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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Billed Party Preference	)	
for 0+ InterLATA Calls	)	CC Docket No. 92-77
	)	
	)	
	)	
Disclosures by Operator	)	RM No. 8606
Service Providers of	)	DOCKET FILE COPY ORIGINAL
Serving Public Phones	)	

SUPPLEMENTAL COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON ALTERNATIVES TO BILLED PARTY PREFERENCE

Respectfully submitted,

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SUMMARY

CompTel, the industry association representing the interests of the competitive interexchange services industry, participated with a broad coalition of participants in the operator services industry to develop a feasible solution to the problem of excessive operator service rates. This coalition has come together in recognition of the staggering costs of billed party preference and its concomitant confusion, market disruption and consumer inconvenience. BPP is a hugely expensive reaction to an isolated problem -- excessive OSP rates.

CompTel and a broad industry cross-section have developed an alternative which will address this problem directly, promptly, and without billions of dollars in unnecessary investment. The solution is for the FCC to identify a level of total end user charges for operator services that it deems presumptively lawful. OSPs with end user charges at or below this level could file tariffs without any cost support, while OSPs that wish to charge more than this level must provide appropriate cost support to justify the proposed rate. The coalition supporting this proposal has taken great care to develop a set of benchmark rates that could be used for this purpose. CompTel believes the proposed benchmark rates harmonize the consumer's interest in obtaining reasonable rates with the legitimate rights of OSPs and aggregators to cover their costs, and recommends that the Commission adopt the coalition proposal.

The rate ceiling approach advocated by CompTel is a sound legal and policy response to excessive OSP rates. Moreover, it achieves the Commission's objectives better than any of the other proposals presented to the Commission. In particular, the

NAAG proposal to require additional consumer warnings from certain carriers shifts the burden to combat excessive rates from the carriers themselves to consumers, who would be required to exercise a series of affirmative steps to avoid potentially excessive rates. Further, the NAAG petition assumes, without any factual support, that all rates above a "dominant" carrier's rates, even rates only slightly above this level, are per se unreasonable and objectionable. CompTel believes the coalition's approach to determining a reasonable rate -- which included a review of customer complaints claiming excessive charges -- provides a more accurate reflection of what are reasonable rates.

Accordingly, CompTel urges the Commission to abandon billed party preference, once and for all, and to adopt the coalition rate ceiling proposal in its place.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits these supplemental comments in response to the Commission's public notice inviting comment on two recent proposed alternatives to billed party preference ("BPP").[1]

One of these proposals was submitted by a broad coalition of parties, including CompTel, who have worked together to develop a feasible solution to the problem of excessive rates in the operator services industry. CompTel respectfully recommends that the Commission adopt this alternative proposal -- which would attack the problem of high operator service rates with a rate ceiling -- instead of BPP or the alternative proposed by the National Association of Attorneys General ("NAAG").

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[1] Public Notice, DA 95-473 (rel. Mar. 13, 1995).

I. INTRODUCTION

The proposal for a "billed party preference" system for operator assisted long distance services has been before the FCC, in one form or another, for almost nine years. Since the time BPP was originally proposed in 1986, the Commission has received comment on its merits on at least three occasions. The substantial record now compiled clearly shows that BPP is not in the public interest because, *inter alia*:

- BPP would cost $2 billion or more to implement,[2]
- BPP would not be operational for at least 3 years from the date of a Commission order adopting it,[3]
- BPP would result in a different routing of less than 20 percent of all operator assisted calls,[4]
- BPP would create as many new problems as it is claimed to solve, including mass consumer confusion in switching to an entirely new system of dialing and presubscription, many serious new fraud control issues, and harm to the competitive workings of the marketplace.[5]

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[2] *See* CompTel Reply Comments at 6-10, CC Docket No. 92-77 (Sept. 14, 1994); AT&T Reply Comments at Attachment B, CC Docket No. 92-77 (Sept. 14, 1994). Some studies estimate even higher costs. *See* Strategic Policy Research, *Quantifying the Costs of Billed Party Preference*, submitted by American Public Communications Council, CC Docket No. 92-77 (Sept. 14, 1994).

