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Before the
Federal Communications Commission
Washington, D.C. 20554

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

SECOND REPORT AND ORDER AND ORDER ON RECONSIDERATION

Adopted: January 29, 1998

Released: January 29, 1998

By the Commission: Commissioner Tristani issuing a statement

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I. INTRODUCTION

1. In this Second Report and Order and Order on Reconsideration, we address the problem of widespread consumer dissatisfaction concerning high charges by many operator services providers (OSPs) for calls from public phones and other aggregator locations such as payphones, hotels, hospitals, and educational institutions.¹ Today, callers at such locations who dial "0" followed by an interexchange number typically do not know what rates the particular OSP will be charging.² We amend our rules to require OSPs to disclose orally to away-from-home callers how to obtain the total cost of a call, before the call is connected.³ This rule makes it easier for such callers using operator services to obtain immediately the cost of the call, prior

¹ OSPs include all carriers that routinely accept interstate collect calls, credit card calls, and/or third-party billing calls from aggregator locations, including hotels providing automated billing. Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744, 2755 (1991). Under the Communications Act of 1934, as amended (the Communications Act), an aggregator is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

² A 0+ call occurs when the caller enters "0" plus an interexchange number, without first dialing a carrier access code, such as 10288. An access code is a sequence of numbers, e.g., 10288, that connects the caller to the interexchange carrier associated with that number sequence. See infra paras. 44-51.

³ See Appendix A. The total charges or price that is conveyed must include any aggregator surcharge that such callers will be billed for the operator services call.

to the call being completed.⁴ Under the current rules, to obtain rate information, a 0+ caller generally has to dial a separate number to reach the OSP and inquire about the OSP's rates. This action should eliminate the surprise that many consumers encounter upon being billed for an operator services call. Further, requiring that OSPs divulge this information without the consumer having to dial a separate telephone number more readily enables consumers to obtain valuable information necessary in making the decision whether to have that OSP carry the call at the identified rates, or to use another carrier.

2. As discussed below, we believe that adoption of this rule will result in better informed consumers, foster a more competitive marketplace, and better serve the public interest than if we were to establish price controls or rate benchmarks.⁵ We also decline to implement a billed party preference (BPP) approach to the problem of high rates.⁶ We also deny petitions for reconsideration of our Phase I Order in this proceeding, where we declined to implement a fourth alternative to the problem, namely, a 0+ in the public domain approach, in which OSPs would be entitled to access the calling card validation databases of all carriers.⁷

3. In this order we also conclude that we should not, at this time, either waive or forebear from enforcing the requirement that OSPs file informational tariffs pursuant to Section 226 of the Communications Act.⁸ We amend our rules, however, to increase the usefulness of informational tariffs by requiring that such tariffs include specific rates expressed in dollars and cents as well as applicable per-call aggregator surcharges or other per-call fees, if any, that are collected from consumers.⁹

II. BACKGROUND

4. This Commission has long been concerned about consumer dissatisfaction over high charges and certain practices of many OSPs for calls from public phones at away-from-home

⁴ Consumers would be advised to press a digit or digits on the key pad or to remain on the line.

⁵ See infra paras 29-34.

⁶ See infra paras. 35-38. To address the similar problem of high interstate rates for calls initiated by prison inmates, we also amend our rules to require that carriers orally inform the party to be billed for interstate calls initiated by prison inmates of the carrier's identity and to disclose how to obtain the carrier's charges for the call to such party before the call is connected. See infra paras. 56-61.

⁷ See infra paras. 44-51.

⁸ 47 U.S.C. § 226.

⁹ See Appendix A.

aggregator locations.¹⁰ In 1990, Congress responded to such consumer concerns by providing the Commission and consumers with additional tools to address abusive practices, through the passage of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA or Section 226 of the Communications Act.)¹¹ Under TOCSIA, an aggregator must, among other things, allow consumers the option of using an OSP of their choice by dialing an 800 or other number to reach that OSP, rather than having to use the particular OSP the aggregator has selected as its preferred or presubscribed interexchange carrier (PIC) for long-distance calls.¹² Further, under TOCSIA, OSPs are required to file and maintain tariffs informing consumers of, not only their interstate charges, but also any applicable premises-imposed fee (PIF) or aggregator surcharge collected by the OSP or permitted in an OSP's contracts with aggregators.¹³

5. The Commission initiated Phase I of the instant proceeding in May, 1992 to examine alleged competitive inequities arising from AT&T's issuance of its proprietary card and short term proposals by many of AT&T's competitors to restrict the use of proprietary carrier

¹⁰ See Telecommunications Research and Action Center and Consumer Action Center, 4 FCC Rcd 2157 (Com.Car.Bur. 1989) (TRAC Order) (consumer disclosure and call blocking practices of OSPs found unreasonable in violation of Section 201(b) of the Communications Act); Policies and Rules Concerning Operator Service Providers, Notice of Proposed Rulemaking, CC Docket No. 90-313, 5 FCC Rcd 4630 (1990) (rules proposed to remedy problems related to operator services, such as call blocking, that impeded and distorted the operation of a fully competitive OSP industry). "Public phones" refers here to payphones and other aggregator phones, including hotel phones.

¹¹ Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

¹² 47 U.S.C. § 226(c)(1)(A). This provision requires aggregators to post on or near the telephone instrument, in plain view of consumers:

- (i) the name, address, and toll-free telephone number of the provider of operator services;
- (ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone . . .

