

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
 )  
Billed Party Preference for )  
Interlata 0+ Calls )

CC Docket No. 92-77

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REPLY COMMENTS OF U S WEST, INC.

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## SUMMARY

Herein, U S WEST urges the Commission to give serious reconsideration to the original CompTel/Coalition proposal. That proposal remains the “best on the table” insofar as the existing record is concerned. First, it is not a rate prescription. While the Commission might not deem its “Big Three OSP Rate Average/Above-Average A Disclosure” proposal to be a rate prescription, a reviewing court might deem it otherwise, particularly if a Commission-mandated rate disclosure is selectively applied and later deemed either beyond the authority of the Commission under TOCSIA or (while permissible) sufficiently punitive as to suggest that a rate prescription had, indeed taken place.

Second, the CompTel proposal is not one based on undemonstrated “customer expectations.” Rather, it is factually grounded in demonstrated consumer conduct. Since the Commission has never found the rates, let alone the averaged rates, of the Big Three OSPs to be just and reasonable, and has never found the rates of OSPs that might have rates above those averages unjust and unreasonable, utilizing undemonstrated customer expectations about the rates of the Big Three (apparently demonstrated through the absence of complaints) as the baseline for the establishment of rate/price general OSP “benchmarks” could well be judged “arbitrary and capricious” by a reviewing court. Indeed, the very fact that there are OSP rates that have not generated complaints would lead one to assume that those rates, as well, are not “unexpected,” according to the Commission’s logic.

Third, the CompTel proposal, while not based on OSP costs *per se* are not inconsistent with the cost structures of a broad range of OSP providers (above and beyond the Big Three). This cost/benchmark connection could well prove critical in assessing the potential for future litigation over the Commission's chosen benchmark alternative.

Fourth, those OSPs supporting the CompTel proposal present serious statutory and constitutional issues that must be considered as the Commission reflects upon various benchmark/disclosure models. Since Congress has explicitly provided a disclosure message that would be appropriate in the event that it "appear[s] upon review" to the Commission that an OSP's rates are not just and reasonable, deviation from that legislative standard carries some legal risk. So, too, does a mandate that a particular class of carriers provide a message to the public that is deemed contrary to the best business interests or reputation. These legal issues can be avoided by adoption of the CompTel proposal.

For all the above reasons, U S WEST encourages the Commission to reconsider, and ultimately adopt, the CompTel proposal. That proposal would require only selective audible disclosures (which U S WEST supports) in those circumstances where an OSP was charging rates above the level of demonstrated customer complaints. Its remedial focus is entirely consonant with the current record, and does not rely on either undemonstrated customer expectations or a Commission prescription.

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**REPLY COMMENTS OF U S WEST, INC.**

I. **BILLED PARTY PREFERENCE VIA A PARTICULAR TECHNOLOGY  
OR PLATFORM SHOULD NOT BE MANDATED -- REGULATORY  
INTERVENTION IN THE MARKETPLACE OF 0+/- CALLING SHOULD  
BE KEPT TO A MINIMUM**

U S WEST, Inc. ("U S WEST") supports those commenting parties arguing that Billed Party Preference ("BPP"), as it has been envisioned through a Line Information Database ("LIDB") platform, is a technological solution to a marketplace need that no longer exists.<sup>1</sup> Thus, like these commenting parties, we urge the termination of this proceeding,<sup>2</sup> except with respect to the most limited regulatory intervention.

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<sup>1</sup> See, e.g., Bell Atlantic/NYNEX/BellSouth at 1-2, 9; Pacific at 2 n.1; SWBT at 1-2 (all noting that local number portability would not render BPP any more appropriate); Cleartel Communications, Inc. and Conquest Operator Services Corp. ("Cleartel/ConQuest") at 1; Competitive Telecommunications Association ("CompTel") at 1, 2-3, 20-21; National Telephone Cooperative Association ("NTCA") at 3.

<sup>2</sup> See, e.g., American Public Communications Council ("APCC") at 12; Bell Atlantic/NYNEX/BellSouth at 9-10; Communications Central Inc. ("CCI") at 3-5; CompTel at 21-22.

Ideally, the Federal Communications Commission (“FCC” or “Commission”) would address the matter of bad-acting Operator Service Providers (“OSP”) through enforcement actions,<sup>3</sup> leaving remaining market discipline to be accomplished through market forces.<sup>4</sup> Enforcement is targeted and effective. At the same time, it promotes, rather than retards or burdens, an overall fair competitive environment.

