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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking of the National Association of Attorneys General Proposing Additional Disclosure by Some Operator Service Providers	)	RM-8606
	)	
And	)	
	)	
CompTel's Filing in CC Docket No. 92-77 Proposing a Rate Ceiling on Operator Service Calls	)	CC Docket No. 92-77

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REPLY COMMENTS
OF U S WEST COMMUNICATIONS, INC.

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REPLY COMMENTS
OF U S WEST COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. ("U S WEST") herein replies to those Comments filed with respect to the Competitive Telecommunications Association ("CompTel") *Ex Parte*[1] and the audible disclosure proposal of the National

[1] This *Ex Parte* was filed on behalf of CompTel, the American Public Communications Council ("APCC"), Bell Atlantic telephone companies ("Bell Atlantic"), BellSouth Telecommunications, Inc. ("BellSouth"), MFS Communications ("MFS"), NYNEX Telephone Companies ("NYNEX"), Teleport Communications Group ("TCG") and U S WEST on Mar. 8, 1995 ("*Ex Parte*"). On Mar. 13, 1995, the Federal Communications Commission ("Commission") put the *Ex Parte* out for public notice. See Public Notice, Pleading Cycle Established for Comments on CompTel's Filing in CC Docket No. 92-77 Proposing a Rate Ceiling on Operator Service Calls and Pleading Cycle Extended on Petition for Rulemaking of National Association of Attorneys General Proposing Additional Disclosures by Some Operator Service Providers RM-8606, DA 95-473, rel. Mar. 13, 1995.

Association of Attorneys General ("NAAG"),[2] both pertaining to the issues of Operator Service Provider ("OSP")-processed calls and their concomitant rates. As one of the original drafters of the *Ex Parte*, U S WEST did not deem it necessary to file opening comments on it. We obviously support it.

And, after viewing all the relevant comments, we continue to support it.[3] We believe it is the most straight-forward and direct, simple, cost-effective mechanism to bring discipline to the OSP market, in those statistically small,[4] but certainly personally-annoying, situations where OSP providers appear to be charging excessive rates -- whatever the cause.[5] It is certainly a more targeted enforcement tool

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[2] Petition of the National Association of Attorneys General Telecommunications Subcommittee for Rules to Require Additional Disclosures by Operator Service Providers of Public Phones filed Feb. 8, 1995.

[3] Comments and Supplemental Comments were filed Apr. 12, 1995 by the American Public Communications Council ("APCC"), Ameritech Operating Companies ("Ameritech"), AT&T Corp. ("AT&T"), Bell Atlantic, Capital Network System, Inc. ("CNS"), CompTel, Frontier Communications International Inc. ("Frontier"), Gateway Technologies, Inc. ("Gateway"), Intellicall, Inc. and Intellicall Operator Services, Inc. ("Intellicall"), MCI Telecommunications Corporation ("MCI"), MessagePhone, Inc., National Telephone Cooperative Association ("NTCA"), NYNEX, Oncor Communications, Inc. ("Oncor"), One Call Communications, Inc. d/b/a OPTICOM ("Opticom"), Pacific Bell and Nevada Bell ("Pacific"), Sprint Corporation ("Sprint"), Southwestern Bell Telephone Company ("SWBT"), Teltrust, Inc. ("Teltrust"), U.S. Long Distance, Inc., ("USLD"), United States Telephone Association ("USTA"), and U.S. Osiris Corporation ("Osiris"). Additionally, Comments were filed by the Colorado Public Utilities Commission Staff ("Colo. PUC") on Apr. 4, 1995, Operator Service Company ("OSC") on Apr. 7, 1995, Florida Public Service Commission ("Florida") on Apr. 10, 1995, and NAAG on Apr. 10, 1995.

[4] See *Ex Parte* at 2.

[5] One has to phrase this issue in the theoretical, because absent a tariff investigation it is clearly not possible to make a definitive determination that the charged rates are excessive. Specific rates may, in fact, represent actual reflections of individual OSP's cost structures. See Oncor at 6, n.10 (noting that in 1991, the Commission found that OSP expenses equaled 94.5% of OSP revenues); Opticom at 6 (referencing the Commission's Final Telephone Operator Consumer Services Improvement Act of 1990, ("TOCSIA") Report to Congress, indicating that OSPs were "'not making extraordinary profits' and that a 'vast majority' of all OSPs charge rates that are 'close to the industry average.'"); Osiris at 6-7. (U S WEST is uncertain what facts NAAG has at its disposal that permit it to categorically assert that OSPs charge rates "which are not cost based" and that the rate cap proposal outlined in the *Ex Parte* would permit them to continue to do so. NAAG at 3.) While that cost structure might

than billed party preference (or "BPP"). Unlike BPP, a rate cap plan directs its "remedy" to those portions of the market remaining in need of a solution to the putative "OSP problem": those individuals who either cannot or do not (either out of choice or ignorance) hook up with a carrier they deem to have satisfactory rates. It does not interfere with, or impose costs on, those away-from-home callers who currently know how, can and do reach their preferred carrier, thus not suffering from allegedly excessive OSP rates.