¹³ See 47 U.S.C. § 226(h)(1)(A); note 12, supra. The TOCSIA informational tariff filing requirement became effective on January 15, 1991. Thereafter, rates and surcharges contained in informational tariffs of a dozen OSPs were designated for formal investigation because they did not appear to be just and reasonable. See, e.g., People's Telephone Company, Inc., 6 FCC Rcd 6658 (Com. Car. Bur. 1991); South Texas Phone, Inc., 6 FCC Rcd 6664 (Com. Car. Bur. 1991); Capital Network Systems, Inc., 6 FCC Rcd 6707 (Com. Car. Bur. 1991). In December 1991, the tariffed rates and related aggregator surcharges, of an additional fourteen OSPs also were designated for formal investigation. See, e.g., American Network Exchange, Inc., 7 FCC Rcd 163 (Com. Car. Bur. 1991); American Public Communication, 7 FCC Rcd 169 (Com. Car. Bur. 1991); Ascom Autelca Communications, 7 FCC Rcd 175 (Com. Car. Bur. 1991); Fone America, Inc., 7 FCC Rcd 181 (Com. Car. Bur. 1991). These proceedings were terminated after the OSPs under investigation generally reduced their rates to more reasonable levels.

cards with 0+ access.¹⁴ At the same time, we also initiated an investigation of long term issues related to certain interexchange carrier (IXC) calling card practices, including a BPP routing system for all 0+ interLATA calls (Phase II).¹⁵ In November, 1992, the Commission released a Report and Order with respect to Phase I of this proceeding, declining to adopt a "0+ in the public domain" proposal or other alternative interim remedies proffered by AT&T's competitors.¹⁶ In Phase II, we are addressing, on a generic basis, the continuing complaints and concerns over the high level of charges billed consumers by many OSPs.¹⁷

6. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act) was enacted.¹⁸ The goal of the 1996 Act is to establish "a pro-competitive, de-regulatory national policy framework" in order to make available to all Americans advanced telecommunications and information technologies and services "by opening all telecommunications markets to competition."¹⁹ The 1996 Act requires that the Commission forbear from applying any provision of the Communications Act, or any of the Commission's regulations, to a telecommunications carrier or telecommunications service, or class thereof, if the Commission makes certain specified findings with respect to such provisions or regulations.²⁰ On June 6, 1996, the Commission released a Second Further Notice of Proposed Rulemaking in the instant proceeding²¹ seeking

¹⁴ Proprietary cards are calling cards that are valid only for calls handled by the carrier that issued the card.

¹⁵ Billed Party Preference for 0+ InterLata Calls, Notice of Proposed Rulemaking, CC Docket No 92-77, 7 FCC Rcd 3027 (1992).

¹⁶ Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 7714, 7726 (1992), petitions for reconsideration pending (Phase I Order). See infra paras. 43-45.

¹⁷ In May 1994, the Commission tentatively concluded that the implementation of a BPP system for 0+ calls for interLATA payphone traffic and for other types of operator-assisted interLATA traffic would serve the public interest. Billed Party Preference for 0+ InterLATA Calls, Further Notice of Proposed Rulemaking, CC Docket No. 92-77, 9 FCC Rcd 3320 (1994) (Further Notice). Under BPP, operator-assisted long-distance traffic would be carried automatically by the OSP preselected by the party being billed for the call. Given the estimated cost of BPP, calculated in the neighborhood of \$1 billion as of 1993, and the fact that much of the data of record on which its tentative conclusion was based was dated, the Commission sought proposals for less costly alternatives to BPP. The Commission stated that it would mandate BPP only if its benefits outweighed its costs, and those benefits could not be achieved through alternative, less costly, means. Id., 9 FCC Rcd at 3325.

¹⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

¹⁹ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 113 (1996).

²⁰ 47 U.S.C. § 160(a).

²¹ Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 (1996) (hereinafter OSP Reform Notice).

comment on whether, under the 1996 Act, we should forbear from applying the informational tariff filing requirements of Section 226.²² The Commission also sought comment on whether to require all OSPs to disclose their rates on all 0+ calls.²³ Alternatively, the Commission sought comment on a tentative conclusion that we should: (1) establish benchmarks for OSPs' consumer rates and associated charges that reflect what consumers expect to pay and (2) require OSPs that charge rates and/or allow related PIFs whose total is greater than a given percentage above a composite of the 0+ rates charged by the three largest interstate, interexchange carriers to disclose the applicable charges for the call to consumers orally before connecting a call.²⁴ Further, with respect to collect calls initiated by prison inmates, we sought comment on whether the public interest would be better served by some alternative to BPP.²⁵

7. In the OSP Reform Notice, we noted that OSPs generally compete with each other to receive 0+ traffic by offering commissions to payphone or premises owners on all 0+ calls from a public phone. In exchange for this consideration, the premises owners agree to designate the OSP as the "presubscribed" IXC or PIC serving their payphones.²⁶ Many OSPs using this strategy agree to pay very high commissions to both premises owners and sales agents who sign up those premises owners and claim, as a consequence, they must assess very high usage charges

²² Id. at 7295-96. Under Section 226, OSPs are required to file informational tariffs specifying all charges, including any PIFs such as aggregator surcharges, that consumers may be billed for making or accepting interstate telephone calls placed from payphone or other aggregator locations. 47 U.S.C. § 226(h)(1)(A) provides that:

[e]ach provider of operator services shall file . . . and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers . . . with respect to calls for which operator services are provided

On October 31, 1996, the Commission released a Second Report and Order in CC Docket No. 96-61, in which it determined under Section 10 to forbear from requiring or allowing nondominant interexchange carriers to file tariffs pursuant to Section 203 of the Act for their interstate, domestic, interexchange services. Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd 20,730 (1996), stayed, MCI v. FCC, No. 96-1459 (D. C. Cir. February 13, 1997), modified on reconsid., 12 FCC Rcd 15,014 (1997) (hereinafter Tariff Forbearance for Nondominant Carriers). We left to the instant proceeding whether we should similarly forbear from applying the tariff filing requirements of Section 226 of the Communications Act. 11 FCC Rcd at 20,789-90.

²³ OSP Reform Notice, 11 FCC Rcd at 7283.

²⁴ Id. at 7294.

²⁵ Id. at 7301. Thirty-nine parties timely filed comments. Also, two dozen reply comments, including some filed jointly by more than one party, were timely filed. The parties filing comments and reply comments are listed in Appendix B. On October 10, 1996, the Common Carrier Bureau sought further comment on certain specific questions. Public Notice, 11 FCC Rcd 12,830 (Com. Car. Bur. 1996); 61 F.R. 54979 (October 23, 1996) (Public Notice). Twenty-three parties filed comments or reply comments in response thereto. See Appendix B.