While the Commission might eschew this approach at this time, it should all the same act with significant restraint in its attempts to curb what commentators -- correctly -- argue are statistically insignificant instances of price gauging by OSPs.<sup>5</sup>

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<sup>3</sup> U S WEST continues to be mystified as to why enforcement is not the intervention of choice by the Commission and other regulatory and law enforcement agencies. See, e.g., GTE Service Corporation (“GTE”) at 3 (citing to the Oncor enforcement action); CCI at 9 n.14 (citing to two enforcement actions in 1991); The Intellicall Companies (“Intellicall”) at 4 (supporting the “take them out and shoot them approach”); U.S. Long Distance, Inc. (“USLD”) at 11 (noting that consumer complaints are about the level of charges, suggesting that regulation of unreasonable charges is the proper approach. “USLD has never received notice of a complaint in which a consumer requested that a branded announcement of the charges precede the connection of an operator assisted call.”), 21 (noting that the complaints listed in Attachment 1 of the original NAAG [National Association of Attorneys General Telecommunications Subcommittee] Petition, filed Feb. 9, 1995, involved a single carrier in 60% of the cases). Compare U S WEST’s Comments in the Commission’s various 900 proceedings arguing that enforcement, rather than burdening an industry generally, is the most appropriate regulatory action with respect to outlying bad-actors within an industry. See U S WEST’s Reply Comments, CC Docket No. 93-22, In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Oct. 31, 1994 at 4-16; U S WEST’s Reply Comments, RM-8606, CC Docket No. 92-77, In the Matter of Petition for Rulemaking of the National Association of Attorneys General Proposing Additional Disclosure by Some Operator Service Providers, Apr. 27, 1995 at 5-9.

<sup>4</sup> See SWBT at 1.

<sup>5</sup> See, e.g., AT&T Corp. (“AT&T”) at 4; Cleartel/ConQuest at 3-4 (a “tiny fraction (0.0005) of complaints”); GTE at 2 and n.1; U.S. Osiris Corporation (“USOC”) at 2; USLD at 6-7. Not only is the complaint level small *vis a vis* total 0+/- calling, but it appears to be relatively small *vis a vis* specific companies. Compare USLD at *id.* While there can be no doubt that high charges cause irritation and annoyance to

Certainly in light of increasing dial-around and pre-paid calling in the marketplace (indicating increasing awareness by consumers of their choices as they make 0+ calls and a reduction of such “directly dialed” calls)<sup>6</sup> and the obvious predictable changes that will occur in 0+ calling rates as payphone providers secure compensation for calls utilizing dial-around dialing patterns (i.e., 0+ calls seeing a reduction in rates as costs are recovered more ubiquitously across a broader range of dialing patterns),<sup>7</sup> the Commission should act with the utmost restraint and in a targeted way to address existing consumer complaints about excessive OSP rates.

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those individuals who are subject to them (often, as argued by Cleartel/ConQuest at 5, simply due to the individual’s own lethargy), the complaint levels associated with 0+ calling, when compared to the total volume of calling, simply cannot accurately be characterized as producing an “avalanche of consumer complaints” as argued by NAAG (at 9).

Indeed, in our earlier comments, U S WEST described the situation as one evidencing a “marginal market dysfunction” or a “limited market failure” in an otherwise healthy industry. See In the Matter of Billed Party Preference for InterLATA 0+ Calls, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd. 7274, 7299 ¶ 46 (1996) (“SFNPRM”) (citing to U S WEST’s characterizations). We agree with NAAG that this situation is not due to the fact that informational tariff filings are made (NAAG at 12) but to the administrative processes associated with tariff reviews and investigations by limited Commission resources. Thus, we argued for a shift in the “process burden,” a position we continue to support. See Section III, below.

<sup>6</sup> See, e.g., the figures presented by ACTEL, Inc. (“ACTEL”) at 3; CCI at 6 and Attachment B; Oncor Communications, Inc. (“Oncor”) at 2 n.5, 12. See also Cleartel/ConQuest at 5-6; SWBT at 2; USOC at 2, 5, 7, 11.

<sup>7</sup> See, e.g., ACTEL at 8-9; APCC at 2, 9; CCI at 3, 19-20; Illinois Public Telecommunications Association (“IPTA”) at 1, 2-3, 9-10, 11-12; New Jersey Payphone Association (“NJPA”) at 6-8, 13-15; USOC at 11; USLD at 16-17.

