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

In the Matter of	)	
	)	
Billed Party Preference	)	CC Docket No. 92-77
for InterLATA 0+ Calls	)	
	)	

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Reply Comments of Oncor Communications, Inc. On Second Further Notice of Proposed Rulemaking

Oncor Communications, Inc. (Oncor), by its attorneys, hereby submits its reply comments on the Commission's Second Further Notice of Proposed Rulemaking issued in this proceeding.[1]

Introduction

In its initial comments, Oncor explained the bases for its opposition to the Commission's proposal to implement a system of rate "benchmarks." Under that proposal, benchmark rates for 0+ calls would be established based, not upon carriers' cost of service, not upon competitive conditions, not upon any quantifiable standard of just and reasonableness. Instead, those benchmarks would be established based upon the Commission's perception of consumer "expectations." Those "expectations" are based upon rates currently charged by the three largest interexchange carriers and are based upon the inherent economies of scale and scope enjoyed by those three largest carriers. As proposed by the Commission, providers of 0+ services whose rates exceed 115 percent of the average rates of the "Big 3" carriers -- AT&T, MCI, and Sprint, would be required to disclose their rates, either on a per minute basis, or for a hypothetical seven minute call (which may bear no relation to the call any specific user will place) at the outset of each call. Underlying the Commission's rate benchmark proposal is the notion that by effectively capping rates at AT&T/MCI/Sprint rate levels, rates of all carriers

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[1] Billed Party Preference for InterLATA 0+ Calls (*Second Further Notice of Proposed Rulemaking*), FCC 96-253, released June 6, 1996 ("Second Further Notice").

for 0+ services will meet consumers' expectations, and complaints to the Commission about high rates will be eliminated.

As discussed by Oncor and others, rate benchmarks and mandatory disclosure requirements based on those benchmarks will not achieve the Commission's intended result.[2] Furthermore, the rate benchmark proposal exceeds the Commission's statutory authority regarding operator service rates as codified in the Telephone Operator Consumer Services Improvement Act,[3] would constitute an unlawful rate prescription in violation of Section 205 of the Communications Act,[4] and would amount to impermissible mandated speech in violation of the First Amendment of the Constitution of the United States. Moreover, as discussed in Oncor's initial comments, rate benchmarks and rate disclosure requirements would be bad public policy and would be thoroughly inconsistent with the regulatory model upon which the Telecommunications Act of 1996[5] is based. Notwithstanding these legal and policy impediments, if the Commission remains desirous of implementing any system of rate information for 0+ services, then Oncor has suggested that rate availability announcements be required for all 0+ calls by all providers without regard to rate benchmarks, and that the required announcements be limited to rate availability, rather than actual rates. The weight of the comments submitted in this proceeding supports these recommendations.

I. Mandatory Rate Disclosures are Incompatible with the Telecommunications Act of 1996

Significantly, the Commission's twin proposals to establish rate benchmarks and to

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[2]See, *e.g.*, Oncor comments at 5-6 where Oncor explained that any attempt by the Commission to establish rate benchmarks based upon consumers' expectations will not work, in part, because different consumers inevitably will have differing expectations, and any attempt to establish a consumer expectation-based benchmark will be arbitrary and futile.

[3]See 47 U.S.C. § 226 (TOCSIA).

[4]47 U.S.C. § 205.

[5]Pub. L. No. 104-104, 110 Stat. 56 (enacted February 8, 1996).

require rate disclosures for those carriers whose rates exceed the Commission-prescribed benchmarks come within months of passage of the Telecommunications Act of 1996. It is difficult to imagine any regulatory proposal more antithetical to the principles of deregulation and market-driven competition upon which the 1996 Telecom Act are based than the pending rate benchmark/rate disclosure proposal. Commenting parties with interests as divergent as Southwestern Bell Telephone Company and Cleartel/Conquest agree that the proposal cannot be reconciled with the 1996 Act.[6] Southwestern Bell correctly characterizes rate "benchmarks" as what they really are -- price controls, and that such price controls are "an anathema to competition." As stated by Southwestern Bell, "while the rest of the industry moves to open markets, OSPs cannot be shunted into highly regulated, price-controlled environments."[7]

So long as consumers have choices and access to information necessary to exercise those choices in an informed manner, price controls (even if they are called "benchmarks") are an unnecessary restraint on the market forces of competition.[8] As Cleartel/Conquest noted in their joint comments, in enacting the 1996 Act, Congress intended to create a national policy framework for telecommunications that is "pro-competitive," "deregulatory," and "beneficial to American consumers."[9] Establishment by the Commission of *de facto* rate limits for carriers combined with the Commission's companion proposal that rates which exceed those limits must

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[6]See comments of Southwestern Bell Telephone Company at 1, 4; comments of Cleartel Communications, Inc. and Conquest Operator Services Corp. at 3-4.