²⁶ OSP Reform Notice, 11 FCC Rcd at 7278.

to consumers placing calls from payphones. While this process has generated added revenues for the premises owners and sales agents, it forces callers to pay exceptionally high rates. As a result, some callers began to use access codes, such as 800 numbers, to reach their preferred, lower-priced OSPs and to avoid the payphone's presubscribed OSP.²⁷ Because payphone owners and other aggregators did not earn any commissions on these so-called "dial around" calls, many aggregators blocked the use of access codes from their phones.²⁸

8. As noted above, Congress enacted TOCSIA in 1990, which directed the Commission to promulgate regulations to "protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls . . . [and to] ensure that consumers have the opportunity to make informed choices in making such calls."²⁹ Among the regulations that we have issued pursuant to that mandate is a requirement that payphone providers and other aggregators permit callers to use 10XXX, 1-800, and 950 access codes to reach their carrier of choice.³⁰

9. Branding requirements that the Commission adopted in response to TOCSIA currently require an OSP to "[i]dentify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call."³¹ This identification is intended to notify consumers of the identity of the presubscribed OSP before they purchase service from that OSP.³² Consumer education initiatives by the industry, government, and the media appear to have helped produce a favorable downward trend over recent years in

²⁷ A consumer "dials around" a presubscribed carrier by dialing an access code prefix (e.g., 10333 or 1-800-877-8000 to reach Sprint, 1-800-888-8000 to reach MCI, and 1-800-CALL ATT for AT&T) in order to reach the consumer's preferred long distance carrier.

²⁸ Because aggregators also experienced fraud due to access code-like dialing, many blocked the use of access codes from their phones.

²⁹ See 47 U.S.C. § 226(d)(1).

³⁰ See 47 C.F.R. § 64.704. Pursuant to Section 226(c)(1)(A)(ii) of the Communications Act, the Commission has required unblocking of all aggregator phones. See 47 C.F.R. § 64.704(c)(5). The Commission also adopted rules and policies governing the payphone industry that, among other things, established a plan to ensure fair compensation for each completed intrastate and interstate call using a payphone. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 20,541; Order on Reconsideration, 11 FCC Rcd 21,233; applications for review granted in part and denied in part, Illinois Public Telecommunications Assn. v. FCC and United States, 117 F.3d 555 (D.C. Cir. 1997). (Payphone Compensation Order).

³¹ 47 C.F.R. § 64.703(a)(1); see Policy and Rules Concerning Operator Service Providers, 6 FCC Rcd at 2756-57. In this connection, under our rules, OSPs also must identify themselves to both parties of a collect call. 47 C.F.R. § 64.708(d) (definition of consumer includes both parties to a collect call).

³² See Policies and Rules Concerning Operator Service Providers, 5 FCC Rcd 4630, 4631-32 (1990) (citing TRAC Order, *supra*, 4 FCC Rcd at 2159).

the number of complaints received by the Commission about high OSP rates. Nevertheless, more than five years after enactment of TOCSIA, the high rates of many OSPs and surcharges imposed by aggregators continue to be a concern.³³ In 1995, the second largest category of complaints processed by the Commission's Common Carrier Bureau consisted of complaints directed against OSPs, and the vast majority of these concerned rates and charges that consumers thought were excessive.³⁴ In 1996, the Commission processed 4,132 written complaints about the level of interstate rates and services of OSPs.³⁵ Accordingly, we examine in the next sections what additional steps we can and should take to foster greater competition by OSPs.

III. ADDITIONAL ORAL BRANDING

A. Background

10. In our OSP Reform Notice, we sought comment on the benefits and costs associated with imposing a price-disclosure requirement on all 0+ calls. We noted that while consumers generally are informed about the prices that they will be charged for the individual 1+ calls that they make from their homes, they may not be aware that 0+ calls from outside the home may be more expensive than such 1+ calls. We asked commenters to evaluate whether the benefits of requiring disclosure of the price for each 0+ call before a call is completed, including calls priced at levels that consumers expect, would exceed the costs of such disclosure. We indicated that such a requirement would further a pro-competitive, pro-consumer environment and obviate Commission regulation of particular nondominant carriers' prices.

B. Comments

11. Many commenters agree with our observation that the problem of consumers often being billed charges much higher than expected stems from a lack of adequate information for

³³ See, e.g., Letter from Honorable Strom Thurmond to Reed E. Hundt (February 12, 1996), File No. IC-96-00963 (urging prompt FCC action to protect the American public from excessive rates charged by some OSPs); letter from Honorable John Edward Porter to Reed E. Hundt (February 9, 1996), File No. IC-96-00866 (inquiring about constituent concerns over high rates charged by Oncor Communications, Inc.). Some OSPs charge up to 10 times the AT&T rate. Penny Loeb, Watch that Pay Phone or Risk Getting Charged Far Above the Usual Rate for Long-distance Calls, U.S. News & World Rep., June 26, 1995, at 60, available in 1995 WL 3114002. See also Don Oldenburg, Long DiStance; Pay-Phone Charges Can Burn the Unwary, Wash. Post, June 8, 1995, at D05, available in 1995 WL 2097640.

³⁴ The Bureau processed 4,487 written OSP complaints in 1995. This represented 17.6% of the total complaints processed. Common Carrier Scorecard, Federal Communications Commission, Fall 1996 edition, at 14-15.

³⁵ Common Carrier Scorecard, Federal Communications Commission, Dec. 1997 edition, at 22. This represented 11.87% of total complaints processed in 1996.

callers to make an informed choice.³⁶ Several commenters attribute this problem to a misconception among many consumers that if they use a LEC calling card to charge the call, the call will be handled by that LEC or at least at rates comparable to those charged by their residential or business presubscribed carrier or the LEC's rates.³⁷ In fact, these calls are typically billed at the presubscribed OSP's rates and the aggregator's surcharge. Consumers, relying on their mistaken impression, however, do not discover their error until they receive bills for their calls some time later.

12. The commenters disagree on whether a new price disclosure rule would be in the public interest.³⁸ Several commenters contend that a universal rate disclosure requirement will only operate to increase the price of 0+ calls and burden an entire industry with additional, unnecessary costs. Some argue that to the extent that current rules may be insufficient to protect consumers, the challenge is primarily in the area of consumer education. Others contend that a universal rate requirement will distress consumers that expect a payphone call to be connected quickly without unnecessary delay. One commenter states that it has no current technology in place to quote rates and that there is no mechanized system for real-time quotation for 0+ calls.

