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SUTHERLAND, ASBILL & BRENNAN
1275 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20004-2404
(202) 383-0100

CABLE: SUTAB WASHINGTON
TELEX: 89-501
FACSIMILE:
(202) 637-3593

999 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30309-3996
(404) 853-8000

RANDOLPH J. MAY
DIRECT LINE: (202) 383-0730

October 1, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Ms. Cheryl A. Tritt
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. Room 500
Washington, D.C. 20554-0001

Re: "0+" Public Domain Proposal
CC Docket No. 92-77
EX PARTE

Dear Ms. Tritt:

Capital Network System, Inc., a regional interexchange carrier ("IXC") whose primary business is the provision of interexchange operator services, by its attorneys, submits this letter in response to the rate cap proposal contained in a letter dated September 18, 1992 to you from the Competitive Telecommunications Association ("CompTel") and several individual operator service providers ("OSPs") ("the rate cap letter").

The rate cap letter requests the Commission to schedule and preside over industry meetings in order to produce an agreement whereby AT&T would permit all carriers to validate and bill for calls charged to its Card Issuer Identification ("CIID") calling card which are dialed on a "0+" basis, provided that the calls will be billed at no more than AT&T's standard tariffed rates. (Letter at 1) In addition, the letter states that the FCC may wish to prohibit all interexchange carriers ("IXCs") from paying commissions to aggregators on "0+" dialed calls charged to proprietary IXC cards. (Letter at 3)

As a threshold matter, CNS opposes the rate cap proposal as presented in the September 18th letter because it avoids, rather than addresses, the fundamental problem facing the competitive operator services industry: the higher costs necessarily incurred by OSPs vis-a-vis AT&T with regard to billing, collection, validation, and other services where AT&T continues to enjoy preferential treatment. For over three years, CNS has been urging the FCC to take positive actions which would reduce OSPs' costs and thereby level the competitive playing

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field. Because OSPs' costs are higher than AT&T's as a result of the FCC's inaction, their rates are in general higher than AT&T's rates. Rather than having the effect of reducing OSPs' costs, which could then lead to lower rates and improved competition, the rate cap proposal would instead result in the Commission establishing a system whereby AT&T sets the rates for OSP calls. Such a system would be, in essence, putting the fox in charge of the chicken coop -- something that does not work, at least as a long-term solution. In this instance, AT&T may be encouraged to lower its rates -- which already are below costs in many instances [1/] -- over the short term to eliminate its competitors from the market before substantially increasing its rates later.

Because it ignores the economic realities of the operator services industry, the rate cap proposal ultimately will weaken or eliminate real competition. This would occur because under such a system, OSPs would be required to lower their rates below their costs for calls charged to CIID cards, and make up those losses by raising their other rates on non-CIID card calls. If OSPs do not raise their rates on non-CIID card calls, they will be forced to go out of business since, unlike AT&T, other OSPs lack a captive body of ratepayers with which to subsidize losses for these services.

Moreover, both the rate cap proposal and the prohibition on commissions for "0+" CIID card calls are totally impracticable. The proposed rate cap appears to assume that AT&T has only a few calling card rates at any given time. In fact, however, AT&T has hundreds of different rates -- many negotiated in conjunction with Tariff 12 and contractual arrangements with individual customers. Furthermore, if AT&T raises its rates, then OSPs would be forced to charge rates lower than AT&T's rates until they could make their own, expensive and resource-intensive billing adjustments. Similarly, small regional carriers cannot be reasonably expected to bear the substantial costs of reexamining or altering their rates every time AT&T files a tariff revision affecting some "standard" calling card rates. The prohibition on commissions is equally unworkable. Premises owners have always received "commissions" for operator-assisted calls in one form or another, whether the payments are denominated as commissions or by such euphemisms as "space rental," and it is unlikely that the FCC would be able to enforce

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[1/] For example, in Texas a majority of AT&T's operator services rates are below even its direct access costs, so there is no way that OSPs -- including AT&T -- can offer service at AT&T rates without losing money.

a prohibition against the payment of commissions, absent an extraordinary and costly enforcement effort.

As a legal matter, both the rate cap proposal and the proposed prohibition on commissions would probably be unconstitutional. That a rate cap raises a serious constitutional question under the Fifth Amendment was recognized by the then-current Chief of the Common Carrier Bureau, Mr. Firestone, in his testimony before the Senate Communications Subcommittee concerning the bill that later became the Operator Services Act. In that testimony, he stated that it would be improper and perhaps unlawful for the Commission to focus on the rates of one carrier (i.e., AT&T) compared to its competitors' rates (rather than the carrier's rates in comparison to its costs) because it would raise "the Fifth Amendment question of a 'taking' of property without due process."

Similarly, in a statement accompanying the FCC's news release in CC Docket No. 91-141, Chairman Sikes recently acknowledged the "taking" issue raised by the Commission's decision to require expanded interconnection for special access. The prohibition on commissions for "0+" calls raises similar questions. The proposed prohibition seems particularly suspect in light of the FCC's decision in CC Docket No. 91-35 to require OSPs to compensate premises owners for dial around pay telephone calls.

Moreover, a rate cap would likely violate the Communications Act, the Operator Services Act, and the Administrative Procedure Act. A rate cap would constitute an unreasonable practice under Section 202 of the Communications Act because it would force OSPs to discriminate between similarly situated customers simply on the basis of payment method and without any examination or knowledge of a cost basis for the rate differential. With a rate cap, two people at adjacent pay telephones calling the same number and using the same carrier would be charged different rates simply because of the choice of their payment method -- without any difference in the carrier's cost structure to justify what could be a substantial rate differential. Such a practice would clearly violate the Communications Act.