Barring the use of targeted enforcement as the most appropriate regulatory tool, and in an effort to reverse the “regulatory burden” equation,<sup>8</sup> the “next best” -- but still targeted -- regulatory intervention would be one that was directed to the ongoing problem, i.e., consumer complaints.<sup>9</sup> Targeted regulatory intervention would not attempt to address overall consumer expectations or to establish a framework in which presumptive “just and reasonable rates” were being charged, particularly as there is scant record evidence to support such an approach.<sup>10</sup> Rather, the regulatory intervention would be targeted to address those circumstances generating consumer complaints about OSP prices (or, as well stated by APCC, those situations where consumers sense “they are being asked to pay ‘too much’”).<sup>11</sup>

It is to the matter of “too much” charges that the Commission should focus its attention and its regulatory intervention. These charges produce complaints and unduly burden scarce regulatory resources -- regardless of whether they are charges based on actual and demonstrable costs, are just and reasonable or are unjust and unreasonable. For these reasons, the original CompTel proposal<sup>12</sup> was -- and

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<sup>8</sup> See U S WEST Comments at 12 (arguing that the Commission needed to accomplish such a reversal).

<sup>9</sup> See, e.g., Bell Atlantic/NYNEX/BellSouth at 2; CCI at 14; Cleartel/ConQuest at 11-12.

<sup>10</sup> See notes 41 and 42, infra.

<sup>11</sup> APCC at 4 n.1.

<sup>12</sup> See Ex Parte filed herein, Mar. 8, 1995 on Behalf of CompTel, U S WEST, NYNEX Telephone Companies, Bell Atlantic, BellSouth and APCC, “Rate Ceiling Alternative to Billed Party Preference.”

remains -- the most appropriate solution (barring enforcement actions) to the existing problem. It is the model most targeted to the "evil" the Commission seeks to address and resolve,<sup>13</sup> is the most consistent with the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA") imperatives and implementation and is likely to be subject to the fewest legal challenges of any of the Commission's proposals.<sup>14</sup> The Commission should give serious reconsideration to its adoption.

## II. MANDATED DISCLOSURES MUST BE LAWFUL, ACCURATE AND TARGETED

A number of commentors address the matter of the scope and text of mandated disclosures. U S WEST supports the overwhelming majority of commentors who argue against disclosures on every 0+/- call.<sup>15</sup> As these

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<sup>13</sup> The CompTel proposal is directed at the specific problem the Commission seeks to address and resolve (*i.e.*, customer complaints), does so utilizing a range of OSP cost structures, involves the Commission in regulatory oversight of rates, and would permit the Commission -- where rates appear to be unreasonable -- to require a disclosure of sorts. None of the other Commission proposals is as well-crafted to withstand legal attack as is the CompTel proposal.

<sup>14</sup> See, *e.g.*, American Network Exchange, Inc. ("AMNEX") at 3; CompTel at 5-8; USLD at 7-9 (arguing that the Commission lacks legal authority, under TOCSIA, to do more than order an OSP to offer up as a disclosure message that rate information is available upon calling a certain number). Compare CCI at 8; Cleartel/ConQuest at 7.

<sup>15</sup> See, *e.g.*, Ameritech at 3; APCC at 3; Bell Atlantic/NYNEX/BellSouth at 4-5; Intellicall at 4-5; IPTA at 6; New York State Consumer Protection Board ("NYCPB") at 6; SWBT at 2-3; Sprint Corporation ("Sprint") at 4 n.3; Telecommunications Resellers Association ("TRA") at 5 n.9. A few OSPs, such as America's Carriers Telecommunications Association ("ACTA") (at 1), Operator Service Company ("OSC") (at 3-4, 11), Oncor (at 3) and USOC (at 13) argue for price disclosure requirements on all calls for all carriers. They claim such an approach is non-discriminatory and would avoid any need for benchmarking of any kind. They are supported in this position by NAAG, who -- despite company and industry

commentors have correctly argued, such disclosures would be time consuming to create,<sup>16</sup> would add to call set-up times and impose often unwanted messages on some callers.<sup>17</sup> This is true not just for price disclosures but for other types of disclosures, as well (i.e., disclosures about the availability of price information).