13. Other commenters assert that the Commission's proposal to impose a requirement on all OSPs to disclose orally their rates to consumers when a call is placed could immediately address many of the concerns prompting the consideration of BPP and at a much lower cost to consumers and carriers. CompTel proposes that, before a customer may incur any charges for any interstate 0+ calls from an aggregator location, the presubscribed carrier serving that aggregator phone be required to provide an audible disclosure immediately after its carrier brand. Such disclosure would inform the customer how to obtain a rate quote without having to re-dial a second number. A number of state commissions and the Attorneys General support adoption of rules requiring universal rate disclosure to the paying party, believing that option would be administratively simpler, more informative, and fairer than a benchmark system, and lead to more competitive pricing.

C. Discussion

14. Insofar as ultimate consumers are concerned, we disagree with suggestions that the Commission should adopt regulations requiring OSPs to provide consumers with less, rather than more, information about the prices of their services and any related per call surcharge that an OSP permits in order to be selected by an aggregator to be its PIC. As noted previously, OSPs generally compete to receive 0+ traffic by offering commissions to payphone or premises owners, or allowing surcharges to be placed, on all 0+ calls from a public phone in exchange for being

³⁶ See OSP Reform Notice, 11 FCC Rcd at 7282.

³⁷ Id.

³⁸ See Appendix C at paras. 1-23.

chosen by the premises owners as the PIC serving their phones at that aggregator location.³⁹ The North Dakota Commission, Sprint, and other commenters correctly note that competition between OSPs in this segment of the market for aggregator customers historically has driven prices to consumers up, rather than down, in order to finance such commissions and gain 0+ business.⁴⁰

15. We cannot find that existing measures that are designed to protect consumers against excessive prices for 0+ payphone calls are adequate. Although current statutory dial-around, branding and posting requirements,⁴¹ the Commission's implementing rules,⁴² industry print, radio and television advertisements,⁴³ other industry, governmental and media consumer education initiatives,⁴⁴ marketplace competition, and the Commission's complaint and enforcement procedures provide important assistance to consumers, the large number of complaints concerning OSP rates we continue to receive indicates that these measures are not sufficient. Accordingly, we disagree with those commenters who contend that no additional rules are necessary at this time.⁴⁵ As the New York State Consumer Protection Board (NYSCPB) observed, current branding and posting requirements are insufficient notification to prevent consumer surprise and

³⁹ Our Payphone Compensation Order, requiring providers of payphones at aggregator locations to be compensated for dial-around calls, should serve to alleviate, if not eliminate, any need for OSPs to pay high commissions or to permit high aggregator surcharges. See supra note 30.

⁴⁰ See Letter from Susan E. Wefald, President, Bruce Hagen, Commissioner, and Leo M. Reinbold, Commissioner, to Secretary, Federal Communications Commission (July 3, 1996); Sprint Comments at 9; Florida Commission Comments at 8 ("competition exists among OSPs to serve payphone owners, not to serve end users"); Daniel Pearl, Costly Talk: Why Pay-Phone Calls Can Get So Expensive And Spark Complaints. Some Long-Distance Carriers Reward Shops to Sign Up and Then Soak Callers, Wall St. J., May 30, 1995, at A1, available in 1995 WL-WSJ 8715335 ("[c]ompetition over pay phones has made prices soar").

⁴¹ 47 U.S.C. § 226.

⁴² 47 C.F.R. §§ 64.703-708.

⁴³ See, e.g., Daniel Pearl, Costly Talk: Why Pay-Phone Calls Can Get So Expensive and Spark Complaints, supra, Wall St. J., May 30, 1995, at A6. (AT&T and MCI commercials urge callers to dial their special 800 numbers when making collect calls).

⁴⁴ See, e.g., "Public Phone Users Beware," Consumer News, Federal Communications Commission (June 1996); Common Carrier Scorecard, Federal Communications Commission, Fall 1996 edition at 14-15; Jane Adler, Dialing Up for Dollars: Biz Owners Say Beware of Pay Phone Scams, Crain's Chi. Bus., July 18, 1994, at 23, available in 1994 WL 3009472.

⁴⁵ Any complainant alleging that a nondominant carrier's rates are unreasonably high in violation of Section 201(b) has a heavy burden to overcome the presumption of lawfulness of rates of nondominant carriers and that a carrier without market power cannot long survive if it sets its rates at a supracompetitive level. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, First Report and Order, CC Docket No. 79-252, 85 FCC 2d 1 (1981) (applying current regulatory procedures to nondominant carriers imposes unnecessary and counterproductive regulatory constraints upon a marketplace that can satisfy consumer demand without government intervention).

dissatisfaction because they provide no indication of what consumers will be charged for 0+ calls from an aggregator site.⁴⁶ We agree with its view that the high rate of complaints and inquiries, at both the federal and state levels, regarding excessive OSP charges demonstrates that stronger consumer safeguards are needed.⁴⁷ Some commenters rely on the Commission's findings and conclusions in its Final TOCSIA Report to support their claims that the market is sufficiently competitive and that all that is needed are targeted ad hoc enforcement proceedings or further consumer educational initiatives, not new rules.⁴⁸ The Commission there found that informed consumer choice "is the best means of ensuring that the rates consumers pay for interstate operator service calls are just and reasonable."⁴⁹ We concluded that, especially because of the availability and growing use of the dial-around option by consumers, market forces were securing rates for consumers that, "overall, are just and reasonable."⁵⁰ Accordingly, we found that "conditions in the operator services marketplace are such that we need not initiate a further proceeding to prescribe regulations concerning rates for operator services at this time."⁵¹ Despite these conclusions regarding the operator services marketplace as a whole, the Commission noted that some OSPs "still charge rates that are substantially above the industry mean and these rates may warrant further action by the Commission."⁵²

16. Based on our experience following release of the Final TOCSIA Report, we conclude that, although many OSPs compete for the business of aggregators, such competition in this segment of the interstate, domestic interexchange market has not ensured that OSP charges and aggregator surcharges are not excessive insofar as ultimate consumers are concerned. Indeed, ACTEL, a payphone service provider (PSP) and OSP operating throughout New Jersey, readily conceded, that in the absence of adequate compensation for all dial-around and toll-free subscriber 800 and 888 calls, the rates for operator-assisted calls placed from its public pay telephones have

⁴⁶ NYSCPB Comments at 3,7. Unless otherwise indicated, all citations to comments and reply comments of record in this proceeding are to comments or reply comments filed, or which were due to be filed, on July 17, 1996, and August 16, 1996, respectively.

