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STATE OF WASH.
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COMMISSION

Mr. Paul Curl
Acting Secretary
Washington Utilities
and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Chandler Plaza Building
Olympia, Washington 98504

Subject: Proposed Rules Relating to Alternate Operators, Pay Telephones and Form of Bills Docket No. UT-900726

Dear Mr. Curl:

On behalf of the Northwest Payphone Association, enclosed are the original and nineteen copies of its initial written comments in the above-designated rulemaking proceeding.

Very truly yours,

Clyde H. MacIver

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Adoption of WAC 480-120-021, -106, -138, and -141	Docket No. UT-900726 INITIAL COMMENTS OF THE NORTHWEST PAYPHONE ASSOCIATION

I.

INTRODUCTION

The Northwest Payphone Association (NWPA) submits the following opening comments on the proposed amendments to WAC 480-120-021, -106, -138, and -141 relating to alternate operator services, pay telephones, and form of bills.

NWPA is an association of approximately 30 businesses engaged in the provision of privately owned pay telephones which are available for use by members of the public. There are approximately 50 privately owned pay telephone companies doing business in Washington state which provide in excess of 4,000 pay telephones to the public within the state of Washington.

While the NWPA is not representing the specific interests of alternate operator services (AOS) in this

rulemaking proceeding, comments on certain portions of the proposed rules relating to AOS providers are offered because they would have both economic and operational impacts on private payphone operators. It is the understanding of the NWPA that AOS providers will be independently addressing the proposed rules.

Neither the NWPA nor any individual private payphone prover was, to the knowledge of the NWPA, involved or consulted in the drafting of the proposed amendments. In light of the importance of these rules and their potential substantial impacts on aggregators (private payphones), this is unfortunate. A reading of the proposed rules suggests that there are numerous portions of the rules which could well have been drafted differently given a clearer understanding of the industries involved and the conditions under which they currently operate and interrelate.

Despite the fact that time is now very limited under the present schedule in this rulemaking proceeding, it is the hope of NWPA that through written and oral comments and, hopefully, the opportunity for informal meetings with the Commission's staff, information can be exchanged which will result in procedures and rules which are fair and appropriate for the payphone and AOS providers and consumers.

NWPA wants to make clear at the outset that private payphone providers do not want to take advantage of consumers of payphone services and will work with the Commission to

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eliminate charges and practices which are shown to unfairly or inappropriately disadvantage consumers. At the same time, private payphone providers, if their services are to remain available to the public, must be able to recover their operating costs and realize a reasonable return on their investments.

Even without the severe economic and operational impacts which the proposed rules would impose, it is very difficult for private payphone providers to achieve economic viability given the circumstances under which they presently operate. Examples of conditions which currently confront the providers of private payphones and which mandate their reliance on AOS providers include, but are not limited to, the following:

1. Local exchange company (LEC) public access line charges currently absorb from 40-60% of private payphone revenues. Competing LEC payphones, however, are exempted from public access line charges and, in addition, are subsidized by revenues generated from other LEC telecommunication services;

2. It is currently possible to make <u>all</u> credit card calls, including local, intralata and interlata calls, from private payphones with no revenue going to the private payphone provider;

3. Other common carriers (OCC) have historically provided no or very nominal sharing of credit card revenues to the private payphone operator;

4. U. S. West refuses operator services to private payphone customers, unless it is a U. S. West credit card call (in which event U. S. West retains all the revenue from the call), thus forcing the private payphone provider to contract with an AOS; and

5. Due to the opportunity to subsidize their payphones with other revenue sources, LECs can and do offer location owners a substantial percentage of their payphone gross revenues, including a percent of long distance revenues the LEC receives from the OCC, to induce the location owner to accept the LEC payphone instead of a privately owned payphone. The same LEC will refuse, however, to share revenues with private payphone providers.

Public access line charges, the absence of any reimbursement or sharing of local or intralata credit card or operator assisted call revenues by LECs with private payphones,

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and USWC's refusal to provide operator services to private payphones, constitute only some of the competitive hammers used by LECs to promote their subsidized payphones and which make reliance on AOS providers essential to the economic survival of the private payphone provider.

