

rate cap plan does not pose this level of regulatory resource dedication or insinuation.

V. THE COMMISSION HAS THE AUTHORITY, THROUGH A FORMALLY INSTITUTED RULEMAKING PROCEEDING, TO IMPOSE A RATE CAP FOR OSP RATES -- THOSE RATES WOULD NOT BE "PRESCRIBED" RATES AND DO NOT NEED TO BE ESTABLISHED BASED ON STRICT COST CRITERIA.

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U S WEST disagrees with those commentators who assert that the Commission lacks authority under the Communications Act to adopt a rate cap plan utilizing benchmark rates.<sup>42</sup> The TOCSIA itself does not prohibit such Commission intervention in OSP rates. Under the statute itself (not even considering additional sources of authority), the Commission was authorized to insinuate itself into the OSP rate-making process through two separate vehicles. First, if the Commission did not determine that market forces had largely addressed and taken care of consumer abuses, the Commission was authorized to initiate a rulemaking proceeding to establish regulations to assure that OSP rates were just and reasonable.<sup>43</sup> Within the context of such a rulemaking, the Commission was authorized to investigate the possibility of limiting the amount of commissions paid to aggregators.<sup>44</sup>

Under this statutory section, it is correct that if the Commission reported that the market was addressing the OSP "problem" satisfactorily, it had no

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<sup>42</sup> See Osiris at 11-12; Opticom at 6-10.

<sup>43</sup> 47 USC § 226(h)(4)(A).

<sup>44</sup> Id. at (4)(B).

authority to proceed with a general rulemaking on OSP rate setting.<sup>45</sup> However, there are other sources supporting Commission ratemaking authority with respect to OSP rates.

For example, if after the filing of OSP informational tariffs, the Commission determines that the rates “appear upon review” to be unjust and unreasonable, the Commission is authorized to require the OSP to demonstrate the justness and reasonableness of the proposed rate.<sup>46</sup> The rate cap plan clearly fits within the authority granted to the Commission pursuant to this discrete provision of the TOCSIA.<sup>47</sup>

Rates falling below the levels in the rate cap plan would “appear” just and reasonable; while those above the plan would “appear” to be otherwise. Only in this latter situation must the Commission afford the affected OSP the opportunity “to demonstrate that its rates and charges reflect the reasonable cost of providing the service, plus a reasonable profit.”<sup>48</sup> Such is not a burden the Commission bears in

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<sup>45</sup> See H.R. Rep. No. 213, 101st Cong., 1st Sess. (1989) at 14-15 (“If the FCC makes a factual determination that market forces are securing just and reasonable rates and practices for consumers, rate regulation pursuant to this section is not required. Unless the FCC makes the determination [addressed above], the FCC shall complete a rulemaking within 90 days on how to establish rate regulation for the industry to ensure that AOS rates are just and reasonable.”) (emphasis added). In its attack on the Commission’s authority to “regulate” OSP rates through a rate cap plan, Osiris focuses on only this provision of the TOCSIA. See Osiris at 11-12. As discussed below, there is additional statutory authority that supports the Commission’s adoption of a rate cap plan.

<sup>46</sup> Id. at (h)(2).

<sup>47</sup> And, as AT&T has pointed out, the Commission undoubtedly has the authority right now, under Section 203, to require OSP rates to be just and reasonable. See AT&T at 3.

<sup>48</sup> See H.R. Rep. No. 213, 101st Cong., 1st Sess. (1989) at 7 (“The FCC is instructed to review these informational tariffs and require that any operator service provider, whose rates appear unjust or unreasonable, to demonstrate that its rates and charges reflect the reasonable cost of providing the service, plus a reasonable profit.”), 14 (“if upon review of the schedules filed . . . the Commission considers the rates and charges of a provider of operator services to be unjust and unreasonable, the Commission shall require the provider of operator services to demonstrate that its rates and charges

establishing a rate cap plan, as suggested by Opticom.<sup>49</sup> Rather it is a burden the OSP bears in the event its “informational tariffs” do not appear just and reasonable.

If an OSP cannot bring its rates down below the rate cap, that OSP remains free to “demonstrate” the justness and reasonableness of its rates, utilizing a “cost plus,” rather than a rate of return, burden of proof. Nothing more is required. Nor does the legislative history suggest otherwise.