While the rate cap proposal outlined in the *Ex Parte* is not the only rate cap proposal that might be divined or be found reasonable,[6] it is certainly one that -- in its simplicity -- warrants serious consideration. What would not be simple, and what U S WEST would not support, is a rate cap plan modeled, in some way, upon dominant carrier rates. There are a number of reasons for our opposition to such a model.

First, U S WEST has difficulty imagining what legitimate regulatory interest there could be "in having all other firms set their prices at the dominant firm's rates," assuming a "dominant firm" could even be identified.[7] We agree with AT&T

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be burdened by what the Commission and others (see SWBT at 10; Sprint at ii, 3) might deem inappropriate levels of "legitimate business expense[s]" (see Oncor at 10, citing to a Common Carrier Bureau finding that commissions are such expenses and do not qualify as a "tariffed rate"), without discrete investigations it is impossible to make broad, general "findings of fact" about the reasonableness of any individual OSP's cost structure or rates. See APCC at 13.

[6] See Ameritech at 2-3 (reinforcing its support for BPP, but suggesting an alternative rate cap plan based on dominant carriers' rates, if any rate cap plan at all gets adopted); Pacific at 2-3 (proposing its own rate cap plan based on different types of calls theoretically having different cost structures); OSC at 5-6 (suggesting its own version of a rate plan, which it claims is more closely aligned with OSP cost structures and recovery).

[7] AT&T at 5. See also OSC at 8. Compare Colo. PUC at 10.

that the public interest benefit of such an approach is not intuitively demonstrable. Second, absent a Commission investigation and pronouncement, there is nothing to demonstrate that current dominant carrier rates are "reasonable," despite their undisputed lawfulness. Third, absent a similar investigation with respect to an individual OSP's rates, there is nothing to demonstrate those rates are "unreasonable," despite the fact that they may be above the rates of the three largest interexchange carriers ("IXC"). A determination as to the reasonableness of the rates being compared or utilized for purposes of establishing an OSP rate cap plan based on dominant carrier rates would be unnecessarily time-consuming and contentious. Such an investigation does not seem warranted by market responses, at least as the market has expressed itself through complaints, and it is not required by legal precedent.[8]

We urge the Commission to go beyond this notice and comment round and to frame a proposed rule based on the elements of the rate cap plan outlined in the *Ex Parte*. We believe the *Ex Parte* proposal is well within the authority of the Commission to enact.[9] And, we believe that none of the currently-filed comments on that *Ex Parte* sufficiently impugn its integrity or capability of successful implementation such that its outright dismissal is warranted.

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[8] See In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 3295-3307 ¶¶ 880-96 (1989) ("Report and Order"), Erratum, 4 FCC Rcd. 3379 (1989), modified on recon., 6 FCC Rcd. 665 (1991), remanded on other grounds sub nom., AT&T v. FCC, 974 F.2d 1351 (D.C. Cir. 1992), vacated in part, 8 FCC Rcd. 3715 (1993); Second Report and Order, 5 FCC Rcd. 6786, 6836 ¶¶ 401-06 (1990), modified on recon., 6 FCC Rcd. 2637 (1991), aff'd sub nom., National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[9] See discussion at Section V, below.

We do, however, agree with Osiris that a formal Notice of Proposed Rulemaking would be required to proceed with an implementation of any kind of OSP rate cap plan.[10] We urge the Commission to proceed expeditiously to initiate such a rulemaking. The sooner the remaining offending OSP rates are disciplined through the vehicle of a rate cap/no suspension regulatory policy, the sooner those members of the consumer marketplace who remain adversely affected by OSP-processed calls will reach a state of some degree of equilibrium. The longer-term implications of an OSP rate cap on the OSP industry will be harder to determine.

II. A GOOD ARGUMENT CAN BE MADE THAT, GIVEN THE LIMITED REMAINING MARKET "FAILURES" ASSOCIATED WITH OSP TRAFFIC, NOTHING MORE THAN AGGRESSIVE ENFORCEMENT IS REQUIRED

Before addressing the specifics of the CompTel proposed rate cap plan, and the comments about it, it is important to address the predicate question of the need for any additional regulatory intervention in the matter of OSP rates and market behavior. A few commentors make the argument that nothing additional needs to be done via a rulemaking or regulatory rate structure, and that what is needed is not more regulation but more aggressive, tough enforcement of the TOCSIA and the Commission's existing rules.[11] Frankly, U S WEST agrees with this argument as a matter of pure ideological principle.

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[10] See Osiris at 12. Because the Commission's current rules allow non-dominant providers to file tariffs under a short notice period, and to utilize a streamlined tariffing process, the Commission would be required to amend those rules with respect to OSP tariffs. Vis-à-vis those tariffs, a special "no suspension" rule would need to be specifically promulgated. See APCC at 6-7.

[11] See, e.g., Oncor at 4; Opticom at 5-6, 10; AT&T at 2-4; Osiris at 2-6.