Given (1) the very difficult and, indeed, unfair environment in which private payphones must now operate and compete with payphones of local exchange companies and (2) the fact that the operating costs and revenue opportunities of private payphones are not comparable to the competing LEC payphones, it is submitted that the Commission should not, in the context of a rulemaking proceeding, attempt to set noncompensatory rates for and impose other requirements upon private payphones which cannot be met, without the benefit of a proper fact-finding proceeding.

As initially stated, private payphone providers are not in favor of consumer abuses whether they be in the form of excessive surcharges, inadequate information, inability to access an OCC, or in any other form. It is essential, however, to develop all relevant facts, in an appropriate and fair proceeding, relative to LECs, private payphones, and AOS providers before adopting many of the proposed amendatory rules.

II.

DISCUSSION

1. The Commission may not set rates in a rulemaking proceeding; proposed ratemaking, including the requirement of parity of rates charged by AOS providers and aggregators with those of USWC and/or AT&T, must be made in a ratemaking adjudicative proceeding on the basis of a full record.

Several provisions of the proposed rule amendments are designed to set rates, directly and/or indirectly, for the services of AOS and private payphone providers. Ratemaking is not included within the Commission's rulemaking authority. The Commission's notice of this rulemaking proceeding, in light of its ratemaking impacts, is incomplete and inadequate.

The provisions of the proposed rules which set rates include:

1.	WAC 480-120-138(4):	Directory assistance rates limited to prevailing per call charges of USWC and AT&T for intralata and interlata directory assistance.
2.	WAC 480-120-138(12) and WAC 480-120-141(4)(a), (c), and (d):	Requires without-charge access to all available inter-exchange carriers and to 1-800 numbers; Prohibits a surcharge for any operator, toll or local service above tariffed rates for service.
3.	WAC 480-120-141(5)(e):	Requires, without charge, re-origination of calls to another carrier.
4.	WAC 480-120-141(9)(a) and (b):	Defines "public convenience and advantage" (1) for minimum service standards (entry requirements) by referral to a service which equals or

exceeds the services of USWC and AT&T for intralata and interlata service and (2) for "charges" as the prevailing charges for USWC and AT&T for intralata and interlata service.

5.	WAC 480-120-141(9)(c):	Limits charges to consumers for any commission, location fee or surcharge and charges of any kind to a customer for the benefit of a call aggregator to 25 cents for any sent-paid call or non sent-paid call and provides that no tariff may provide for rates which vary at the option of a customer-aggregator.
7.	WAC 480-120-141(10):	Provides that rates for AOS providers shall not exceed "prevailing rates" which are defined as the rates of USWC and AT&T for intralata and interlata service.

(A). <u>Rates cannot be set in a rulemaking proceeding</u>.

The Commission's ratemaking power arises under RCW 80.36.140 which permits the Commission to order changes in rates or practices only after a hearing and upon findings that existing rates or practices are unjust or unreasonable. The hearing contemplated by the statute must be a fair hearing, preceded by an appropriate notice, which accords an opportunity to be heard by all effected parties, i.e., due process.

A two-step procedure which involves (1) the setting of rates in a rulemaking proceeding (which does not include an

adjudicative proceeding and the findings of fact mandated by RCW 80.36.140) and, thereafter, (2) instituting a second proceeding to eliminate or change rates existing prior to the adoption of the rule on the basis that such rates are higher or different than the rates set in the rulemaking proceeding and are therefore unjust or unreasonable, would be unlawful. Such a two-step procedure would not provide the required hearing on whether the specific rates which existed before the rulemaking proceeding or the specific rates which are set in the rulemaking proceeding are fair, just and reasonable. Absent a fact finding proceeding, the Commission has no basis upon which to determine the reasonableness or unreasonableness of the rates which are the target of this rulemaking proceeding.