[3] Ameritech Comments at 18, CC Docket No. 92-77 (Aug. 1, 1994); GTE Comments at 25 (Aug. 1, 1994); Southwestern Bell Comments at 13 (Aug. 1, 1994).

[4] Frost & Sullivan, Inc., *Report on Applicability and Costs of Billed Party Preference: A Market Impact Report* (October 1993), submitted in CC Docket No. 92-77 by CompTel, Nov. 22, 1993. With the massive advertising of 1-800-COLLECT and similar services that has occurred since this study was conducted, one would expect even fewer calls would be routed differently today.

[5] CompTel Comments at 20-32, CC Docket No. 92-77 (Aug. 1, 1994).

Furthermore, the BPP proposal predates the passage of the Telephone Operator Consumer Services Improvement Act ("TOCSIA"), which created several important consumer safeguards, including the mandatory unblocking of 800, 950, and 10XXX access codes, aural identification of the OSP providing service on a call, free rate quotes upon caller request, and mandatory posting of relevant consumer information on or near public telephones.[6] The profound impact of these regulations was acknowledged by the Commission in its 1992 report to Congress, when it concluded: "[C]onsumers are being protected from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls and consumers have the opportunity to make informed choices in making such calls."[7]

The empirical evidence presented in Common Carrier Docket No. 92-77 confirms that BPP would be a hugely expensive solution to a diminishing problem.[8] In recognition of this, CompTel worked with a broad industry coalition to devise an alternative which would address the remaining problems existing in the operator

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[6] *See* 47 C.F.R. §§ 64.703-05.

[7] FCC, *Final Report of the Federal Communications Commission Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990*, at 3 (Nov. 13, 1992) ("TOCSIA Final Report").

[8] Consumers' extensive use of access code dialing, which the record shows exceeds 50% and is growing, confirms that the problem of unwanted use of operator service providers is diminishing. *See* Comments submitted August 1, 1994 by APCC (60%), Bell Atlantic (55%), NYNEX (66%), Teleport (60%), Teltrust (54%), SNET (52%), and Polar Communications (67%). Even Ameritech and Sprint, both proponents of BPP, acknowledge substantial consumer dial around. Ameritech Comments at 8, CC Docket No. 92-77 (Aug. 1, 1994) (55% dial around); Sprint Corporation *ex parte* letter, CC Docket No. 92-77 (Dec. 23, 1994) (44%).

services industry directly, promptly, and without billions of dollars in unnecessary investment. This coalition represents a broad cross-section of the industry, including the association for the competitive interexchange industry, the national payphone industry association, four of the seven regional Bell Companies, and two major competitive access providers. Their proposal (the "Rate Ceiling Proposal") was presented in an *ex parte* document submitted in CC Docket No. 92-77 on March 7, 1995.[9] The fact that so many disparate, competing interests agree on such an important policy issue lends credence to the overwhelming evidence that BPP will not serve the public interest and that the Rate Ceiling Proposal should be seriously considered.

II. THE RATE CEILING PROPOSAL PRESENTS A SIMPLE AND WORKABLE SOLUTION TO PROBLEMS IN THE OPERATOR SERVICES MARKETPLACE

The concept of the rate ceiling is straightforward. The Commission would identify a rate level for operator services that it deems presumptively lawful. This rate would be a maximum charge to end users, including all applicable usage charges, surcharges, premises imposed fees, etc. Tariffs which are filed proposing total end user charges at or below this level would be presumed reasonable, without cost support information from the carrier. Tariffs which propose rates above this level, on the other

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[9] *See ex parte* Notice of CompTel, APCC, Bell Atlantic, BellSouth, MFS Communications, NYNEX, Teleport Communications Group, and US West, CC Docket No. 92-77, Mar. 7, 1995 ("March 7 *ex parte*").

hand, must be accompanied by cost support information demonstrating that the charges are not unjust and unreasonable.