To the extent that any disclosures at all are required by the Commission, it is critical that this rulemaking conclude with a consumer protection model that is appropriate, helpful and lawful. To accomplish such a result, the Commission might well need to move away from its notion of price disclosures altogether.

A number of commentors pose serious legal questions about the Commission's statutory and constitutional authority to mandate price disclosures. The Commission must not cavalierly dispense with those arguments. Clearly, the

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opposition to the "all call disclosure" approach on the grounds of lack of necessity and economic/resource burdens -- argues that such would "actually be advantageous, to these companies." NAAG at 6.

While the facts about nondiscrimination and lack of benchmarking necessity from an "all call disclosure" approach might be correct, other facts cannot be disputed. First, a substantial number of companies argue that the burden and cost imposed on the OSP industry from such an approach far outweigh the benefits. Second, those companies' assertions must be taken as truthful and factual. Regulatory assertions that they are "incorrect" and a "burden would really be a benefit" must be discounted as lacking credibility or factual support.

<sup>16</sup> A number of commentors point out the problems associated with creating a system that could provide real-time actual price quotations for 0+/- calls, similar to the information provided for 1+ calls. See, e.g., APCC at 4-5; Intellicall at 2 n.3, 3, 6-7, 8-12; USOC at 13 (addressing store and forward technology); Cleartel/ConQuest at 13-14; Bell Atlantic/NYNEX/BellSouth at 4-5 and n.8; CompTel at 17-18; MCI Telecommunications Corporation ("MCI") at 3-4; Pacific at 3; SWBT at 3; USLD at 19-20 n.22.

<sup>17</sup> See, e.g., APCC at 4; AT&T at 5; Bell Atlantic/NYNEX/BellSouth at 6; CompTel at 19; Intellicall at 5; MCI at 3-4; Pacific at 3; SWBT at 3; TRA at 7; USOC at 13-15.

TOCSIA addresses rates, rate levels and customer disclosures.<sup>18</sup> To the extent the Commission varies its approach from the strictures of the statute, the variances must be moderate and defensible, grounded in the nature of remedial market intervention. Upon reviewing the filed comments, U S WEST is not convinced that mandated price disclosures would conform to such standard as discussed below.

The original CompTel proposal contained no disclosure or audible message component. Rather, that proposal was designed so that those OSPs charging above a certain “rate ceiling” would have been required to justify their charges to the Commission as part of a full tariff investigation and justification, in part because such charges would “appear upon review”<sup>19</sup> to the Commission to be unjust and unreasonable.<sup>20</sup> The affected OSP would have had an opportunity to prove the reasonableness of the charges in question, or be required to change them.

The notion of affirmative disclosure messages was introduced by the NAAG, APCC and the Colorado Public Utilities Commission Staff (“Colorado PUC Staff”). As U S WEST argued earlier in these proceedings, the disclosure messages proposed by the NAAG and the APCC were inappropriate because they were misleading or created a negative connotation in their expression.<sup>21</sup> Thus, in U S WEST’s opinion, to the extent disclosure messages were appropriate in any context, price disclosures appeared the most neutral and factual with the *caveat*

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<sup>18</sup> TOCSIA, 47 USC §§ 226(b)(1)(C), (h).

<sup>19</sup> *Id.* at 226(h)(2).

<sup>20</sup> *Id.* at 226(h)(2)(A).

<sup>21</sup> See U S WEST Comments at 2-3. See also SFNPRM, 11 FCC Rcd. at 7293 ¶ 35.

that such disclosures not be required to provide actual, real-time information and that they be sparingly required. In our opening comments, U S WEST expressed just such a position.

AMNEX and CompTel, however, argue persuasively that in those circumstances where an OSP's rates "appear upon review" to be unjust and unreasonable to the Commission (a suggestion that would certainly be gleaned from a benchmark/disclosure model such as the Commission proposes), the Commission's authority under TOCSIA is limited to requiring OSPs to do an affirmative disclosure that prices can be secured upon customer request, with no specific statement of price of any kind (e.g., actual, average, highest, etc.) in the communication.<sup>22</sup> This argument finds support not only in the language of TOCSIA but also in current OSP rating practices (of which Congress was undoubtedly aware) which would not easily accommodate interactive or real-time actual price quotations.<sup>23</sup> Based on the legal arguments presented, U S WEST is persuaded that the most legally sustainable disclosure message for the Commission to compel is one that offers up a message about the availability of rate information but does not compel the provision of rate information itself.