⁴⁷ Id. at 4.

⁴⁸ See, e.g., US WEST Reply Comments, filed December 3, 1996, at 2.

⁴⁹ Final Report of the Federal Communications Commission, pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, November 13, 1992, Final TOCSIA Report at 2.

⁵⁰ Id. at 32. As required by TOCSIA, the Commission there concluded a "rate compliance" proceeding, which it had initiated as Phase II of CC Docket No. 90-313. Id. at 1.

⁵¹ Id. at 2 (emphasis added).

⁵² Id. at 3 (footnote omitted).

been "too high."⁵³ Also, additional consumer educational initiatives, while necessary and appropriate to further consumers' awareness of their options and enable them to make an informed or better informed choice, have proven insufficient, and are unlikely to be sufficient, in and of themselves, to protect thousands of consumers who have not availed themselves of dial-around options. Nor has our overall experience with targeted ad hoc rate proceedings proven to be an efficient and effective means of ensuring just and reasonable charges in the OSP marketplace.

17. Under the rules adopted herein, before a 0+ interstate, domestic, interexchange call from an aggregator location may be connected by an OSP, the OSP must orally advise the caller how to proceed to receive a rate quote, such as by pressing the # key or some other key or keys, but no more than two, or by simply staying on the line.⁵⁴ This message must precede any further oral information advising the caller what to do to complete the call, such as to enter the caller's calling card number. Thus, under our rule, OSPs may require affirmative action by the consumer in order to receive a rate quote. The rule applies to all calls from payphone or other aggregator locations, including those from store-and-forward payphones or "smart" telephones. Potential OSP customers, after hearing an OSP's message, may waive their right to obtain specific rate quotes for the call they wish to make by choosing not to press the key specified in the OSP's message to receive such information or by hanging up.⁵⁵ Therefore, it is quite unlikely that all calls would entail costs associated with the intervention of a live operator. Further, the additional time for consumers to make 0+ calls and for OSPs' call set-up process for such calls should not be significant, given the brief language that OSPs are required to add following their audible identification brand. Just as now, consumers may bypass their right to receive rate quotes by proceeding to enter their credit card number. And OSPs may proceed with call set-up at the same time that the oral message required by our rules is being delivered. Of course, as currently mandated by TOCSIA and our rules, OSPs must continue to afford consumers a reasonable opportunity to terminate the telephone call at no charge before the call

⁵³ ACTEL response, received July 8, 1996, at 3. See Payphone Compensation Order, *supra*, 11 FCC Rcd at 20549 n.35 (Term "Subscriber 800 calls" includes other sequences of numbers that FCC may deem in future the equivalent, such as 888).

⁵⁴ We are not aware of any technical reason why more than a one or two-digit keypad entry would be necessary. See *ex parte* letter from Steven A. Augustino, counsel for CompTel, to William F. Caton, Acting Secretary, Federal Communications Commission (April 4, 1997) at page 1; *ex parte* letter from Mason Harris, President, Robin Technologies, Inc., to Paul F. Gallant, Legal Advisor to Commissioner Tristani (January 22, 1998) at page 2.

⁵⁵ Callers, of course, would also avoid the delay due to disclosure rules regarding prices when calling via an access code rather than making a 0+ call. The new disclosure requirement is not applicable when a caller dials-around the presubscribed OSP by dialing another carrier's 800, 10XXX, or similar identification or access code. The requirement also is inapplicable to calls to local and long distance operators, *i.e.*, 0- and 00 calls, where callers who wish to make interstate calls already have the opportunity to obtain rate quotes.

is connected.⁵⁶ OSPs may proceed with call set-up whether they require callers either to act affirmatively to receive rate quotes or merely to remain on the line to receive such quotes. We conclude that the information disclosure requirements adopted herein are sufficient to enable consumers to make informed business decisions in the marketplace. Such disclosure also is in accord with the dual purpose and policy objectives of TOCSIA, *i.e.*, (1) "[protecting] consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls;" and (2) providing sufficient information to "ensure that consumers have the opportunity to make informed choices in making such calls."⁵⁷ This disclosure requirement will better ensure that consumers do not unintentionally use carriers that charge unexpectedly high rates for interstate calls, or use such carriers only because they are unaware that they have other options. We conclude that the rules adopted herein will serve to place downward pressure on prices charged in excess of competitive rates, and could save consumers part, if not all, of a previously estimated quarter of a billion dollars per year.⁵⁸

18. The proper allocation of resources in our free enterprise system requires that consumer decisions be intelligent and well informed.⁵⁹ In a competitive market, people will tend to search for the cheapest product or service when other factors are comparable. Accurate price information at the point of purchase is therefore important for commercial choices in a market economy. Especially, as here, when an OSP may not have established long-term relationships with potential customers, the absence of price information at the point of purchase inhibits competition from driving prices down and requires consumers, provided that they are so inclined, to spend more time to find the best or a lower price. OSP and aggregator practices that are designed to keep, or have the effect of keeping, callers ignorant of all applicable charges for a 0+ call from that particular aggregator location facilitates undue manipulation of consumers' choices in this segment of the interstate, domestic interexchange market.

19. We agree with the assessments of the Attorneys General and other commenters that rules requiring universal rate disclosure to the paying party would be administratively simpler, more informative, and fairer than our benchmark proposal and that "a complete and accurate universal rate disclosure requirement will increase consumer awareness and lead to more competitive pricing."⁶⁰ In further implementation of our responsibilities under TOCSIA "to ensure that consumers have the opportunity to make informed choices in making [interstate

⁵⁶ 47 C.F.R. § 64.703(a)(2) (OSPs "shall . . . permit the consumer to terminate the telephone call at no charge before the call is connected.").

⁵⁷ 47 U.S.C. § 226(d)(1); *see* § 226(d)(1)(A).

⁵⁸ *See* OSP Reform Notice, 11 FCC Rcd at 7293-94 (commenters have estimated that prices in excess of competitive rates cost consumers approximately a quarter of a billion dollars per year).