The proposed rules, therefore, to the extent they set rates, are beyond the Commission's authority in this proceeding. Likewise, any subsequent complaint proceeding which would challenge pre-existing rates on the basis of rates improperly set in this rulemaking proceeding, would be improper.

An essential part of any inquiry into whether rates are fair, just and reasonable includes an inquiry into the costs incurred by the entity providing service, including the costs of capital. Otherwise, the proceeding would be a "farce". Mississippi R. Fuel Gas v. Federal Power Comm., 163 F.2d 433 (Cir. Ninth) (1947). This Commission has to date conducted no inquiry into the cost of providing the various services for which it proposes to set rates in this rulemaking

proceeding. Any provisions in the proposed rules, including those described above, which would have the effect of setting rate levels for services would therefore be vulnerable to challenge as being in excess of the Commission's rulemaking authority.

(B). Setting rates for AOS providers and aggregators at "prevailing rates" of USWC and AT&T improperly reverses burden of proof.

Several of the above-cited amendatory sections are designed to set rates for AOS providers and aggregators at the prevailing charges of USWC and AT&T "in the absence of persuasive contrary evidence". Not only is this standard ambiguous, it has the effect of imposing a burden of proof on AOS providers and aggregators to demonstrate that the rate levels of USWC and AT&T are not fair, just and reasonable. Not being privy to all of the cost information and other facts relevant to the issue of the reasonableness of USWC and AT&T rates, AOS providers and aggregators could not and should not be required to meet this reversed burden in a rate case.

In a rate proceeding, it is proper to require AOS providers and aggregators to establish that their rates are fair, just and reasonable in the context of relevant costs, operating conditions, etc. It would not be reasonable or proper, however, to require these entities to establish that the rates and charges of USWC and/or AT&T are not fair, just and reasonable as a reverse method of justifying rates for their respective services. In addition, rates that are fair,

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just and reasonable for one entity may not be fair, just and reasonable for another entity.

(C). The ratemaking provisions of the proposed rules render the economic impact analysis of the Small Business Impact Statement inadequate.

The SBIS fails to properly evaluate the ratemaking impacts of the proposed rules. For example, the proposed 25-cent surcharge limit in the rule will have the effect of forcing independent providers of directory assistance calls to subsidize callers who charge such calls on a credit card. LECs charge independent providers 54 cents for billing each directory assistance call placed on a credit card. Thus the caller will be subsidized by the independent provider in the amount of 29 cents per call. The SBIS did not measure or consider this economic impact.

In addition, the SBIS incorrectly measures the total economic impact of the rules ratemaking proposal to limit location surcharges to 25 cents. For example, paragraph 5 of the SBIS estimates that the 25-cent limit on surcharges will reduce revenues by an average of 50 cents per call. The SBIS assumes a total calling volume of approximately 1,140,000 calls.(SBIS, para 5; Summary, para 5.) At a lost revenue of 50 cents per call, this amounts to $507,000.00 in total lost revenues as contrasted to the $216,306.00 lost revenue impact set forth in SBIS summary, paragraph 5.

(D). The ratemaking provisions of the proposed rules would violate the Washington Constitution.

The state constitution prohibits the establishment of monopolies. Art. XII, Section 32. The Commission's

authorizing legislation includes a legislative declaration of policy of the state to (1) ensure that rates for noncompetitive telecommunication services do not subsidize the competitive ventures of regulated telecommunications companies and (2) promote diversity in the supply of telecommunication services and products throughout the state. RCW 80.36.300. By arbitrarily setting rates for services provided by AOS providers and call aggregators at the levels charged by USWC and AT&T in some cases (and in other cases by no reference at all), the Commission will in fact promote monopoly by USWC and AT&T.

USWC and AT&T rates which are the "prevailing rates" under the proposed rules could well be cross-subsidized by revenues from other services provided by those entities. If the services of AOS providers and aggregators are set at rates which USWC and/or AT&T cross-subsidize with other revenues, the AOS providers and private payphone providers will soon be out of business.