Given the overall general positive contribution of the actions already taken by the Commission with respect to OSPs, pursuant to the TOCSIA, a good argument can be made that there is little market failure or OSP "problem" left. The remaining problems, some of which appear to be quite identifiable, well-known and blatant, can (and U S WEST believes should) be addressed directly through enforcement initiatives.

Lingering OSP "problems" are caused by a limited number of OSPs and undoubtedly involve a statistically insignificant number of minutes of traffic.[12] The vast majority of the OSP industry has been disciplined via the broad mandates of the TOCSIA and the Commission's implementing rules. What "problem" remains is clearly "marginal": marginal with respect to the number of affected OSPs, marginal with respect to the number of affected consumers, and marginal with respect to the number of minutes of traffic involved. While this does not demean the seriousness of the market failure with respect to those individuals that get caught in its web, this situation represents a classic enforcement issue. It is not necessarily a cry for further broad regulatory mandates or regulations.

In this regard, compliance with TOCSIA or the Commission's mandates are no different than with any other legislative prescription. Most people/companies obey the law. But some do not. Some break it and break it and break it, until it be-

[12] As Opticom points out, where millions of calls are processed, and you have a .0005% complaint rate, you have to question the size of the "problem." Opticom at 5. For example, one might deem such a ratio a huge success, rather than a market "failure."

comes too risky or too expensive for them to stay in business or to continue with their malfeasance.

It is common knowledge that with respect to any particular legislative or regulatory mandate, some individuals and businesses disobey or break the law. However, when they do, the traditional American response is to prosecute the offenders. And, until those charged have been proven guilty, we do not make them go around warning others that "I may be a criminal" or "I may engage in behavior that is different from the normative behavior of those around me." Nor do we make their associates or members of their family make such disclosures. Neither do we establish elaborate social and technological databases to allow others the opportunity to avoid interaction with the putative criminal, to shun him and to, hopefully, over time drive him from the community. Our tradition is more one of direct action. And so it should be here.

As a general matter, U S WEST does not believe in ubiquitous, often punitive, regulatory mandates where the problem stems from few, not many, members of the industry, and the bad acts are not systemic to the industry structure or conduct.[13] Furthermore, U S WEST is not generally supportive of Congressional or regulatory mandates that seek, under the general banner of "consumer protection," to burden an entire industry because certain unwary -- as opposed to reasonable -- consumers have failed to act to educate or protect themselves.

[13] See Reply Comments of U S WEST, Inc., CC Docket No. 93-22, filed Oct. 13, 1994, at 4-16.

Yet, despite all of the above, there is certainly a practical, political and pragmatic side to the debate that must be addressed. BPP is outrageously expensive. And, yes, U S WEST relishes the legitimate opportunity to aid the Commission in finding a more targeted, direct approach than BPP to solving the problem of customer complaints over excessive OSP rates.[14] As a mechanism to facilitate customer "choice," BPP is overbroad and unnecessary for the vast majority of the away-from-home calling public. As an enforcement mechanism to reign in excessive OSP rates, it is like using a sledgehammer to kill a fly. You may get the fly (but you may not), but the surrounding environment will probably be needlessly and adversely affected by the decision as to the tool utilized.

In support of our advocacy efforts, we will even agree to conduct a certain amount of indirect "enforcement" support activities (in the nature of reporting), despite the fact that we generally are opposed to such assumptions.[15] While we clearly

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[14] See Osiris at 8-9 (suggesting that the drafters of the *Ex Parte* would propose just about anything to avoid BPP); Pacific at 4-5; SWBT at 5-6 (all suggesting that the problem of excessive rates is not the only problem BPP would solve and that the proponents of the *Ex Parte* are myopic in their approach); Osiris at 8-9.

[15] As a general matter, U S WEST does not believe the local exchange carriers ("LEC") should be conscripted as enforcement arms of the Commission with respect to its rules or mandates simply because we are easy targets, either due to our ubiquitous networks or our billing operations. Thus, many situations would find us in support of the kinds of comments filed by the NTCA, SWBT and Sprint, and concerned and cautious, as USTA is. See NTCA at 3-4; Sprint at 8, n.8; SWBT at 6; USTA at 2-3. In this particular case, however, we depart from our general position quite simply because we see more to be gained by our departure than by our refusal to lend support. Furthermore, as our actions will involve only "monitoring" of information in our possession, with subsequent reporting to the Commission, we do not see ourselves in a direct "enforcement" role, as suggested by NTCA. NTCA at 3. Indeed, it was our lack of participation directly at the enforcement level that was a driving factor behind our willingness to act, in this particular circumstance, as a "reporting" vehicle. We might well make a different decision in other circumstances, based on other facts and market environments.

understand that preventing excessive OSP rates is not the only articulated "benefit" of BPP, we also know that the other putative benefits could be achieved with far less costs imposed on us and other LECs BPP imposes. The avoidance of those costs requires either lots of fortitude from politicians and regulators, or a more targeted, creative approach to the immediate problem than has been articulated thus far.

