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333 BUSH STREET
SAN FRANCISCO, CALIFORNIA 94104-2878
FACSIMILE (415) 772-6268
TELEPHONE (415) 772-6000

555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071-2306
FACSIMILE (213) 614-1868
TELEPHONE (213) 689-0200

3505 FIRST INTERSTATE BANK TOWER - 1300 S. W. FIFTH AVENUE
PORTLAND, OREGON 97201-5696
TELEPHONE (503) 227-7400 · FACSIMILE (503) 241-0950

525 UNIVERSITY AVENUE
PALO ALTO, CALIFORNIA 94301-1908
FACSIMILE (415) 324-0638
TELEPHONE (415) 328-7600

701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104-7098
FACSIMILE (206) 447-0849
TELEPHONE (206) 447-0900

MICHAEL C. DOTTEN, P. C.
PARTNER

October 18, 1990

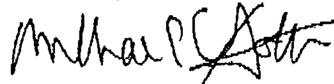
The Office of the Secretary
Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive, S.W.
Olympia, Washington 98504

Re: Docket No. UT-900726

Dear Sir or Madam:

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

Very truly yours,



Michael C. Dotten

Enclosure

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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. The Proposed Rules Would Unconstitutionally Impair Contract Obligations

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. See Ruano v. Spellman, 81 Wash.2d 20, 505 P.2d 447 (1973)

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[5] The contracts clauses of the United States and Washington Constitutions have substantially the same effect. Ruano v. Spellman, 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. Access to Alternative Long Distance Carriers

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.

<u>WAC 480-120-141(4)(e)</u>

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.

<u>WAC 480-120-141(5)(d)</u>

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

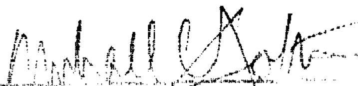
Fone America agrees with the Commission's apparent attempt to ensure that consumers are given the opportunity to know with whom they are transacting business, the option to choose an alternative, and the ability to exercise their choice prior to incurring charges. The Commission must take care in this 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 [illegible] 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,

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



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

Of Attorneys for Fone America, Inc.

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