatory burdens are put on competitors of the LECs. As an independent agency, the Commission has a duty to adopt rules that

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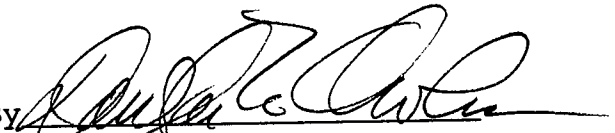
comply with statutory and constitutional restrictions.

CSI does not denigrate the sincerity of those who believe change is required in the regulatory framework of services that involve connection to long distance companies in a nonresidential setting. The Legislature has required disclosure of rates and identity of providers. The proposed rules vastly exceed those disclosure requirements, they violate statutory restrictions and constitutional guarantees and they should not be adopted.

DATED this second day of May, 1991.

Respectfully submitted,

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By 
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