III. ASSUMING DIRECT ENFORCEMENT IS TOO EXPENSIVE OR COMPLICATED, OR IS CONSIDERED OTHERWISE "UNSATISFACTORY" FOR THE MARGINAL MARKET PROBLEMS STILL ASSOCIATED WITH OSP CALLS AND RATES, A RATE CAP IS CLEARLY A BETTER SOLUTION THAN BPP

Given the "reality" facts outlined above, it certainly cannot be inappropriate to propose (or to create) a structure in which the perceived need (or real marginal need) for TOCSIA or Commission-rule enforcement is dampened. A rate ceiling proposal, where the rates are established below rate levels that have generated the vast majority of consumer complaints about OSP rates makes perfect sense. If consumers are not angry about a rate, they will not complain. If they do not complain, enforcement costs decrease. And, in such an environment, who is to say that such rates are not reasonable,[16] even if they may be "above" the rates of the "dominant carriers." If the market is not objecting, that says something.

[16] The NAAG argues that under the approach of the *Ex Parte* OSPs "would [be] authorize[d] . . . to charge rates which are not cost based and which are substantially higher than existing dominant carrier rates." NAAG at 3. See also Pacific at 1-2. While the latter might be correct (see Sprint at 7-8; Colo. PUC at 11-12), the former is not demonstrated. As far as U S WEST is aware, the NAAG has no independent knowledge of whether the rates are cost-supported or not, at least not across the industry. While it may have some information based on individual prosecutions or consultant expertise, U S WEST would question whether it would support the statement -- one of purported fact -- as articulated by the NAAG.

The current "market problem" facing the Commission is not one of stunted customer choice. Customers currently have choices and are advised of those choices,[17] choices that are expanding every day. Furthermore, their carriers of choice are driven to provide them detailed information about how to exercise those choices.

The "market problem" is that some consumers do not care to exercise such choices or do not heed warnings or do not read the literature. They see toll as a commodity offering and they don't care who carries the call so long as the tendered bill is not "outrageous."

It is that problem, simple as it is, that the Commission should attempt to solve -- simply, immediately, and with as limited a number of resources as the "problem" warrants. And, solving that problem does not require BPP because the source of the "problem" is caused by calling individuals who generally do not care about exercising "choice," or about aggregating their own traffic for some promotional or affiliation award or benefit.[18] From their perspective, "It's the rates, stupid!"

Added to the continued marginal market dysfunction is the fact that the costs, and in many instances the "hassles," associated with TOCSIA and

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[17] See Reply Comments of U S WEST Communications, Inc., CC Docket No. 92-77, filed Sep. 14, 1994, at 27-29 ("U S WEST BPP Reply").

[18] If they cared, they could do it now. The idea that BPP might be instituted to give "choice" to those individuals who really don't care about choice -- but would make one if asked or prompted -- is frightening. Again, this is a marginal part of the calling population, not the mainstream. It is clearly more cost efficient, vis-à-vis this population, to just discipline the rates so that affected consumers find no reason to object.

Commission rule enforcement at this margin are perhaps more than Congress or the Commission originally envisioned. The enforcement activities are not insubstantial.

Since OSP tariffs are non-dominant, they are not generally suspended or investigated for their substantive "reasonableness." Assuming, for the sake of argument, that there were 200 OSPs in the market (other than the Big Three), it is obvious that just "reviewing" the tariffs of all these carriers would be a formidable task. If each of 200 OSPs generated a single consumer complaint a month about excessive rates, the burden of tariff investigations would be virtually impossible.[19] And, while the investigations were ongoing, additional complaints would be coming in.

A more targeted way of getting to individual instances of excessive rate charging, perhaps, would be via Section 208 of the Communications Act. However, if each of the 200 OSPs charged just 10 individuals one excessive rate per month, over 2,000 individual complaints a month would get filed, often with minimal damages. And, within this kind of complaint process, the complainants (the individuals) would bear the burden of proof to show the "unreasonableness" of the OSPs' rates.

What needs to be done is to get the above-described "process burden" reversed. OSP rates, and their reasonableness, is no longer a subject matter easily

[19] This situation only gets worse as more and more service providers would qualify for the appellation OSP. See Sprint at 4. According to Sprint, and U S WEST has no reason to assume they are wrong, there are "literally hundreds or thousands of [OSPs]." Id. at 11. This is a far cry from what Congress assumed when it passed TOCSIA initially. See H.R. Rep. No. 213, 101st Cong., 1st Sess. (1989) at 2 (where it is noted that "[c]urrently, there are over 35 [Alternative Operator Service] AOS companies competing in the United States.").

accommodated by traditional common carrier regulatory processes. It is a matter of continuing market disturbance and distress, at least at the margin. And it is a distress that the Commission cannot easily address or solve via the traditional dispute resolution processes at its disposal.