In order to permit appropriate investigation of a tariff, the Commission has authority to require that tariffs proposing to exceed the rate ceiling be filed on up to 90 days notice and to suspend such tariffs for up to five months, if it deems these actions necessary.[10] Proponents of the Rate Ceiling Proposal have suggested that any rate hearings be conducted in an expedited manner using simplified cost categories to examine the OSP's cost structure.[11] The simplified categories proposed in the March 7 *ex parte* are very similar to those cost categories used by the Commission in its TOCSIA enforcement review.[12]

In order to promote fairness to all parties, the rate ceiling should be as simple as possible and should apply to all carriers providing operator services. The parties supporting the Rate Ceiling Proposal have recommended setting the ceiling rate on a per-minute basis, without regard to time-of-day, distance, call processing or payment differences, or any of the other complicating factors which might make compliance or enforcement unnecessarily costly or burdensome. The proposed benchmarks contain separate maximum charges for person-to-person calling in recognition of the unique

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[10] 47 U.S.C. §§ 203(b), 204(a).

[11] March 7 *ex parte* at 6. Of course, the Commission could always request additional information from the carrier if analysis of this initial data is not conclusive.

[12] *See Policies and Rules Concerning Operator Service Providers,* Order, 6 FCC Rcd 2314 (Com. Car. Bur. 1991).

circumstances of this traffic. The recommended benchmark levels are set forth at page 8 of the Rate Ceiling Proposal.[13]

Finally, in order to facilitate enforcement of the rate ceiling, the LECs could be required to provide periodic reports to the Commission of calls billed through them on behalf of OSPs where the rates exceed the rate ceiling. Since an overwhelming majority of operator services calls are billed through the LECs, a review of these calls would provide the Commission with sufficient data to take whatever enforcement steps may be necessary to ensure compliance with the plan. The Rate Ceiling Proposal suggests that LECs be required to submit to the FCC quarterly reports showing a summary of the calls reviewed which exceed the rate ceiling.[14] Two suggested report forms were attached to the March 7 *ex parte*, each of which would identify the OSP, total calls billed in the period, total calls exceeding the rate ceiling, and the percentage of calls reviewed that exceeded the rate ceiling. Bell Atlantic, BellSouth, NYNEX, and US West (the four LECs joining in the Rate Ceiling Proposal) developed the proposed reporting requirements and believe they can be implemented relatively inexpensively[15] within 6 months of release of a Commission order.

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[13] March 7 *ex parte* at 8.

[14] *Id.* at 8.

[15] *Id.* at 9. In addition, the proposal recognizes that the LECs should be permitted to recover those costs they incur, which are expected to be minimal.

III. THE RATE CEILING APPROACH OUTLINED IN THE MARCH 7 EX PARTE IS PREFERABLE TO ANY OTHER ALTERNATIVE, INCLUDING BPP

CompTel believes that the proposal made in the March 7 *ex parte* is the best alternative from both the legal and policy perspectives. The Rate Ceiling Proposal will achieve the Commission's policy objectives, promote efficient use of the Commission's resources, and satisfy the Commission's legal obligations far better than any other alternative, including BPP. Therefore, it is preferable to any other action the Commission may take in this proceeding.

A. The Rate Ceiling Approach Rests on a Sound Legal and Policy Basis

A rate ceiling approach will succeed in eradicating operator service overcharges if the benchmark rate harmonizes the consumer's interest in obtaining reasonable rates and the legitimate rights of aggregators and OSPs to recover their costs in making equipment and service available for public use. Because OSP and aggregator costs vary, it is not appropriate to base the benchmark on the rates or cost structure of any one particular carrier or group of carriers, dominant or otherwise. The benchmark rate contained in the Rate Ceiling Proposal was crafted specifically to allow OSPs to recover their reasonable costs of service while isolating excessive charges.