This position is buttressed by certain policy arguments, as well. There is little consensus on the form that "price disclosures" should take. Some commentators

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<sup>22</sup> AMNEX at 5-8; CompTel at 5-8. See also Oncor at 9-10.

<sup>23</sup> See Intellicall at 7; APCC at 5 (discussing store and forward technology in smart payphones).

urge the Commission to require actual, real-time price disclosures,<sup>24</sup> despite the costs of implementing such a complex scheme.<sup>25</sup> Others support “average” or “representative” price disclosures.<sup>26</sup> Still others have argued that average or standard price quotations are inherently misleading.<sup>27</sup> And others still argue that any type of price disclosure message -- to the extent it is not ubiquitous -- will adversely affect competition by compelling speech that the speaker would prefer not to make and depressing usage because of the negative market connotation associated with the speaker of the message.<sup>28</sup> These are not frivolous arguments.

U S WEST has long been an advocate of the constitutional protection of commercial speech.<sup>29</sup> While the Commission has, on occasion, rejected such

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<sup>24</sup> See, e.g., ACTA at 6; OSC at 3-4.

<sup>25</sup> See, e.g., Cleartel/ConQuest at 12-14; MCI at 3-4; GTE 7-8; U S WEST Comments at 10 n.19.

<sup>26</sup> See, e.g., CCI at 19; Intellicall at 14.

<sup>27</sup> See Cleartel/ConQuest at 12, 15-16 (arguing that such messages are the equivalent of “scare” messages, at least for those customers below the average); AMNEX at 8-9 and n.22; IPTA at 13; Oncor at 15. U S WEST, in our opening comments (at 3), supported average price quotations over other types of disclosures. However, we concede that any price quotation other than an actual price quotation is likely to produce some market confusion and depression of consumption by consumers confronting the disclosure message. U S WEST Comments at 6-7.

<sup>28</sup> See, e.g., AMNEX at 5-6; USLD at 7-9.

<sup>29</sup> See, e.g., U S WEST Communications, Inc. Petition for Expedited Reconsideration, CC Docket No. 91-115, In the Matter of Policies and Rules Concerning LEC Validation and Billing Information for Joint Use Calling Cards, Jan. 13, 1994 at 3-12; Comments of U S WEST Communications, Inc., CC Docket No. 93-22, In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Apr. 19, 1993 at iii, 24-30; Comments of U S WEST Communications, Inc., In the Matter of Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Company Violate Sections 201(a)

arguments on the grounds that what was being compelled was speech in the nature of a “legal notice,”<sup>30</sup> it is not clear that such analysis fits well in the current situation.<sup>31</sup>

For these reasons, U S WEST supports -- to some extent -- the position advanced by AMNEX. While we do not support the notion that disclosure messages should be ubiquitously mandated, we support the position that the particular disclosure message mandated to be delivered by those OSPs that exceed some “benchmark” or “rate ceiling” should be crafted in close alignment with the requirements of TOCSIA, i.e., a message that further rate information is available upon request.

We believe that such message could, lawfully, be somewhat embellished by the regulatory requirement that a toll-free number be provided to make the “request” process as simple as possible for the consumer. We also believe that, as a matter of targeted remedial regulatory intervention, the Commission could require OSPs charging above a certain level (ideally the level originally proposed by

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and 202(a) of the Communications Act, Mar. 25, 1992 at 17-19 (“USWC 900 Comments”).

<sup>30</sup> See In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 8 FCC Rcd. 4478, 4486-87 ¶¶ 39-40 (1993).

<sup>31</sup> For example, the BNA notices required by the Commission conveyed neutral speech, unlikely to cause any negative reputational damage to U S WEST as the speaker. Such cannot be said with respect to a mandated price disclosure message, especially if only targeted speakers must convey the message. Such a message does carry with it some negative connotation that could adversely affect one’s reputation and business success. See, e.g., AMNEX 8; Cleartel/ConQuest at 16.