⁵⁹ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748,765(1976).

⁶⁰ Attorneys General Comments at 8.

operator services telephone] calls,"⁶¹ we shall require all OSPs to make additional oral disclosure at the point of purchase of 0+ calls. This will better enable consumers to be aware of, and have the option of, exercising their legal rights. We believe consumers need to have sufficient information, prior to being charged for an interstate call, to be fully aware of their right to know the cost of a 0+ call, including any applicable PIF or aggregator surcharge, and of their right to obtain rate quotes of the applicable OSP charges for the initial rate period and each subsequent rate period. Consistent with the intent of Congress when it enacted TOCSIA, we conclude that the price quoted for the call must include either the cost of the specific applicable surcharge, or the maximum surcharge that could be billed at that aggregator location.⁶² We believe that these additional up-front oral disclosures will prove to be a more effective and efficient means of providing consumers the information they need to make fully informed decisions regarding the choice of an OSP than (a) various other messages that have been proposed by some commentators⁶³ or (b) requiring carriers that are not bound by our accounting and cost allocation rules to file cost data in support of their charges.

20. Several commenters, including Sprint, oppose adoption of a universal prior price disclosure requirement to address the problem of high OSP charges and related PIFs. These commenters maintain that such a requirement will lead to increased costs and delayed call completion.⁶⁴ Sprint continues to maintain that "the only way to mitigate, if not eliminate, the market power of premises owners is to require the implementation of [BPP]."⁶⁵ No one has denied, however, that to implement BPP would entail a considerable period of time and even greater costs. The cost of implementing BPP has been estimated at around a billion dollars, whereas the estimated costs of implementing the oral disclosure requirement are much less and will accomplish many of the same objectives.⁶⁶ Insofar as delayed call completion is concerned, the California Commission has concluded, on the basis of its experience from its 900 proceedings, that "price disclosure prior to call completion will not create an unacceptable delay to

⁶¹ 47 U.S.C. § 226(d)(1)(B).

⁶² See H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 14 (1992) (OSP's can meet filing requirement to specify aggregator surcharges by filing the range of surcharges collected on behalf of call aggregators). Unlike aggregator surcharges, which Congress allowed OSPs to express as a range in their information tariffs, OSPs' own charges must be specifically disclosed in their informational tariffs. See Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd at 2757.

⁶³ See OSP Reform Notice, 11 FCC Rcd at 7291-93.

⁶⁴ Sprint Reply Comments, filed December 3, 1996, at 1; see, e.g., Reply Comments, filed December 3, 1996, of APCC, AT&T, CCOS, Intellicall, and Pacific Telesis.

⁶⁵ Sprint Reply Comments, filed December 3, 1996, at 5 n.2.

⁶⁶ As CompTel notes, the approach that we adopt herein is simple, direct and less costly than BPP. See CompTel Comments filed November 13, 1996 at 2-5.

consumers."⁶⁷ Pacific Telesis disagrees with the California Commission, contending that, because 900 rates are postalized and the disclosure is on the terminating line of the call, "the disclosures involved are so dissimilar as to be irrelevant."⁶⁸ Pacific Telesis does not explain, however, why the disclosure apparatus for 0+ calls from a particular aggregator site could not be sited on a particular originating, rather than terminating, number or line. It also fails to take into account that, as market segments become more competitive, current industry trends are toward postalized or flat rates, irrespective of such factors as mileage, time of day, and other specifics of a call.⁶⁹

21. Further, requiring OSPs to disclose price information about their services does not infringe on their First Amendment commercial speech rights. The United States Supreme Court has stated that when the government "regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review."⁷⁰ In commercial speech cases, the Supreme Court has used a four-prong analysis:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁷¹

⁶⁷ California Commission Comments, filed November 13, 1996, at 5 (emphasis in original).

⁶⁸ Pacific Telesis Reply Comments, filed December 3, 1996, at 3.

⁶⁹ Mark Rockwell, GTE Introduces Flat-rate Pricing, Communications Week, Feb. 3, 1997, at T33, available in 1997 WL 7691446 (GTE rolled out a flat-rate long-distance calling plan for consumers, to complement its flat-rate plan for businesses); How to Keep 'Em on the Loop, Telemedia News & Views, Apr. 1, 1996 (A rouser of "low fare" long-distance carriers, led by Sprint Long Distance and several second tier carriers offering "postalized" flat \$0.10-a minute rates); Telco Communications Adding Internet to Commercial Long Distance, M2 Presswire, Dec. 10, 1996, available in 1996 WL 14655722 (Prime Business Select II offers one simple flat rate for both intrastate and interstate calls); Sprint, MCI Announce New Long-Distance Plan, Orlando Sentinel, Jan. 7, 1995, at C10, available in 1995 WL 6401982 (Sprint offering flat rates for residential long-distance calls); Kevin Petrie, Small Competitors Roll Out Flat-rate Phone Plans, Denv. Bus. J., Nov. 24, 1995, at 4, available in 1995 WL 11627775.

⁷⁰ 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1506 (1996).

⁷¹ Id. citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

22. Requiring OSPs to disclose the price of a 0+ call does not compel them to make misleading or confusing commercial speech, contrary to a commenter's suggestion,⁷² and does not contravene their First Amendment rights. The Commission previously has imposed a similar requirement to disclose rates on providers of 900 service.⁷³ No common carriers, including OSPs, may lawfully provide interstate telecommunications service, except at rates that are just and reasonable.⁷⁴ Assuming, *arguendo*, that an OSP's charges and any applicable PIF associated with an interstate 0+ call are neither unreasonable nor misleading, then a governmental requirement that the OSP must disclose such charges at the point of purchase, *i.e.*, mandating commercial speech that is not misleading concerning lawful activity, is not inconsistent with the first part of the four-prong analysis.