[7]Southwestern Bell comments at 4.

[8]As Oncor described in its initial comments at pp. 11-12, major carriers, including the "Big 3" upon whose rates the proposed rate benchmark would be based, have expended vast sums on advertising and other efforts to educate consumers to utilize "dial around" calling arrangements. Indeed, it is difficult to imagine any consumer who has not been made familiar with such dial-around options as 1-800-COLLECT and 1-800-CALL ATT as a result of those massive advertising campaigns.

[9]Joint Explanatory Statement of the Committee of the Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (as quoted at Cleartel/Conquest comments at 3-4).

be subject to disclosure requirements hardly can be called either pro-competitive or deregulatory.

II. The Initial Comments Demonstrate that No Benchmark Levels are Appropriate

Not surprisingly, the initial comments reflect significant disagreement among commenters with regard to the appropriate level of rate caps or benchmarks. Some parties complain that the Commission's proposed rate benchmarks are too high and that the maximum allowable rates should be no higher than the rates of the "Big 3."[10] Other parties assert that the Commission's proposed rate benchmarks are too low and that the Commission should adopt the benchmark levels proposed by the CompTel coalition.[11] Still other parties believe that the Commission's 115 percent of the "Big 3" proposal, like the porridge in Goldilocks and the Three Bears, is "just right."[12]

Each of those parties misses the point. There is no one level of "correct" rate levels for all carriers providing 0+ services which, if exceeded, should subject carriers to rate disclosure obligations. Just as there are differences in consumer "expectations" there also are differences in carrier costs. Rate levels which might be just and reasonable if charged by certain carriers could be unreasonably high if charged by other carriers or confiscatorily low if imposed upon other carriers. Any attempt to establish rate benchmarks applicable to all carriers providing 0+ service, based upon the rates of the "Big 3" or some other factor (*e.g.*, the CompTel proposal), would be inherently arbitrary. Moreover, a benchmark based on "Big 3" carrier rates would effectively establish *de facto* maximum rate levels for 0+ based upon cost economies available only to those "Big 3" carriers.

Similarly, the widely divergent opinions as to the proper level of benchmarks indicates

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[10]See, *e.g.*, comments of New York State Consumer Protection Board at 5.

[11]See, *e.g.*, comments of U.S. Long Distance, Inc. at 21-22; comments of CompTel at 15-16.

[12]See, *e.g.*, comments of the Ohio Consumers' Counsel at 2.

that consumers have differing expectations. The record indicates that some consumers expect to be charged no more than their preferred carriers' 1+ rates when they make operator-assisted calls. In order to satisfy those expectations, 0+ rate benchmarks would have to be set at the "Big 3" carriers' 1+ rates. The 0+ rates of the "Big 3" carriers themselves would exceed that benchmark.

Fortunately, it is not necessary for the Commission to embroil itself in establishing benchmark rates based upon some perception of consumer expectations. There already exist legal and regulatory requirements designed to enable consumers easily to ascertain the rates to be charged for 0+ calls and to utilize the services of their preferred carriers. As described in the initial comments of Oncor and others, TOCSIA's provisions and the Commission's operator service rules require carrier identification in the form of posting and verbal announcements, informational tariffs, rate availability, and, most importantly, an unlimited right to "dial around" to reach consumers' preferred carriers. In the years since these requirements have been enacted, the frequency of dialing around presubscribed carriers has increased dramatically.[13] Today, when consumers elect to use the services of presubscribed carriers from public phones, they do so having been afforded every opportunity to utilize other carriers, and to obtain the information necessary to make informed carrier selections. Given these circumstances, not only are the Commission's proposed rate benchmarks unconstitutional and otherwise unlawful, they are unnecessary.