CompTel) to provide a message along the lines suggested by Cleartel/ConQuest, which would advise a party to be charged that the charges to be assessed by the OSP might be in excess of those charges the consumer would incur if making a call from home and which provides a toll free number for the consumer to call if they wish to receive further rate information.<sup>32</sup>

To the extent that the Commission requires any disclosure to exceed that authorized by TOCSIA, the Commission runs some risk of adverse legal action on appellate review. Thus, the Commission should target its mandate in a way that is clearly remedial rather than generally legislative or administrative in nature. By

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<sup>32</sup> Cleartel/ConQuest at 13, 16-18. Compare AMNEX at 9-10 (who disputes the Commission's authority to require any disclosure out of line with the TOCSIA requirements, but who also suggests that a disclosure along the line of that suggested by Cleartel/ConQuest might be acceptable for those who charge rates above the CompTel proposed benchmark); One Call Communications, Inc. d/b/a Opticom ("Opticom") at 4 and n.14. Compare Oncor at 10 (generally disputing the Commission's authority to require such rate disclosure announcements, but noting that, from a constitutional perspective the Commission may have certain authority to compel speech in the event of "a finding that such disclosure is necessary to avoid public deception" (arguing that no such case could be made with respect to 0+ calling)).

For the reasons stated by Cleartel/ConQuest at 18, as well as for the reasons previously stated by U S WEST (i.e., the NAAG proposed disclosure was confusing and misleading; the APCC proposal was a "scare" message), U S WEST agrees that the Cleartel/ConQuest proposed disclosure is far superior to either that previously proposed by the NAAG or by APCC. It is also superior to the disclosure message proposed by TRA (at 8), which suffers from the same infirmities as the earlier-proposed APCC message by referencing a "federal" or governmental "established" benchmark or ceiling strongly suggesting that the fact that the rate deviates from the established benchmark or ceiling means that it is a "bad" rate. Compare USOC at 15; CompTel at 19-20.

While Cleartel/ConQuest is correct that such a carrier/rate-neutral disclosure could be made on all 0+/- calls (Cleartel/ConQuest at 19), we oppose such a requirement for the same reason we oppose a ubiquitous price disclosure.

so doing, the Commission can appropriately act to address the “evil” giving rise to the need for speech while minimizing the chance of a future judicial reversal of its action.<sup>33</sup>

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<sup>33</sup> To the extent the Commission rejects the arguments against mandated price disclosures, U S WEST supports the following commentor positions: GTE’s position (at 5 n.4) that such disclosures should not pertain to wireless calling (since such calling incorporates both a wireless and wireline component); Bell Atlantic/NYNEX/BellSouth (at 6-7); MCI (at 4) that OSPs should not be required to disclose information on charges not set by that particular OSP (such as charges imposed by hotels, hospitals, etc.) because the OSP will generally not have knowledge of the charge. But see CompTel’s argument (at 15) that this is one of the areas where the Commission’s proposal could have a pernicious affect (if OSP #1 has the surcharge included in its rates whereas OSP #2 requires it to be independently assessed).

Additionally, the original CompTel proposal did not incorporate a rate ceiling associated with inmate calling. On the other hand, the Commission’s outstanding proposals do address such calling. Should the Commission adopt something along the lines of a “Big Three Plus 15% Average Rate/Price” model, a similar model should apply for inmate calling. That benchmark, however, should exclude any owner imposed fees and commissions, for the reasons addressed above in this footnote (e.g., they are generally unknown to the rating party). Furthermore, U S WEST opposes the position advanced by Gateway Technologies, Inc. (“Gateway”) (at 4-12) supporting a rate cap and a real-time rate disclosure. As discussed in note 16, supra, real-time rate disclosures cannot survive any sound cost/benefit analysis, particularly when such disclosures should only be compelled for calls rated above a promulgated benchmark. Finally, U S WEST opposes the Inmate Calling Services Providers Coalition (“ICSPC”) notion (at 13-14) that local exchange carriers (“LEC”) should have to do bill screening and suppression for calls exceeding any Commission-prescribed benchmark (whether associated with inmate or other calls). LECs should not be burdened with such a policing requirement with respect to the conduct and charging practices of independent third parties. U S WEST is opposed to the California approach (at 4, 6), believing that LEC reporting (as included in the original CompTel proposal) is the maximum “cost” that any LEC should bear in pursuit of an OSP rate/customer complaint reduction benefit.