There are readily apparent reasons to conclude that cross-subsidization exists with respect to USWC's prevailing rates: (1) Local coin rates have not been increased in this state since U-75-40 and U-75-50, some fifteen years ago. Even if twenty-five cents was reasonably compensatory fifteen years ago (which is doubtful), ensuing inflation has surely since driven that rate below the compensatory level. (2) Call aggregators compete with, among other products, semi-public

phones for which the premise owner pays USWC or the independent LEC a monthly charge for the privilege of having the phone on the location. Private payphone providers, on the other hand, not only do not charge the premise owner, they must pay the premise owner a commission. (3) USWC charges AOS operators 54 cents to bill and collect a local credit card call, a call for which a consumer using a USWC payphone pays only 50 cents total.

In light of the actual and potential cross-subsidies between the "prevailing charges" and the other services provided by USWC and AT&T, the use of such "prevailing charges" as the benchmark for the prices of the competitive providers (which operate under vastly different costs and competitive circumstances) is improper, exceeds the Commission's statutory authority, and would promote the establishment of monopolies contrary to the Washington Constitution and to the legislative policies mandated to the Commission in RCW 80.36.300.

2. <u>Ratemaking provisions of the proposed rules which require free connection to interexchange carriers and to 1-800 numbers are confiscatory</u>.

The combination of (1) requiring a service to be provided and (2) forbidding a charge for the service, is confiscatory. If the Commission, in a proper ratemaking proceeding, directs that no charge may be made for a particular service, the provider must have the option to elect not to provide the service, otherwise confiscation occurs. (14th Amendment of the U. S. Constitution; <u>Munn v. Illinois</u>, 94 U.S. 113, 24 L.Ed. 77 (1877)). Likewise, forcing provider "A" to

adopt charges of provider "B", a competitor, whose charges may be subsidized and whose charges are below provider "A's" cost of providing service, is confiscatory.

In addition, a requirement to dedicate, without charge, the facilities of one private party (private payphone) to the use and benefit of another private party (the interexchange carrier requested by the customer) constitutes the "taking of private property for private use" in violation of Article 1, Section 16 of the U. S. Constitution.

If the Commission, in a proper ratemaking proceeding, orders that AOS providers and call aggregators provide certain services without charge to consumers, the Commission should consider the appropriateness of providing compensation to these companies from other sources. The proposed rules, however, do not offer this alternative. In this connection, the Commission should note that S.1660, which was recently passed by Congress and sent to the President, provides that the FCC shall consider whether to provide for compensation to AOS providers and call aggregators from sources other than charges to calling parties.

Additionally, the requirement that these "free" services be posted on the payphone will have an economic impact on providers of those services not considered by the SBIS. No consumer will elect to pay the "optional" charges for operator services which the proposed rules allow. The SBIS does not discuss or weigh the economic impact of this obvious fact. Substantial revenues for the provision of operator services

will be lost to the AOS providers and call aggregators and transferred to competitors as a result of these proposed rules.

In S.1660, the Congress has required that AOS providers and call aggregators permit access to interexchange carriers by means of an equal access code, where equal access has been implemented. Congress has not mandated that such access will be without a charge to the consumer or, in the alternative, to another party. Likewise, this Commission should not categorically deprive AOS providers and call aggregators of any revenue from any source for providing access to interexchange carriers.

3. <u>The proposed rules would unlawfully delegate the power of the state to private entities</u>.

Proposed WAC 480-120-138(12) and WAC 480-120-141(2) and (4)(a) constitute unlawful delegations of power to LECS and AOS providers. The delegation occurs in the form of the prohibition against a local exchange company maintaining a connection to a public access line for any payphone which violates the prohibition against charging for access to interexchange carriers or 1-800 numbers and by requiring an AOS company to enforce standards of behavior by contracting call aggregators, at the risk of being found itself to be violation of the Commission's regulations. These provisions of the proposed rules constitute unlawful delegations of regulatory powers from the Commission to private companies.