23. With respect to the second prong of the analysis, the rules adopted herein will directly advance a substantial governmental interest, *i.e.*, protecting consumers from unfair and deceptive practices or possible rate gouging. We have received thousands of complaints annually over the past several years, directly from consumers, or from Congressional offices, alleging that callers from payphone and other aggregator locations have been billed excessive rates and charges. These represent the third largest category of complaints that our Common Carrier Bureau has processed over recent years. With respect to the third prong of the analysis, our new rules are tailored to advance directly "the asserted governmental interest" in this proceeding and are not more extensive than what we believe is necessary to serve that interest. For example, we do not require OSPs automatically to disclose the rate for every call. Instead, we require such disclosure only upon affirmative request of the caller. Indeed, we believe other regulatory alternatives we have considered would not advance as well our goals of fostering a more fully competitive OSP marketplace and ensuring that away-from-home callers have sufficient information at the point of purchase to make an informed decision whether or not to place a call through a particular OSP. Such alternative regulatory options we considered include: mandating BPP; prohibiting PIFs; conducting a rulemaking to prescribe appropriate accounting, cost allocation, and cost support rules with respect to charges of nondominant carriers; prescribing caps on charges of OSPs and aggregators; establishing benchmark rates; and engaging in other price regulation of nondominant carriers' retail charges. As we discussed above, each of these options would have been more burdensome, and possibly less effective, than what is necessary to serve the public interest.

24. MCI erroneously maintains that OSPs should not be required to include PIFs in any rate disclosure required by Commission rule because PIFs are not part of the carrier's tariffed

⁷² See AMNEX Comments at 8-9 n.22.

⁷³ Policies and Rules Concerning Interstate 900 Telecommunications Services, 6 FCC Rcd 6166 (1991).

⁷⁴ 47 U.S.C. § 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio common carrier] service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful"

rate.⁷⁵ To the contrary, all OSPs, including MCI or its OSP affiliate, are required currently under TOCSIA to include PIFs in their Section 226 informational tariffs.⁷⁶ Only PIFs that an OSP has specified or permitted in its PIC agreement with a particular aggregator must be reflected in such tariffs. Our information disclosure rules similarly require a nondominant OSP to disclose only such aggregator surcharges and PIFs, if any, that it has permitted in the applicable PIC agreement with an aggregator.

25. The rules adopted herein provide OSPs and potential OSP competitors a level playing field in that they apply equally to all OSPs and, unlike benchmark proposals based on the rates of AT&T, MCI, and Sprint, do not establish two classes of OSP competitors (*i.e.*, "the Big Three" and all smaller carriers). Accordingly, we need not address contentions that proposed benchmark policies and rules based on such classes are arbitrary, discriminatory and, if adopted, would deny smaller carriers "equal protection" of the law in contravention of their Fifth Amendment rights.⁷⁷

26. We are cognizant of the remarks of those who have commented that exact rate disclosure is technically infeasible to implement for store-and-forward payphones, and would necessitate the forced retirement of existing equipment.⁷⁸ Other commenters, such as GTE, assert that, while it may be possible to enhance mechanized equipment to quote exact rates prior to the call, this likely would require significant capital outlays and take several years lead time to accomplish. In our 1991 order implementing TOCSIA, we stated that, "with regard to automated technology only, the provision of rate and other information via the use of a separate toll-free number is a reasonable method of compliance with [Section 64.703(a) of our rules]."⁷⁹ We cautioned, however, that "as technology is developed that eliminated the necessity for a separate number, the use of that number should also be eliminated."⁸⁰ OSPs have had more than six years to adapt to, and come into full compliance with, our rules that implemented TOCSIA in 1991. Under such rules, OSPs currently must provide oral rate quotes to prospective customers on request. The rules, as amended herein, require that such rate quotes be furnished at no charge to the caller and without the caller having to hang up and dial a separate number to obtain them.

⁷⁵ MCI Comments at 4.

⁷⁶ 47 U.S.C. § 226(h)(1)(A). (Every OSP informational tariff must include any surcharges and fees collected from consumers).

⁷⁷ See, e.g., AMNEX Comments at 3; CompTel comments at 14.

⁷⁸ See, e.g., Joint Reply Comments of Intellicall and NOSI at 18. A store-and-forward or "smart" payphone is essentially an automated operator system contained in the payphone itself.

⁷⁹ Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd at 2757.

⁸⁰ Id.

We also stated that "any rates quoted by an OSP must be exact rather than approximate."⁸¹ In computing the price of any given 0+ call that OSPs disclose mechanically under Section 64.703(a), as amended herein, OSPs may, at their option, use the maximum cost, including any aggregator surcharge, for the initial and additional minutes, in lieu of using the actual rates, including any surcharges, for the call. We decline, however, to adopt proposals that would afford OSPs the additional flexibility to quote average charges that the caller could be billed. We agree with the views expressed by some commenters that consumers could easily be misled by an average rate disclosure as to the level of the applicable charges for the particular call they wish to make.

27. We deny requests to exempt currently embedded store-and-forward equipment, even when such "smart" telephones are not capable of being retrofitted to comply with the new disclosure rules. The record does not provide a sufficient basis to justify such a broad exemption from our rules. We shall, however, allow 15 months after the effective date of our rules before such embedded equipment must be modified or replaced. That should provide more than sufficient time for parties to come into compliance with the rules. In particular, we are prepared to consider waiver requests on a specific factual showing of good cause. Such showing should specify, for example, the number of embedded phones for which waiver is sought, whether significant numbers of complaints emanate for calls from such phones, and whether the pay phone provider is willing to offer other meaningful efforts to increase consumer awareness of their options. Intellicall, Inc., a provider of "smart" pay telephones to the customer-owned pay telephone service industry,⁸² has requested that its ULTRATEL store-and-forward payphones be required only to advise callers how to obtain rate quotes and to be exempt from the requirement to provide such quotes without callers having to dial a second number.⁸³ Intellicall, Inc. states that its ULTRATEL payphones can be retrofitted within four to six months to provide verbal instructions advising callers on how to obtain a rate quote on each call by hanging up and dialing two digits, *i.e.*, *0 (star-zero).⁸⁴ We deny such request. It is within an OSP's discretion what rate information it will disclose and how it will do so, not the decision of an equipment provider. Although Intellicall, Inc.'s subsidiary company, Intellicall Operator Services, Inc., provides network-based operator and prepaid services throughout the United States from aggregator locations,⁸⁵ the request before us is on behalf of the equipment manufacturer, not its OSP

⁸¹ Id.

⁸² Intellicall Comments at 2.