That market distress, however, can be alleviated by establishing a rate cap plan, where OSP rates are benchmarked below the vast majority of consumer complaints, and "carrier-initiated" rates filed below the cap are presumed reasonable.[20] As USLD has eloquently stated: "The [OSP] industry assumes the risk in this proposal by establishing rate limits which are based upon end user tolerance thresholds rather than empirical cost data."[21]

Furthermore, no rate prescriptions are involved.[22] OSPs who are driven, by virtue of their cost structures, to need higher rates would have two choices: change their cost structures or file documentation demonstrating the reasonableness of their rates. The choice is theirs.[23]

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[20] Compare Opticom at 9-10. Contrary to Opticom's suggestion, there is nothing about the rate cap plan that is at odds with the "carrier-initiated rate" doctrine. OSPs will continue to file rates, on their own initiative.

[21] USLD at 3.

[22] See discussion at Section V, below.

[23] This non-prescriptive aspect of the rate cap plan proposal causes some to criticize it on the grounds that it is "porous," because no one is compelled to follow it (see Sprint at 4-5; and compare SWBT at 5-6). U S WEST urges that the proposal be tried before too much "impossible dream" rhetoric is heaped on it. For example, CompTel's representation that the rate cap plan was shared with certain of its OSP members and found satisfactory vis-à-vis their cost structure (CompTel at 7-8) suggests that the proposal may be more meaty than Sprint gives it credit for. And the filings of OSPs in support of the plan also bode well for its success. See generally USLD; Teltrust; Intellicall; Frontier.

With a rate cap, if the "no suspension zone" for OSP rates are established below the level where consumer complaints are generally received, there should be significantly fewer complaints from customers, in the first instance.[24] The billings of the majority of the assumed 200 OSPs should theoretically cease to contain one "excessive" charge per month to any subscribers.[25]

Furthermore, OSPs who act in violation of the Commission's rules, i.e., who fail either to charge below the cap or to file supporting material demonstrating the propriety of their above-cap rates, will be easier to identify and focus on because there should be less of them. Some will come to the Commission's attention via continued complaints. A simple review of the billing vis-à-vis the rate cap will spell out compliance. Some will come to the attention of the Commission via the LEC reports. However the violations come to the Commission's attentions, the violators

[24] The NAAG suggests that there is something inappropriate about setting the rate cap at this level because this would not eliminate the "deception and misinformation" currently disseminated to consumers. NAAG at 6. Also, it does not believe the rate cap reflects the inclusion of competitive forces. Opticom objects to the starting rates on the grounds that there is no evidence that the rates reflect a typical OSP cost structure. Opticom at 11. It is always easy to criticize the starting rates in any rate cap proposal, as evidenced by all the complaining and grumbling about the LECs' original price cap rates. That does not necessarily mean the starting point is illegitimate. Furthermore, as CompTel indicates, it did an informal review with some of its OSP members, and apparently was not deterred from proceeding. CompTel at 8.

[25] It is certain that this is theory. Until a rate cap plan is put into place, it is impossible to determine the precise result. It is important, however, to address the suggestion that rate cap plans are not effective, especially when the challenger seeks to use as support for the challenge the "Florida experience." MCI cites to that experience to argue that rate caps do not work. MCI at 3-4. Florida also refiles its own BPP Reply comments, suggesting that its rate cap plan has been less than a stellar success. Florida at 2-3. However, if one reads the Florida filing carefully, it is clear that the overwhelming majority of the continued overcharging in Florida (1.7 million of the 2 million alleged overcharges) involve OSP services in the inmate market. U S WEST agrees with Gateway that the CompTel *Ex Parte* was not addressing such a situation. See Gateway, generally. Based on Gateway's comments, the Commission will, apparently, have an opportunity to review an inmate OSP rate cap plan in the future. Id. at 7-10.

can be treated with "swift justice" -- a fine or forfeiture for engaging in unlawful conduct.

As to those consumer complaints received by the Commission involving below cap rates, there would most assuredly be some. With respect to those, the individual can be offered the complaint route. Or, the Commission might merely engage in some targeted customer education. That education effort, expended as it would be on a smaller "pool" of complainants, would still represent a cheaper enforcement cost than is currently reflected in the present situation where there are no capped rates and the volume of complaints is large.

The beauty of the rate cap proposal is that the market results, from an enforcement perspective, should be striking and evident. The rate cap should dramatically reduce consumer complaints. Yet the cost of implementation for the Commission is virtually nothing.[26]

While it is possible that, over time, consumers might begin to lodge additional complaints, focusing on rates concentrated around the cap ceiling, only time will tell. If such does occur, perhaps by then, OSPs might have made further strides in their cost-cutting efforts, such that they would begin filing rates below the levels generating the "new" round of complaints. But, in any and all events, if the plan does not work, the Commission can always do away with it, being out little

[26] Osiris at 10 ("the cost of implementing [a rate cap] . . . in the short term would be almost zero;" but suggesting that over time it would be an administrative burden for the Commission).

expense, having imposed minimal industry "harm," and having been proactive in dealing with consumer perceptions of price gouging.