The benchmark rate recommended in the Rate Ceiling Proposal is based upon three separate analyses of operator services calling. First, a representative sample of operator service complaints was obtained by APCC from the FCC's informal complaint

files. APCC analyzed these complaints to determine a rate which would be below the levels that prompted the vast majority of the complaints in the sample.[16] Second, CompTel conducted an informal review of the cost structures of its OSP members to ensure that the benchmark rate allowed reasonable cost recovery. Finally, the rates were determined to be consistent with the benchmark rates informally employed by the Common Carrier Bureau in its 1991 review of operator services rates.[17] The result is a recommended set of benchmark rates that respects consumers' interests in obtaining service at a reasonable price while permitting competitive forces to work to the maximum extent possible to determine just and reasonable rates. Thus, great care went into determining a workable maximum rate that takes account of both reasonable consumer expectations and legitimate OSP costs.

Importantly, the Rate Ceiling Proposal also recognizes and protects a carrier's constitutional right to recover its reasonable costs of service. The constitutional constraints on rate regulation are long established:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the

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[16] March 7 *ex parte* at 7.

[17] *See, e.g., Ascom Autelca Communications*, 7 FCC Rcd 175 (Com. Car. Bur. 1991). The Bureau initiated proceedings against 26 OSPs to examine their rates. As explained in the FCC's TOCSIA Final Report, by November 1992, all but one of these proceedings were resolved without a hearing when the OSPs voluntarily reduced their rates below those informally adopted as a benchmark by the Bureau. TOCSIA Final Report at 12.

> public utility company of its property in violation of [the Constitution].[18]

Therefore, rate regulated entities must be allowed to "earn enough revenue not only to cover operating expenses but also to pay for the capital costs of doing business, including service on debt and dividends on stock."[19] A rate ceiling which does not permit a carrier with a unique cost structure to recover those costs is an unjust and unreasonable confiscation of the carrier's property in violation of the Constitution.[20]

A benchmark approach, coupled with review of rates above the benchmark, can satisfy these obligations. The Rate Ceiling Proposal endorses precisely this option. Under the proposal, any carrier wishing to exceed the benchmark may do so only if it can demonstrate that a lesser rate will not cover operating expenses and/or will not provide a reasonable yield on investment.[21] Because the Rate Ceiling Proposal

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[18] *Bluefield Water Works & Improvement Co. v. Public Ser. Comm'n*, 262 U.S. 679, 690 (1923); *see Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (return on equity must be "sufficient to assure confidence in the financial integrity of the enterprise"); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (rate must "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed").

[19] *United States v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983); *see D.C. Transit System v. Washington Metro Area Transportation Comm'n*, 350 F.2d 753, 778 (D.C. Cir. 1965) ("rate fixed without particularized reference to [debt service and other] needs does not satisfy any standard of rate making of which we are aware").

[20] *Cf. Permian Basin*, 390 U.S. at 770-71 (maximum rate regulation of natural gas producers does not implicate Constitutional concerns where regulated companies are "proffered opportunities . . . [to] seek special relief from the group rates").

[21] The Commission previously has indicated that commission payments or other expenses which are "excessive or otherwise unreasonable" can be disallowed. National

(continued...)

preserves this opportunity for OSPs to demonstrate the need for "special relief," Commission enforcement of a rate ceiling will not violate the Constitution's strictures.

B. The Rate Ceiling is Preferable to the NAAG Proposal

On February 9, 1995, the National Association of Attorneys General ("NAAG") filed a petition for rulemaking requesting additional audible disclosures by OSPs whose rates exceed a specified maximum charge.[22] NAAG proposes to require an additional audible message, "following carrier identification," for every call that will be charged at rates above the dominant provider's rates.[23] This message warns consumers that the presubscribed carrier may not be their "regular" telephone company and instructs them to call a different number in order to find out how to reach their "regular" telephone company. The NAAG proposal is an unwise and unfair solution to the problem of high rates because it penalizes OSPs with reasonable "above AT&T" rates and because it transfers the burden to consumers to avoid high rates, rather than placing the burden on offending carriers to lower rates.

[21](...continued)
Telephone Services, Memorandum Opinion and Order, at n.12, File No. ENF-88-12 (Com. Car. Bur. 1993).

[22] *Disclosures by Operator Service Providers of Serving Public Phones*, Petition of the National Association of Attorneys General Telecommunications Subcommittee for Rules to Require Additional Disclosures by Operator Service Providers of Public Phones, RM No. 8606 (Feb. 9, 1995) ("NAAG Petition").