In addition, the proposed rate cap would, by its very nature, result in rates that bear no relationship to the costs of OSPs and would, therefore, be prohibited by the Operator Services Act. This is because the Act specifically requires that the FCC

consider OSP costs before it engages in rate regulation. [2] Finally, the rate cap proposal would be unlawful under the Administrative Procedure Act. The FCC's decision to impose such rate caps would be arbitrary and capricious since the FCC would be, in effect, modifying OSP rates regardless of whether or not those rates could be cost justified, and setting OSP rates based on the calling card rates of another carrier, AT&T, whose rates have themselves never been cost justified and for which there is strong, record evidence that they are below cost. In other words, the Commission has no record basis for assuming AT&T's rates cover AT&T's costs and it knows that those rates do not cover other OSPs' costs.

At its heart, the rate cap proposal is based on the faulty premise that OSPs need to offer something to AT&T in order to have "0+" calling cards declared to be in the public domain. As the rate cap proponents themselves acknowledge, the FCC already has Title I ancillary jurisdiction to implement the "0+" proposal and it should do so promptly. If AT&T is dissatisfied with this arrangement, it has the option of converting its CIID card into a truly proprietary card by restricting cardholder access to its "10288" and "800" access numbers. [3] As AT&T acknowledged in a letter to the FCC dated September 14, 1992, [4] its "800" access arrangement is currently being used by "a significant number" of its customers, despite AT&T's own admitted efforts to "downplay" the use of the "800" access numbers the Commission required AT&T to establish. [5]

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[2] See 47 U.S.C.A. § 226(h)(3)(A)(iv) and (h)(4)(B).

[3] After noting that AT&T was a primary provider of "800" services and faced no unreasonable implementation barriers, the FCC ordered AT&T to establish an "800" access number. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 6 FCC Rcd 4736, 4744 (1991). See also 47 C.F.R. § 64.704(d).

[4] Letter dated September 14, 1992, from Robert J. McKee, AT&T, to Donna R. Searcy, Secretary, FCC, regarding CNS's Tariff F.C.C. No. 2, Transmittal No. 1, at 2.

[5] See Letter of July 6, 1992 from Diana A. Hayes, AT&T Account Executive to Ted L. Lightle, Division Officer, South Carolina Division of Information Resource Management ("DIRM"), attached hereto as Exhibit A. This letter was attached as Exhibit D to DIRM's Supplemental Comments submitted in CC Docket No. 90-313, Phase I (filed August 20, 1992).

At a minimum, the Commission should, in any event, reverse the Common Carrier Bureau's rejection of CNS's Tariff F.C.C. No. 2 and permit the tariff to become effective immediately. It should also, of course, allow other OSPs to file similar tariffs to recover their IXC-imposed costs. CNS's tariff proposed to establish a charge of $1.50 per transfer to recover from IXCs the direct costs incurred by CNS in transferring to IXCs interstate telephone calls placed by callers who access CNS facilities at aggregator locations and insist on charging their telephone calls to calling cards that the issuing IXCs do not allow CNS to validate. This tariff or a similar one would help prevent AT&T from continuing its deliberate strategy of imposing costs on its competitors (without the ability of those carriers to recover those costs) solely because AT&T refuses to provide them with the validation information necessary to complete calls charged to its CIID cards.

In conclusion, CNS strongly opposes the rate cap proposal and the proposal to prohibit commissions on calls charged to "0+" cards. CNS urges the Commission to declare "0+" calling cards to be in the public domain, without such unlawful and unworkable restrictions or to allow its transfer tariff and others like it to become effective.

Respectfully submitted,

Randolph J. May

Randolph J. May
Counsel for Capital Network
System, Inc.

RJM/rcg
Enclosure

cc: Chairman Alfred C. Sikes (By Hand)
Commissioner James H. Quello (By Hand)
Commissioner Sherrie P. Marshall (By Hand)
Commissioner Andrew C. Barrett (By Hand)
Commissioner Ervin S. Duggan (By Hand)
Gregory J. Vogt, Chief (By Hand)
Tariff Division
Donna R. Searcy, Secretary (By Hand)
Francine J. Berry, AT&T

Exhibit A

AT&T

July 6, 1992

Ted L. Lightle
Division Director
OIRM
1201 Main St., Suite 900
Columbia, SC 29201

Dear Ted:

I understand that you would like additional information on AT&T's network access number, 1-800-882-CARD (2273). I am glad to comply with this request, forwarded to me via Val Long, and hope this will be helpful.

First of all, AT&T realizes that 10288 is not accessible through every PBX. We therefore followed the FCC's recommendation and made available the 800 network access number. This was done so that even if a caller is blocked from 10288, and still wishes to access AT&T, it can be done by calling the 800 number.

Our policy is to not encourage use of this number. There are no plans at this time for it to appear in any national advertising campaigns. Our reason to "downplay" this number is thus: AT&T offers commissions to hotels/motels, universities, pay phone suppliers, etc., when their customers access AT&T via 10288. Commissions are not paid when the 800 number is used. Therefore, to honor marketing agreements with these customers, and to help them in protecting their commission based revenues, we are not heavily promoting 1-800-882-CARD.

The 800 number does appear on the back of the AT&T proprietary calling card, and is the same number a non-Execu-Bill customer would use to add, delete, or make other changes in their cards.

I hope you will find the above information usaeful. If additional information is needed, I can be reached on 733-3317.

Very truly yours,

Diane A. Hayes
Account Executive

cc: Mackey Goodwin
Val Long

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