In addition to the above, the legal analysis submitted by APCC on the Commission’s general legal authority under the Communications Act to establish a rate cap plan or a “no suspension” zone with respect to OSP tariff filings is sound.<sup>50</sup> The case authority cited therein, much of which was relied on by the Commission itself when it adopted price caps for LECs, supports the proposition that there need not be an absolute Commission finding that there is a strict correlation between costs and rates at the initiation of the rate cap plan. Furthermore, said law also establishes that the Commission’s establishment of a rate cap plan is not a Commission prescription,<sup>51</sup> is not a finding that “starting rates” are just and reasonable, and carries with it no regulatory compulsion.<sup>52</sup>

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are just and reasonable by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit. An operator service provider is not required to demonstrate that its rates and charges are just and reasonable on the basis of traditional rate-based, rate of return regulation, but instead must demonstrate that its rates and charges reflect their reasonable costs of providing service plus a reasonable profit.”).

<sup>49</sup> Opticom at 6-9.

<sup>50</sup> See APCC at 5-7, 9-12.

<sup>51</sup> Contrary to the suggestions of some, such as CNS and Opticom, no rate prescription necessarily occurs with the adoption of a rate cap plan. See CNS at 3-4; Opticom at 9-10. Thus, the Commission

As APCC has noted, the establishment and announcement of a rate cap plan would be good policy, and would undoubtedly be upheld by a reviewing court.<sup>53</sup> Thus, the Commission should not shy away from such an approach out of undue concern over either its jurisdiction or the fundamentals of the rate cap plan itself.

VI. OSP "DISCLOSURE" STATEMENTS ARE UNNECESSARY, ESPECIALLY IN A RATE CAP ENVIRONMENT -- FURTHERMORE, THE PRECISE TEXT OF THE MESSAGE SUGGESTED BY NAAG AND APCC IS PROBLEMATIC IN A NUMBER OF PARTICULARS

We do not support the proposal of the NAAG. We believe it inappropriate to require service providers to reference their competitors (the theoretical "regular phone company"), especially in the context where an implication is certain to be drawn that there is something inferior about the speaker vis-à-vis its competitor. The NAAG disclosure requirement provides OSPs with only two alternatives: price their services below the rates of the dominant carriers (a task that might be formidable, given the various offerings and rate changes the various dominant carriers promulgate)<sup>54</sup> or make a clearly odious disclosure. This does not seem to be a fair approach<sup>55</sup> or good public policy.

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would not be required "to examine the individual cost structure of each OSP before it sets a rate ceiling," as suggested by CNS at 3-4. Report and Order, 4 FCC Rcd. at 3306-07 ¶ 895.

<sup>52</sup> CNS is incorrect in its assertion that what is being proposed is a "rate ceiling to which all OSPs must conform." CNS at 4. Indeed, quite the opposite is true. See note 23 supra.

<sup>53</sup> Id. at 11-12.

<sup>54</sup> See OSC at 8; Oncor at 4, n.7.

<sup>55</sup> See Ameritech at 2 ("Ameritech is . . . concerned that requiring the NAAG recording any time rates exceed AT&T's rates, even by a small amount, may be unfair to OSPs."); CompTel at 10 ("NAAG proposal is . . . unwise and unfair"); APCC at 13-14 (the NAAG proposal is "arbitrary" and "unfair;" the message "would be the equivalent of requiring a small business, which sells consumer products

The cost structures of certain OSPs might well provide them with no ability to accomplish the former. In the absence of such accomplishment, such OSPs would be required to speak to consumers in a manner predictably adverse to their own business interests. Such a requirement seems punitive<sup>56</sup> and it raises not just business and policy questions but constitutional ones, as well.

While the message NAAG proposes might be factual as a literal matter,<sup>57</sup> its import is clearly one of “buyer beware.”<sup>58</sup> In that regard, it is -- indeed -- a “kill” message.<sup>59</sup> Use of such a message over time would drive OSPs delivering it out of business, just as surely as BPP would eventually do. The NAAG proposal might only drive them out faster.

Additionally, the particular substance of the message -- requiring reference to a competitor -- would seem to raise constitutional questions.<sup>60</sup> It is surely not a

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with higher prices than WAL-MART, to disclose to its customers that its prices are higher than WAL-MART.”).

<sup>56</sup> Oncor at 4 (the NAAG approach “appears to punish the OSP for rates above a level deemed to be acceptable”); CompTel at 11-12.