III. Any Required Rate Announcements Should be Limited to Rate Availability, and Should be Applicable to All Carriers, Irrespective of Rate Levels

For the reasons explained in Oncor's initial comments and those noted above,

[13]Due in large part to the massive dial-around advertising campaigns of the "Big 3" carriers, dial-around rates from public telephones already are in excess of sixty-five percent in some locations, and by 1997 may be as high as seventy-five to eighty percent or higher. See, *e.g.*, Oncor comments at 2 n. 5.

establishment of rate benchmarks based on Commission perceptions of consumer expectations is inconsistent with the Communications Act, as amended by the 1996 Telecom Act. Further, mandatory rate disclosure announcements are not necessary to protect consumers. However, if the Commission nonetheless elects to proceed with imposition of rate announcement requirements, those requirements should be subject to two important conditions. First, all that should be required is that carriers inform callers that rates are available upon request by dialing specified telephone numbers for rate information. Specific rate announcements should not be required. Second, any rate availability announcement requirement should be applicable to all providers of 0+ service without regard to any specific carriers' rate levels.

In enacting TOCSIA, Congress considered what type of pre-call rate disclosure information requirement the Commission should be permitted to impose upon carriers. That authority is not unlimited and does not include specific rate announcements. Rather, Section 226(h)(2)(B) empowers the Commission, upon review of informational tariffs, to require that carriers announce that rates are available on request at the beginning of each call. As noted by numerous commenters in this proceeding, no additional rate announcement authority is contemplated by TOCSIA.[14] Had Congress intended to empower the Commission to impose rate disclosure obligations on carriers, it easily could have done so. It did not.

Moreover, as indicated by many commenters, the cost of redesigning operator systems to provide specific rate announcements at the outset of each call would be prohibitive, and in many cases, provision of real time call rating is impracticable, if not impossible.[15] Given the wide variances in the rates charged by carriers based on factors applicable to specific calls, interexchange carriers providing 0+ services do not have the ability to provide real time

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[14]Comments of CompTel at 5-6.

[15]See, *e.g.*, Comments of US West at 4-5, Comments of AT&T at 4.

announcements of specific rates. Even local exchange carriers who not only provide 0+ service, but also bill and collect on behalf of other service providers do not have the ability to provide real time rate information. This was explained by Southwestern Bell as follows:

> . . . many LECs do not possess the technology for real time rating or 0+ calls. Considerable cost would be incurred for such development and deployment. Price disclosure would require unique messages for each tariffed rate of every LEC or IXC served by an OSP, thereby quickly exhausting current storage capacity. Additional trunks would be required because of the holding time necessary to play the announcements. Consumers will begin to experience call completion delay and possibly higher rates.[16]

Other commenters corroborated Southwestern Bell's observations about the costliness and infeasibility of rate disclosures. In addition to the operational impediments and associated costs, there is disagreement as to what rate information should be provided -- assuming that it could be provided on a real time basis. For example, some commenters support the so-called "Colorado Plan" as set forth at paragraph 35 of the Second Further Notice. Under that plan, carriers would be required to disclose the price of a hypothetical seven minute call. Of course, the information contained in such an announcement would be useless, uninformative and misleading to all consumers except for those who planned to make such a seven minute call. As numerous commenters point out, there are many variations in rates for 0+ calls. Prices vary based upon such factors as 1) time-of-day; 2) distance traversed; 3) duration of call; 4) billing arrangement (*e.g.*, third-number billed, calling card, commercial credit card, collect; 5) commissions paid to aggregators and/or agents; and 6) premises-imposed fees.[17] Based upon the initial comments, it does not appear that any carrier currently has an operator call handling

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[16]Comments of Southwestern Bell at 3 (emphasis added).

[17]Collect and third-number-billed calls would present special difficulties. In those cases, the calling party is not the party being charged for the call. Thus, even if a rate disclosure requirement were implementable, necessary to promote the public interest, and constitutional -- all of which it is not -- the requirement still would not provide timely rate information to the parties to be charged for collect and third-number-billed calls.

system which is capable of immediately identifying and announcing the correct rate for every conceivable type of call.