No means of enforcement by an AOS provider is described in the rules, but presumably since the rules mandate

that aggregators enter into contracts with AOS providers as the exclusive means of providing service, the remedies available to an AOS company under contract law would be those which would be available to secure compliance in a court of law. It is implicit in the proposed rules that if a call aggregator breaches its contract with the AOS provider by doing something which the contract is required to prohibit, the AOS provider will be vulnerable to penalties and/or other enforcement action by the Commission. An AOS provider, on the other hand, must seek its remedy to secure compliance with the contract in the courts.

AOS providers are private entities which enter into business relationships with their customers, the call aggregators, through contracts. It is not proper for the Commission to force AOS providers to monitor and enforce Commission rules and regulations as a condition of doing business in this state. Such a practice would be inappropriate and unfair from the perspectives of both the AOS providers and the aggregators.

Similarly, a delegation of enforcement powers to LEC's, competitors of aggregators, appears in WAC 480-120-138(12) wherein LEC's are prohibited from providing network connection for any payphone which does not provide free access to interexchange carriers or 1-800 numbers. It is unlawful and improper for the Commission to make LECs its enforcement arm. Any abuse by a LEC of the power granted under the proposed rules

to disconnect a private payphone provider from the network would immediately put the payphone provider out of business. The public access line connection is the only means by which the private payphone provider can obtain access to the public switched, privately owned, network in order to engage in business on either an intrastate or interstate basis.

Federal legislation S.1660, which was recently passed by Congress, contains no prohibition against charging for interstate access to interexchange carriers or 1-800 numbers. Under the Commission's proposed rule, a LEC could disconnect a private payphone provider from the network for a perceived intrastate infraction which would necessarily cut off interstate access even though the conduct involved is legal under federal law.

4. Compliance with WAC 480-120-106 Display of both service provider and billing agent on the bill is not possible under current LEC technology.

It is not possible to comply with WAC 480-120-106 under the current billing technology of LECs. NWPA is informed, and believes, that current billing systems in use for retail billing by the local exchange carriers are incapable of including multiple providers' names on the same sheet, for jointly provided service.

The rule language is also ambiguous because the rules contemplate as many as four "providers of service": the local exchange company which maintains the public access line connection, the call aggregator, the AOS company and the long distance carrier.

5. AOS providers and aggregators cannot assure compliance with proposed WAC 480-120-141(5)(d).

Proposed WAC 480-120-141(5)(d) would impose on AOS providers the requirement to insure, in effect, that call aggregators who obtained AOS services "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 "O"". No such requirement exists for any other class of provider of operator services. Such a requirement specifically does not apply to the services of USWC and AT&T. Imposing such requirements soley on AOS providers and call aggregators would be discriminatory and would constitute a denial of the equal protection of the laws.

In addition, the language of the proposed amendment does not take into consideration the actual operating conditions under which alternate operator services are provided. Calls are not characterized as simply "O" calls. Calls are either "O+", meaning that additional digits are dialed by the calling party after the zero or "O-" meaning that no additional digits are dialed before some form of response is encountered by the calling party. In many of the calls which involve what is termed as "operator services", whether processed by AOS companies or by USWC, AT&T or another long distance carrier, a human operator is not involved. Many of the functions of calling card or credit card validation, carrier selection and even collect call processing, can be done by automated systems.

To the extent the rule would require that "an operator" actually "answer" a call which is preceded by a zero dialed by the calling party, it would represent a major technological regression. Subparagraph (a)(i) of the same subsection of the rule appears to acknowledge that there are three classes of calls involved: automated, live operator and automated operator calls. This acknowledgment is not carried through to the requirement of paragraph (d), however.

Under the assumption that the "O" in the rule actually refers to "O-" calls in which the intervention of a live operator is required to connect a caller with the desired, but not presubscribed, long distance company, or for collect calls, the rule seeks to impose performance requirements on the wrong entities. The speed with which a call can be answered by an operator depends in large part on the type of switching equipment employed by the local exchange company which provides the public access line. Many privately owned pay telephones must, in order to reach a live operator when "O-" is dialed by a caller, "MF tone dial" a ten-digit "1-800" number. These pay telephones are programmed to do just that. Some local exchange companies operate switches which cannot process MF tone signals, however, and these companies must convert the signals to rotary dial pulses. This process alone can consume more than the ten-second maximum provided in the rule.