<sup>57</sup> CompTel states that the NAAG proposal “unfairly brands all rates above the dominant carrier’s rates as objectionable to consumers.” CompTel at 11. And see APCC at 13 (claiming that the NAAG message uses “as an absolute standard of reasonableness” dominant carrier rates). Neither commentors are precisely accurate. The NAAG message contains no direct reference to a “reasonable” or an “unreasonable rate.” However, the implication certain to be drawn is that the speaker’s rate (the OSP’s rate) is unreasonable vis-à-vis the referenced carrier.

<sup>58</sup> Oncor at 3-4 (the “NAAG proposal appears to try to push users away from using an OSP.”); APCC at 14 (“the message implies that the telephone company’s competitors are, by definition, overcharging and that the consumer must be warned before using any competitor’s services.”).

<sup>59</sup> See Oncor at 7-8.

<sup>60</sup> See Pacific Gas & Elec. v. PUC of California, 475 U.S. 1, 9-18 (1986), reh’g denied, 475 U.S. 1133 (1986).

message that an OSP would want to carry voluntarily. Indeed, if given the freedom to choose, an OSP may add a tail on the message: “but that does not mean we are not reputable folk with reasonable rates.”

Finally, the message -- referencing as it does a “regular telephone company” is confusing and misleading.<sup>61</sup> There probably is not a single such company with respect to an individual consumer. Thus, the reference itself is devoid any understandable context.

A message such as that suggested by APCC, to be used within the context of a rate cap proposal, appears more palatable at first glance.<sup>62</sup> But it is also far from satisfactory. While there is no requirement to make reference to a competitor, the references to the “government” and to “exceed[ed] benchmarks” is chilling.

U S WEST assumes most people would hang up when being told that the OSP may charge more than the “government” apparently deems appropriate, many not even understanding what “benchmark rates” were, and caring even less. (On their second calling attempt, if they do not dial around or take advantage of the opportunity to get the rate information, they might care more because otherwise the consumer will simply keep hearing the same message over and over.)<sup>63</sup>

Finally, we agree with OSC that “In an era where the telecommunications industry has spent tremendous resources in an effort to reduce call set-up times by

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<sup>61</sup> See SWBT at 4; APCC at 14; OSC at 7-8; NYNEX at 3-4; CompTel at 11-12.

<sup>62</sup> APCC at 15.

<sup>63</sup> See SWBT at 4-5; CompTel at 11.

seconds and fractional seconds to improve service to consumers,” some of which was directly mandated by the Commission, “it is a giant step backward to slow down the call process with an unnecessary and lengthy message.”<sup>64</sup> Furthermore, such a message will only increase an OSP’s costs,<sup>65</sup> an initiative at odds with trying to create incentives for OSPs to reduce their costs, so as to be able to price below a rate cap.

## VII. CONCLUSION

U S WEST believes that a rate cap, rather than a behemoth BPP or a noxious disclosure, is the solution best designed to solve the lingering “OSP problem.” The remaining market issues are marginal in their impact. They do not require the establishment of elaborate enforcement or consumer protection mechanisms. Indeed, sound policy suggests they require just the opposite: something simple, something quick, something targeted.

A rate cap will have various market effects. Some OSPs may be driven from the market; some may come in to prove rates warranted above the cap. But many will set their rates below the cap, will remain in business, and will start to work more strenuously at how to remain in business under such a revenue structure.

A rate cap plan is certainly a solution worth testing. The risk of its failure is certainly one borne by the OSP industry. If an OSP is unable to reduce its costs so as to set its rates below the cap, it risks the burden of a rate justification proceeding. Even if the OSP is successful in establishing the “reasonableness” of its rates

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<sup>64</sup> OSC at 7.

<sup>65</sup> Id. at 8.

pursuant to such a proceeding, if the marketplace continues to complain about it rates, it can assume other market, legislative or regulatory pressures will be brought to bear on it.

Finally, if the proposed rate cap fails to accomplish what it proposes to accomplish, i.e., decreased consumer complaints and rates lower than they are today, the Commission can move on to bigger and better things. If it is successful, perhaps the Commission will not have to. We urge the Commission to proceed with proposing the CompTel OSP rate cap plan as a proposed rule of the Commission.

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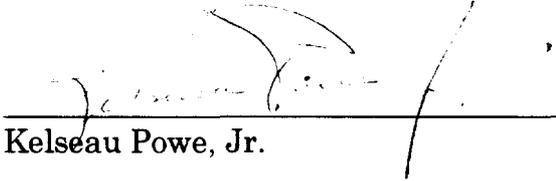
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April 27, 1995

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 27th day of April, 1995, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.**, to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

  
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