Compared to this targeted, simple approach, the unsuitability of BPP to satisfactorily address the situation becomes obvious. It is a clumsy enforcement tool, as it reaches those not necessarily interested in its help; and helps others not by calming the waters of the marketplace but by driving out of business carriers that might well serve an important market function. Furthermore, unlike the limited cost impacts associated with a rate cap plan, BPP would impose costs not just on bad-actor OSPs, and not just on the OSP industry itself. It would impose substantial investment and deployment costs (costs in lieu of enforcement) on **adjacent industries that have minimal OSP market presence** (but just happen to have phones that allow processing of OSP calls or happen to have deep pockets). This is not a logical or a good policy result to correct a marketplace "enforcement" problem. Shackling various businesses with costs to remedy the "bad acts" of a few is just not right.

IV. BILLED PARTY PREFERENCE, REGARDLESS OF ITS OTHER SIGNIFICANT (AND FOR SOME, UNDESIRABLE) IMPACTS, WILL MOST ASSUREDLY DESTROY THE OSP INDUSTRY - IF THAT IS EITHER A DESIRABLE GOAL, OR IF IT IS WHAT THE "EXPECTED" CONSUMER BEHAVIORS WOULD PRODUCE, THERE ARE CHEAPER, LESS EXPENSIVE WAYS OF GETTING TO THE SAME END POINT

A. The Context of BPP and TOCSIA as Market Controls on OSP Conduct and Rates

The comments in this proceeding on the issues raised in the *Ex Parte* generally fall along the lines taken by the parties with respect to BPP. If the commentor

is an ardent supporter of BPP, it generally opposes the concept of a rate cap.[27] On the other hand, to the extent that the commenting party finds BPP anathema, it supports the rate cap.

This is not particularly surprising. Supporters of BPP hail "customer choice" as the driver for the huge investment. The fact that customer choice will have the incidental effect of driving most non-vertically-integrated OSPs out of the market is simply seen as a beneficent by-product of the customer choice behavior.[28]

Yet, BPP was originally proposed and discussed by various industry participants prior to the passage of TOCSIA, not just as a theoretical or ideal way of providing "customer choice." The "customer choice" being proposed was, in large part, being advanced as a mechanism to allow consumers to avoid OSP rate and practices abuses. It was assumed that the ability of consumers to exercise choice to do business with an OSP (or not) would introduce a measure of discipline to the OSP industry.[29] Then along came TOCSIA.

It is for Congress, in the first instance, to define how an undisciplined market situation should be addressed.[30] Congress addressed purported OSP abuses via the

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[27] See, e.g., SWBT at 9-11; Sprint at 11-12; Ameritech at 2.

[28] Compare Sprint at 11 ("If the alternative operator service providers cannot offer service to the public at rates equal to those of the full-service industry, the Commission must question whether their existence serves the public interest.").

[29] In the Matter of Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, 7 FCC Rcd. 3027, 3028-32 ¶¶ 6-29 (1992), in which the Commission recites the genesis of BPP and its benefits. See also Report and Order and Request for Supplemental Comment, 7 FCC Rcd. 7714 (1992); Further Notice of Proposed Rulemaking, 9 FCC Rcd. 3320 (1994).

[30] See Oncor at 4.

TOCSIA. The Commission implemented the TOCSIA. And while the TOCSIA gave the Commission certain rulemaking authority with respect to OSP ratemaking in a distressed market, it made clear that a general rulemaking on OSP rates was not warranted in the absence of continued market distress.[31]

Congress required the Commission to report to it, periodically, the state of the market with respect to OSP rates and practices. The Commission did so. And, in fairly enthusiastic terms, it advised Congress that TOCSIA had reaped major successes with respect to the OSP marketplace and consumer choice and satisfaction.[32]

Thus, it is clear as discussed above that what remains as a problem are bad-acting OSPs at the margin. Added to that phenomena is the fact that certain consumers have made little or no attempt to educate themselves about away-from-home calling and how it might have changed since divestiture. While there was clearly "head in the sand" consumer behavior at and around divestiture, continuing for many years after and still present in certain market segments, it is not a situation that should be promoted. The Commission should not expend considerable resources, nor expect businesses to invest billions of dollars, to protect unwary versus reasonable consumer conduct.[33]

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[31] See discussion below at Section V.

[32] See Opticom at 5 ("In every such report, the Commission made a factual determination that market forces were securing just and reasonable rates and fair practices for consumers."), 6; Osiris at 12.

[33] The NAAG suggests that those consumers who need more protection than the proposed rate cap plan outlined in the *Ex Parte* can provide are those who, apparently despite the branding requirements of TOCSIA and the Commission's mandates, "are still not aware that their calls are

Many of the complaints filed with this Commission and the state commissions obviously come from "reasonable" consumers, not just the unwary. The simplest, easiest, and most timely and cost-effective way to bring this segment of the market immediate satisfaction is to get the rates of the OSPs below the level where complaints are generated. This is the most cost-effective enforcement tool currently at the Commission's disposal to bring under control the marginal segment of the OSP industry that continues, apparently, to bypass other market and regulatory calls for discipline.