If, notwithstanding the legal infirmities surrounding any rate announcement requirement, the Commission remains committed to imposing a rate announcement requirement, then Oncor urges the Commission to remain mindful of the purpose for such a requirement. The purpose for requiring announcements is not to scare callers or to mislead them, nor is it to create false comparisons between 1+ and 0+ calling rates. Neither should the purpose be to punish or competitively disadvantage carriers whose rates exceed the Commission's current perception of consumer "expectations." In Oncor's view, the only legitimate purpose for any rate announcement requirement is to enable consumers to make informed choices. By announcing at the outset of calls that rates are available upon request, every caller would be informed of its right to ascertain the rate for the calls they planned to make. If a caller wants to learn the rate for a seven minute call -- or a ten minute call, or a one hour call --to his or her hometown or to any location, he or she could ask. If the caller wants to ascertain the rate if the call is made collect rather than billed to a calling card, the caller could so inquire. Those callers interested in obtaining rate information and in making carrier selection decisions based on available rate information could do so. That could be achieved by a simple announcement that rates are available upon request. Any other rate disclosure announcement would violate the Act, would result in inaccurate and misleading information being provided to consumers, would increase the costs of providing service, and would delay completion of calls.

Any rate availability announcement requirement promulgated by the Commission should be made applicable to <u>all</u> providers of 0+ service without regard to rate levels. Although certain commenting parties complain that rate announcements are costly and should be required only for carriers whose rates are high, the better view is that rate availability information should be required without regard to rate levels. As indicated by the record in this proceeding, there

is a wide divergence of opinion as to what rates consumers "expect" to be charged. Requiring all providers of 0+ services to make rate availability announcements will enable every consumer to determine for itself whether a carrier's rates will exceed that consumer's expectations. The public's right to know a carrier's rates -- or at least how to obtain carrier rates -- should not depend on what rates a specific carrier may charge.[18]

There is another reason why any rate availability announcement requirement promulgated by the Commission should be imposed upon all carriers without regard to rate levels. As indicated by the initial comments in this proceeding, rate announcements will delay call completion time and will thereby reduce the perceived efficiency and quality of service. Requiring all providers of 0+ service to announce rate availability will equalize the perceived service quality of all service providers and will not unfairly handicap any competitor by increasing call completion time and lowering that carrier's service quality in the collective eye of the consuming public.

Application of a rate announcement to all carriers avoids the Commission having to make arbitrary rate determinations. Significantly, no less a champion of mandatory 0+ rate information availability than the National Association of Attorneys General has endorsed universal rate disclosures without regard to rate levels. As the Attorneys General stated, ". . . from a regulatory perspective, universal disclosure treats all carriers equally. This will further disarm criticism that choosing a given rate level to trigger rate disclosures would be arbitrary or discriminatory."[19]

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[18]Subjecting only carriers whose rates exceed certain levels to rate availability announcements is no more appropriate than requiring posting of highway speed limit signs only on highways where the speed limit is more than 60 miles per hour, or requiring posting of price stickers on automobiles only when the price exceeds $30,000.

[19]Comments of the Telecommunications Subcommittee of the Consumer Protection Committee of the National Association of Attorneys General at 6.

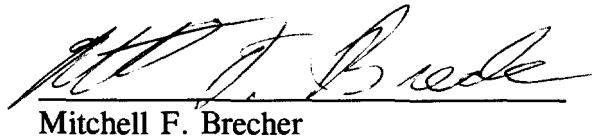
For the reasons discussed above, Oncor does not agree with the Attorneys General proposal that carriers be required to disclose actual per minute rate levels. As has been amply demonstrated by other commenters in this proceeding, such a requirement would be unworkable. However, any rate announcement requirement, including a rate availability requirement, should be applicable to all providers of 0+ service without regard to rate levels, without regard to size, without regard to primary focus of each carrier's business. Even the Big 3 carriers should be subject to the same rate availability requirements as other carriers. Those carriers' customers -- who comprise by far the largest portion of the 0+ calling market -- have no less of a right to pre-call access to rate information than any other customers.

Conclusion

For all of the foregoing reasons as well as those discussed in Oncor's initial comments in this proceeding, Oncor respectfully urges the Commission not to establish rate benchmarks for 0+ calling and not to subject carriers whose rates exceed such benchmarks to rate disclosure requirements. To the extent that the Commission continues to believe that availability of rate information remains necessary to enable consumers to exercise informed choice of carriers and services, then Oncor suggests that the Commission mandate that carriers announce that rates are available upon request, and that such a rate availability announcement requirement be made applicable to all providers of 0+ services.

Respectfully submitted,

ONCOR COMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "*Reply Comments of Oncor Communications, Inc. On Second Further Notice of Proposed Rulemaking*" in Docket 96-77, was served this 16th day of August, 1996, upon the following:

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