An attempt to require AOS companies to "secure compliance" by call aggregators with the ten-second response

time requirement will be ineffective because the call aggregators do not operate all of the equipment which is responsible for delay in response times. Such a requirement, therefore, would unreasonably harm and interfere with the operations of all AOS providers and aggregators.

6. The requirement in WAC 480-120-141(5)(a)(ii) to brand calls with the name of the billing agent at the beginning of the call is an impossible requirement to meet.

WAC 480-120-141(5)(a)(ii) requires audible notification to the caller of the identify of the billing agent which will appear on the bill, at the beginning of the call, which in fact is prior to the prompt for entering billing information on automated calls and on live and automated operator calls, when the call is initially rooted by the operator. At the beginning of the call when the call is initially routed to a live or automated operator, there is a variety of possible ways in which the call may be handled, which can result in different billing agents being involved.

Compliance with this rule is not possible, therefore, because the information the caller will provide to the AOS company or call aggregator after the beginning of the call will have the potential to make the previously announced information on the identity of the billing agent incorrect.

7. WAC 480-120-021 improperly excludes local exchange companies from the definition of "alternate operator services company".

If the Commission wishes to regulate the business of providing operator services, it should do so with an even hand,

neither preferring nor subjecting to prejudice, local exchange companies, AOS providers, or aggregators. The local exchange companies can provide exactly the same services defined as "alternate operator services companies". The local exchange companies are in fact direct competitors of the AOS providers and payphone providers. It is discriminatory, preferential and anticompetitive, therefore, to exempt local exchange companies from the requirements imposed on its competitors in the AOS and aggregator markets.

8. The proposed requirement of WAC 480-120-141(4)(b) to require posting on or near each pay telephone the name, address and toll-free number of the billing agent is impractical and of limited value.

This requirement is duplicative of the oral notification which is proposed in the rules. The requirement also duplicates the proposed requirement that the billing agent be shown on the customer's bill although NWPA has, as discussed above, doubts as to whether the local exchange companies are capable of complying with this rule requirement.

Due to the multiplicity of billing agents which may be used on calls originated from any given payphone, this requirement is impractical. The requirement is also of limited value, for the same reason.

Further, billing agents are frequently changed due to the highly competitive market in which they operate. Accordingly, the printing and posting costs which would be incurred by the AOS provider and/or aggregator each time a billing agent is changed would be prohibitive. In this regard,

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the SBIS considered the economic impact of this requirement on the incorrect assumption that only a single posting would be required and, therefore, failed to evaluate the true economic impacts of this proposed posting requirement.

III.

CONCLUSION

As stated at the outset, NWPA is willing to work with the Commission to correct any charges and practices found to be unfair to consumers. It is sincerely believed, however, that the proposed rules substantially overreach the target from both legal and scope standpoints.

Hopefully, as the staff and Commission become better informed with respect to the environment in which AOS providers and aggregators operate and how and why they interrelate to each other and to LECs and other common carriers, better contained, fair and focused rules can be achieved.

The members of the NWPA sincerely believe that rules can be accomplished to obtain the goals of the Commission without, as these rules indeed would, inflicting unnecessary and substantial harm on providers of private payphones. In this connection, the NWPA urges the Commission to immediately remove the ratemaking aspects of the proposed rules to an appropriate adjudicative proceeding where the relevant data necessary for informed decisions can be made available to the Commission. In the alternative, NWPA suggests that if the Commission wishes to proceed with ratemaking in the context of

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this rulemaking proceeding, that an appropriate fact-finding procedure be implemented so that the Commission will have before it the necessary relevant information before ordering rates which could destroy competition and monopolize services vital to the public interest.

Respectfully submitted this 19th day of October, 1990.

MILLER, NASH, WIENER, HAGER & CARLSEN

By: ____________________
CLYDE H. MacIver

Attorneys for the Northwest Payphone Association

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