TOCSIA solved many of the problems that BPP was expected to solve. And, it did so in a manner that did not involve "hard wiring" a customer's 0+/0- choice in an expensive database. It provided the ability for those customers who cared about their own personal traffic aggregation (perhaps because of the discounts or promotions they would invariably enjoy by sending both their 1+ and 0+/0- traffic via a single "carrier of choice") to do so. It required OSP identifications so that consum-

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being carried by OSPs." See NAAG at 7-8. And, the NAAG describes at least certain individuals who do not take advantage of dial-around access as lacking "savvy." Id. at 4. Compare Sprint at 11 ("The alternative operator service providers can persist in charging higher than competitive rates only because customers don't know who they are dealing with"); Pacific at 4 ("Consumers are still confused as to who carries their calls when they use alternate billing . . . [M]any consumers still call . . . with complaints indicating they do not understand the significance of call branding, or payphone signage.").

In the case of Haskell v. Time, Inc., 857 F.Supp. 1392 (E.D. Cal. 1994), the District Court ruled that the Federal Trade Commission's standard of the "reasonable consumer," rather than the "unwary consumer," was the correct standard to apply to test a complaint alleging false and misleading advertisements. While OSP rate-gouging is not the same thing, necessarily, it does amount to an "abuse" of the consumer. Compare Colo. PUC at 1 ("prevention of consumer abuses by some participants" in the OSP industry), 6. The standard should be the same. The Commission should not establish expensive and elaborate enforcement structures, including databases that utilize defaulted customer choice mechanisms, for this small portion of the population. The most appropriate resource allocation to aid this small market segment would be increased (perhaps more aggressive) customer education.

ers could choose to access their "own" carrier, if so desired. It required disclosures, so that consumers were advised as to how to secure additional information.

A vast majority of the consuming population took advantage of these TOCSIA protections. A minority were either unable to (because the technology did not permit, in limited circumstances, the capability) or lacked the desire to. It is this minority population who continues to "complain" about certain OSP practices, most particularly the rates. It is this population which -- theoretically -- would benefit from the "enforcement" component of BPP.[34] But could not this same market

[34] Sprint makes the argument that "equal access" for 1+ traffic was imposed at a time when only 10% of the consumer market could not reach their "carrier of choice." Thus, it argues, if 20% of the population cannot reach their 0+/0- carrier of choice through a similar simple dialing mechanism, the teaching of divestiture and 1+ presubscription suggests they should be able to and that the telecommunications industry should all belly up to the bar and do whatever it takes to promote this public interest agenda. Sprint at 6-7, n.4. U S WEST disagrees with Sprint's fundamental analysis.

The solution for one "problem" is not the solution for every problem, especially when the facts, markets and consumer behaviors are different. A 1+ presubscription model makes certain contextual sense. It is a calling pattern hard-wired into a station, generally from the principal place of calling by individuals (homes, offices). 0+/0- traffic is "away from home" traffic. There is nothing that suggests that a cost appropriate for one market segment is appropriately incurred in a different market segment. As U S WEST stated in our BPP Reply, right now people making calls away from home expect to make them differently than calls from home. This has been a generally consistent marketplace expectation over time, in large part because away-from-home calling requires some kind of "alternative billing arrangement" (punched in digits, swiped cards, voice recognition, etc.) -- something totally different than picking up the phone and dialing 1+. Learning "additional" behaviors or "new ways" to do away-from-home calling, then, is not particularly burdensome for most of those who do such calling. And, if there were any cost benefit to such callers at all for continuing such calling behavior, they would continue it. In essence, it is the occasional away-from-home caller, who might make only a few calls per year, who is suffering.

That means that one must look to the 20-30% of the away-from-home calling market that either cannot, chooses not to, or does not know how to reach preferred carriers. It is that market segment that should bear the entire expense of BPP implementation. Can this limited segment of the market afford BPP? No, it cannot. Thus, unlike 1+ presubscription, where the entire marketplace gained from the investment and the dialing simplicity from every single home or office in the United States, such cannot be said for the away-from-home calling market. So long as callers away from home can get to their carrier of choice, and that carrier makes it worth their while to get there, they will. BPP adds nothing to these market dynamics but additional costs.

segment benefit from an enforcement structure achieved at far less cost? Certainly it could.

TOCSIA's success removed much of the supporting rationale behind BPP. What remains unsatisfied by the prescriptive provisions of TOCSIA and the Commission's implementing rules is the adverse rate impact on a limited number of customers, involving a limited number of minutes of traffic. It is this limited situation that should be the focus of the Commission's resource allocation and its attention. This limited market failure simply cannot warrant the implementation of BPP.

BPP might well be able to solve this remaining "problem" -- small as it is. However, in solving the remaining problem, BPP will bring down an entire industry. As such, it is an overbroad "enforcement" remedy. And, when sold as a vehicle for easily facilitating consumer choice, it ignores the fact that more direct and cheaper means -- although they may be politically disagreeable -- are available to accommodate such choice.