[23] *Id.* at 4.

NAAG did not submit any studies, data, or other analyses to demonstrate that its suggested advisory message could be understood properly by consumers, or that most consumers would prefer the added call setup delays the message would engender. The NAAG proposal improperly assumes, despite the telephone signage and audible branding required by TOCSIA, that a consumer who remains connected to a presubscribed OSP after the bong tone does not consider that OSP to be an acceptable carrier. Compounding this error, the proposal provides consumers with a potentially confusing message replete with vague references to "regular" telephone companies and unspecified possibilities that the charge "may" be "more" than the consumer might otherwise pay. Even assuming the consumer understood this warning, however, it would require him or her to hang up, redial a different number, speak to an operator, and then hang up *again*, and redial a *third* number to reach a carrier of choice. By making call processing much more time consuming, confusing and expensive, this proposal would negate the Commission's stated goal to promote "simplified" dialing where possible. CompTel submits that it is not wise policy to subject the consumer to burdensome requirements such as these when the concern that the consumer "may" be charged "more" can be addressed directly through a properly tailored rate ceiling.

Again without any evidence, the NAAG proposal erroneously assumes that the rate charged by the presubscribed carrier will always be more than that of the consumer's "regular" carrier. Even more fundamentally, the proposal unfairly brands all rates above the dominant carrier's rates as objectionable to consumers, without undertaking any analysis to determine legitimate consumer expectations or whether

rates slightly above the dominant carrier's are unreasonable within the meaning of the Communications Act. As explained above, the benchmark rates contained in the Rate Ceiling Proposal were derived in part by examining consumer complaints to the FCC, which are a better source of evidence of the rates consumers find to be reasonable.

The NAAG proposal also would not guarantee a reduction in the high rates some OSPs charge. Indeed, an OSP could continue to charge an excessive rate, even with the message proposed by NAAG. Because the NAAG proposal could confuse callers and, in any event, would require multiple, affirmative steps from consumers to terminate the call, some consumers simply would ignore the message. For those consumers, the NAAG proposal may fail to prevent the imposition of the rates that NAAG finds objectionable.

Alternatively, if the purpose of the NAAG proposal is to ensure that consumers pay no more than what their "regular" telephone company would charge,[24] the message similarly would be ineffective in achieving this objective. For many consumers currently paying less than dominant carrier rates for long distance services, charges that are made at the dominant carrier's rates (which would not require the additional message proposed by NAAG) may be more than they would pay to their "regular" telephone company for the same call. Further, the proliferation of discount plans increases the chance that the amount consumers would pay under an alternative carrier's regular plan would be more than consumers would pay if they used their own

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[24] NAAG proposes to inform consumers that "you may be charged more than your regular telephone company would charge for this call." NAAG Petition at 4.

carrier's discount plan. In these situations, the consumer would not receive the protection the NAAG proposal appears to contemplate. Accordingly, the additional aural disclosure proposed by NAAG should not be adopted.

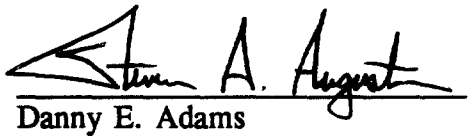
IV. CONCLUSION

For the foregoing reasons, CompTel once again urges the Commission not to adopt a system of billed party preference for interstate operator service calls. CompTel believes that the Rate Ceiling Proposal outlined in the March 7 *ex parte* achieves the goals of BPP not already achieved by the market, but at significantly less cost to the industry and to consumers. Moreover, the Rate Ceiling Proposal is preferable to any other alternative available to the Commission. Accordingly, CompTel urges the

Commission to abandon BPP once and for all, and adopt the Rate Ceiling Proposal instead.

Respectfully submitted,

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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April 12, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 1995, I caused copies of the foregoing "Supplemental Comments of the Competitive Telecommunications Association on Alternatives to Billed Party Preference" to be mailed via first-class postage prepaid mail to the following:

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