III. THE MOST TARGETED “BENCHMARK” OR “RATE CEILING” IS THAT ORIGINALLY PROPOSED BY COMPTTEL -- IT IS THE MODEL MOST ALIGNED WITH REMEDIAL REGULATORY ACTION RATHER THAN GENERAL RULEMAKING CONDUCT

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As a number of commentors have pointed out, the cost structures of OSPs not affiliated with integrated telecommunications service providers can (and do) differ (often significantly) from those companies that are integrated.<sup>34</sup> For this reason, the charges assessed by OSPs might well be high but still just and reasonable from a rate regulation perspective. In those circumstances where individuals argue that such rates are “too much” from a market perspective, further regulatory intervention might be expected with respect to the rates themselves and their foundation and justification (e.g., costs, investments, profit, etc.).

It is precisely this context that renders the CompTel proposal so appropriate. First, the rate ceiling accommodated a broad range of OSPs’ costs.<sup>35</sup> Second, the ceiling reflected a demonstrated market reaction that certain charges were “too much.” Third, there was no finding (implicit or explicit) that the charges of any particular OSP were unjust or unreasonable, if those charges exceeded the particular rate ceiling proposed by CompTel. There was simply an increased

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<sup>34</sup> See, e.g., Opticom at 3; ACTA at 2; OSC at 6; APCC at 7.

<sup>35</sup> See Cleartel/ConQuest at 7, 11; Opticom at 3-4. Compare AMNEX at 3-4, 6 (complaining that the Commission’s proposal is not based on any OSP costs, but on a perceived consumer willingness to pay); Ameritech at 5-6 (noting that the Big Three benchmark derives its vitality from the rates charged by the Big Three to non-aggregators, thus imposing certain discipline on rates charged from aggregator locations).

tariffing justification burden imposed on the particular OSP to justify the propriety of its rates in light of past consumer complaints about the level of such charges.<sup>36</sup>

Any benchmark or rate ceiling approach that requires an OSP to take public market action that sets that OSP apart from others is certain to be claimed (and perhaps found) to be somewhat punitive (in that consumers will assume that OSP must be doing something “bad” that others are not doing).<sup>37</sup> In light of this fact, the benchmark or rate ceiling should be as targeted and remedial as possible, focusing on those rates/prices where it is predictable that consumer complaints will be generated.<sup>38</sup> The benchmark should not necessarily try to emulate presumed “just and reasonable rates” or to conform to speculative “customer expectations.”

A number of commentators point out that the Commission has never found the rates/charges of the Big Three interexchange carriers (“IXC”) to be just and

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<sup>36</sup> See, e.g., Bell Atlantic/NYNEX/BellSouth at 7 (arguing that the CompTel proposal was “broadly based, taking into account prices charged by *all* OSPs and the perceptions of all users of OSP services” (emphasis in original)).

<sup>37</sup> See, e.g., ACTA at 2-3 (the public would become conditioned to associate small providers with excessive rates); APCC at 7 (“a price disclosure requirement that pertains to some calls and not others imposes a definite penalty on those OSPs that must make the disclosure;” “the mere delivery of the message is likely to convey a negative message to consumers”); Cleartel/ConQuest at 9 (disclosure message will create negative customer perception that rates are too high); Intellicall at 5 (consumers will come to believe that those companies who deliver messages are either delaying the completion of the call and/or are charging unreasonable rates); Oncor at 5 (an OSP charging perfectly lawful, just and reasonable rates would be required to “make harmful rate announcements”), 13; Opticom at 4 and n.15 (if all carriers are not required to provide announcements, callers will associate announcement with excessive rates).

<sup>38</sup> See APCC at 7.

reasonable with respect to OSP calls.<sup>39</sup> Nor has the Commission found the rates/charges of other OSPs, as a general matter, to be unjust and unreasonable.<sup>40</sup> Nor can it be said that OSP rates above those charged by the Big Three (even with some margin for error) are presumptively unjust and unreasonable.<sup>41</sup> Thus, differentiating between the two types of charges based on undemonstrated “customer expectations” *vis a vis* the charges of the Big Three is risky, from a legal perspective.<sup>42</sup>

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<sup>39</sup> See, e.g., Cleartel/ConQuest at 8 (“Except for the CompTel Coalition proposal, the Commission does not have sufficient rate evidence in this docket to fashion a rate ceiling, because it lacks data on the average cost of providing OSP services.”).

<sup>40</sup> See AMNEX at 3; Oncor at 12; CompTel at 6.

<sup>41</sup> Compare APCC at 6; CompTel at 6.