As stated above, a fundamental component of BPP is the concept of "hard wiring" a customer's choice of 0+/0- carrier, in the same manner that is currently done with respect to 1+ presubscription.[35] Given the predictable outcome of a 0+/0- consumer subscription process (whether affirmative or negative in form), i.e., most consumers would choose their 1+ carrier for their 0+/0- traffic, it is clear that there is a certain "OSP enforcement" component associated with BPP.

[35] See discussion in U S WEST BPP Reply at 6, 10-11.

BPP would basically eliminate most OSPs from the market, because most consumers would not "choose" them.[36] Given the well-known consumer drive for "one stop shopping," a driver made even more pronounced as consumers are "rewarded" for aggregating their own traffic requirements with a "single carrier" through promotions such as frequent flier miles and what not, it is not hard to imagine that individuals will concentrate their 0+/0- choices on the Big Three IXCs.[37] Predictably, at the conclusion of the first round of BPP balloting, OSPs who are not vertically integrated companies, offering multiple products and services, will have no customer base. OSP "customers" i.e., the aggregators, will simply cease to have any meaningful standing in the marketplace.

Once OSPs are eliminated as service providers, one would not need to "worry" about excessive rates. Two birds killed with one stone: customer choice and elimination of troublesome service providers. While this is an "enforcement mechanism," it is clearly a radical one. There is nothing delicate, tailored or targeted about it.

While the approach is akin to the use of a bludgeon with respect to the OSP industry, the end result may be a good one.[38] Clearly, it would be a result grounded

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[36] This would undoubtedly be the case, regardless of the amount of advertising an OSP might try to do. The consumer drive toward "sole sourcing," a drive advanced and promoted by vertically-integrated companies, will be virtually impossible for most OSPs to overcome.

[37] This phenomena will only become more pronounced as local exchange competition becomes more prevalent and "sole sourcing" for all telecommunications products and services, including local exchange, toll and enhanced services (in packages) becomes the market standard. This will occur because the service providers will aggressively advance such aggregation via marketing promotions.

[38] It might also be the result that is reached as a matter of general marketplace equilibrium, in any event. Currently, OSP volumes are down and aggregators have become more aggressive in their commission demands, as a means to make up for the reduced volumes. The larger the commission payments, the higher the aggregator/OSP rate for the call. See Oncor at 5-8. These higher rates

in some definition of "customer choice." However, if this is the predictable (and desired result), it can more directly be accomplished by passing legislation direct and to the point: only facilities-based, vertically-integrated, carriers should be permitted to compete in the OSP market.[39]

One might view this as an outrageous suggestion: Congress meddling in the operation of the marketplace! Especially in such a direct and straightforward way? While the idea might be painful to some, it is clearly the least expensive and most effective way of securing the predictable end result of BPP. And it has advantages over the BPP regime: it affects only the OSP marketplace (with minimal impact on the adjacent aggregator business); it does not burden adjacent service providers (such as LECs) with costly infrastructure investment; such legislation would not cost much to promulgate; and it cuts to the quick on the way to the ultimate accommodation of "customer choice" -- "one-stop shopping."

On the other hand, the absence of OSPs from the market may not be a good result, even though it would be the end result of BPP and even though "pure" customer choice might drive one to that end point. If there is any value to "open competition," "open markets," spontaneous and varied exercises of customer choice;[40] if there is any place for multiple providers of service (despite varying cost structures)

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will continue to expand the market making use of dial-around behavior. Over time, OSPs will simply be unable to pay the demanded commissions and still stay in business.

[39] See note 36, supra.

[40] See U S WEST BPP Reply at 4-11.

as opposed to a few vertically-integrated providers of packaged services (who become the focus of consumer "sole sourcing"), then getting to the end point may take more work, more customer education, more staying power, than many consumers and regulatory agencies can easily tolerate. But it may be the right thing to do.

It is certainly not an easy call. But what is easy is that the cost of BPP is exorbitant given its predictable outcome. There has to be a better way.

One possible "better way" would be to discipline the rates of carriers, who are used by those consumers not dialing-around to their carrier of choice; carriers who sometimes charge rates that the public perceives to be excessive. Absent these exorbitant charges, these consumers might not care much about the ability to exercise some "ideal" choice. For those individuals who do not seek the market "rewards" of personal traffic aggregation, a toll call resembles a fungible commodity. The consumer will agree to (or accept) any provider, including the provider chosen by the "intermediate customer" (i.e., the aggregator), so long as they are not abused.

A rate cap plan provides protection from consumer "abuse." While there may be other actions that could achieve similar results,[41] they would require some sustained Commission involvement in terms of fact-gathering and policy-making. A

[41] For example, a prescription of the commission amounts paid to aggregators might provide such market discipline. See Oncor at 9-10. Compare Colo. PUC at 8-9. If there were not escalating bidding wars for the aggregator's business, the cost of doing business for OSPs would (theoretically) decrease. We say theoretically because it does appear that the AT&T proprietary CIID card might result in AT&T being able to deliver more traffic to the aggregator, even if the commissions were constant. See Oncor at 5, 7-8; Teltrust at 5, 7-9. Clearly, an ultimate resolution of this matter (whatever the result) would be less costly than BPP.