<sup>42</sup> See, e.g., ACTA at 5 (the Commission has provided no meaningful inquiry into what rates consumers would expect to pay for operator services); APCC at 4 and n.1 (noting that many consumers “probably do not have any definite price expectations” about OSP calls, but have a sense of when they have been charged “too much”); Bell Atlantic/NYNEX/BellSouth at 8 (noting that consumers might have a set of expectations associated with 1+ dialing from their homes but that such expectations bear little or no relationship to 0+ call prices); Cleartel/ConQuest at 8-9 (fact that consumers use Big Three carriers does not mean they expect to pay same rates if they elect not to make an affirmative carrier selection; no linkage between amounts charged from dialing at home and away from home); CompTel at 11-13 (the Commission’s proposal amounts to ratemaking, rather than rulemaking, and customer expectations are not an appropriate foundation for such action; additionally the Commission has “no basis” for concluding what customers expect to pay); Oncor at 3 (at most the Commission has “some indefinite perception” of such expectations), 5-6; Opticom at 8 (the Commission provides no support for its customer expectations assumptions); OSC at 5 (arguing that consumers probably have no price awareness with respect to Big Three 0+ charges, relying solely on name brand); USOC at 5 (arguing that an analysis of the OSP complaints would suggest there is no such thing as a customer “expectation” of an 0+ rate), 18-19. And see AMNEX at 3-4 n.8 (stating that according to Commission reports, more consumers have complained about AT&T’s rates than any other carrier). Compare NYCPB at 6-7, arguing that consumers would find a \$3.75 minute charge “excessive,” but producing no evidence to support such argument. To the extent

What is far less risky is to differentiate between charges (regardless of carrier) based on demonstrated customer behavior, i.e., customer complaints. Such an approach leaves undisturbed those OSP rating practices that exceed some “blended”<sup>43</sup> average of the Big Three IXC rates, but which have not produced complaints. Furthermore, such approach benefits from the fact that it is not likely to have the same kind of depressive influence on rating/pricing innovation as the Commission’s proposed benchmarking proposal would undoubtedly have.<sup>44</sup>

#### IV. CONCLUSION

For the above-stated reasons, U S WEST encourages the Commission to reconsider the CompTel proposal. In its simplicity lies its greatest advantage: it is direct and to the point. It does not prescribe rates. It carries no suggestion that the rates of some OSPs are reasonable, while the rates of others are not. It does not require public *mea culpas* from those OSPs who exceed certain rate/price thresholds. Rather, it makes those OSPs prove the propriety of their rates -- a regulatory model long-deemed appropriate under the Communications Act.<sup>45</sup>

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there have been none to few consumer complaints associated with such charging and if such comports with an OSPs cost structure, it is difficult to label the charge “excessive” in the first instance.

<sup>43</sup> AT&T at 3.

<sup>44</sup> See, e.g., APCC at 8 (arguing that the Commission’s proposal would discourage pricing innovations unless such had been previously adopted by the Big Three); CompTel at 18.

<sup>45</sup> Compare Cleartel/ConQuest at 8 and n.15. Both Ameritech and the NAAG are incorrect when they argue that rates/prices above the CompTel rate ceiling proposals would be “presumed just and reasonable.” See SFNPRM at ¶ 17 (quoting Ameritech) and NAAG at 9. Rates/prices above the rate ceiling would be subject to increased Commission review and investigation in order to determine the justness

Furthermore, to the extent the Commission wishes to further reallocate the "process burden" associated with "too high" OSP rates/prices, the Commission could require a fairly neutral expression of speech, which would clearly advise consumers of their right to secure additional rate information, if they have an interest in so doing. A material deviation from the original CompTel proposal is fraught with legal peril, ranging from challenges to the sustainability of the Commission's decision based on the existing record to challenges of constitutional magnitude.

Should the Commission determine, however, to proceed down a different course, it should craft a rating/pricing matrix that would allow for maximum ease of implementation and administration. A too-detailed or explicit matrix would not only increase the complexity of any benchmarking proposal but predictably would depress any rating/pricing innovation by OSPs. Such should be avoided.

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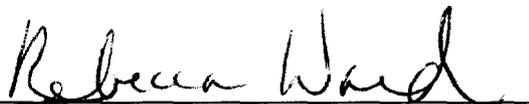
August 16, 1996

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and reasonableness of the respective rates. To the extent such rates were found to be unjust and unreasonable, the Commission could prescribe a rate and require a verbal disclosure to consumers. See CompTel at 6-7.

## CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 16th day of August, 1996, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, 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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