⁸³ Ex parte Letter from Judith St. Ledger-Roty, counsel for Intellicall, Inc., to William A. Caton, Acting Secretary, Federal Communications Commission (Mar. 21, 1997) at 4.

⁸⁴ Id. OSPs, including those that provide service from store-and-forward payphones, have been on notice for more than a year that they could be made subject to proposed price disclosure requirements of record in this proceeding and that we expected them "to begin to take the actions necessary to be able to implement them in a timely manner." OSP Reform Notice, 11 FCC Rcd at 7294.

⁸⁵ Id.

subsidiary. Moreover, while it appears that Intellicall, Inc. has sold over 200,000 pay telephones for use in forty-six states, of which over 60,000 use store-and-forward technology,⁸⁶ its request fails to specify how many of its payphones cannot be retrofitted to comply with the rules adopted herein and otherwise lacks the specificity necessary to justify a blanket exemption from the rate disclosure requirement. We have determined that disclosure of rate information at the point of purchase will better enable consumers to make informed decisions and also further competition in the OSP marketplace. Intellicall, Inc. has not made a sufficient showing of good cause to warrant exempting calls from any of its payphones at aggregator locations from the requirement that OSPs, including its subsidiary OSP, disclose the cost thereof if requested by prospective customers.

28. In summary, OSPs' informational tariffs, our open entry policies, and current competition in the OSP marketplace have not been sufficient to ensure that the charges for all OSP calls are just and reasonable. The price of an interstate 0+ call from an aggregator location is generally higher, and, in some cases, substantially higher, than consumers pay for 0+ calls from their regular home or business location. Consumers making such away-from-home calls often do not have any long-term business relationship or familiarity with the presubscribed OSP that the aggregator has selected to provide operator services at its site. The policies and oral information disclosure rules we adopt herein require OSPs to provide accurate information about the price of their services to consumers, particularly prospective new customers whom they have never served, if callers exercise their right to receive a rate quote. The rules require OSPs to disclose to consumers the true cost of placing a call through them, including any applicable aggregator surcharge, or the maximum possible such charge, that they permit. Such surcharges are a principal, if not the principal, reason for consumer complaints about OSP rates and charges. The rules provide transient callers with the information necessary to maximize their awareness of their options and to make informed decisions with respect to payphone calls. The rules, thus, are not only pro-consumer, but also pro-competitive in furthering marketplace decisions based on options available to an informed consumer.

IV. FCC RATE BENCHMARK OR PRICE REGULATION

A. Background

29. In the OSP Reform Notice, we invited comment on our tentative conclusion that we should require OSPs to disclose rates when they exceed consumers' expectations. To achieve this, we tentatively concluded that OSPs that charge rates, or allow related PIFs, whose total is greater than a given percentage above a composite of the 0+ rates charged by the three largest IXC be required to disclose the cost of the call orally to consumers, before connecting the call.⁸⁷

⁸⁶ Id.

⁸⁷ OSP Reform Notice, 11 FCC Rcd at 7294.

We also sought suggestions for alternative disclosure requirements that would more effectively and efficiently provide consumers with the information that they need to make fully informed decisions regarding the choice of an OSP.⁸⁸

⁸⁸

Id.

B. Discussion

30. For reasons set forth below, we decline to adopt benchmark rules. Instead, as previously discussed, we are requiring OSPs to disclose to consumers orally how to obtain rate quotes or the price of a call to a specific terminating location, to enable them to make a more informed decision at the point of purchase.⁸⁹ This course of action will best serve the dual objectives of TOCSIA, further our goal of fostering a more fully competitive marketplace for operator services from payphones and other aggregator locations, help ensure a level playing field for all OSP competitors, and better serve the public interest than would the use of benchmarks as tentatively proposed in the OSP Reform Notice.

31. Commenters were divided in terms of support for the use of benchmarks and whether such benchmarks should be based upon consumer expectations and tied to the rates of the three largest carriers (e.g., based on some percentage of the average of those rates or some set flat increase over such rates).⁹⁰ After considering the alternatives to benchmarks and examining the record before us, we agree with those commenters who believe that benchmarks would not be the best alternative for addressing the problem. We believe that the imposition of price controls or benchmarks upon the entire industry, in order to curtail rate gouging by some carriers and aggregators, would be overly regulatory and could even stifle rate competition (e.g., if it results in carriers migrating their rates to the benchmark, or only slightly below it).⁹¹

32. In addition, commenters submit that many consumers would not expect OSP charges and aggregator surcharges at even the levels that would be allowed under CompTel's benchmark proposal of 115% of the weighted average of the largest three carriers' rates. Such charges are perceived as excessive not only by some consumers, but public officials, regulators, and, according to the state Attorneys General, even many OSPs.⁹² We also agree with commenters that establishing benchmarks based on the average of rates of the three largest IXCs

⁸⁹ See supra paras. 14-28.

⁹⁰ See Appendix C at paras. 24-42.

⁹¹ See, e.g., Letter from Susan E. Wedfald, President, Bruce Hagen, Commissioner, and Leo M. Reinbold, Commissioner, North Dakota Public Service Commission, to Secretary, Federal Communications Commission (July 3, 1996) (The North Dakota Commission's experience is that benchmarks will not have the intended result of motivating operator services providers to keep rates low).

⁹² See, e.g., Attorneys General Comments at 4 ("Many OSPs agree with our assessment that CompTel's proposed benchmarks are too high"); NARUC Comments at 1 (CompTel's proposed rate benchmarks of \$3.75 and \$4.75 are "excessively high"); NYSCP Comments at 6 (benchmarks proposed by CompTel, Bell Atlantic, NYNEX and others are "far too high"); Pennsylvania Commission Reply Comments, filed May 5, 1995, at 4-6 (CompTel's proposed benchmarks are "excessive," agreeing with comments to that effect filed on or about April 12, 1995 by the Colorado Commission Staff, Ameritech, Sprint and the National Association of Attorneys General, Telecommunications Subcommittee of the Consumer Protection Committee).

or their OSP affiliates, could arguably constitute a denial of the equal protection of the law to all other OSPs.

33. Moreover, even if benchmarks were not based on a separate class of carriers, setting benchmarks at the level initially proposed by CompTel could be anti-competitive and anti-consumer. If such presumed reasonable or "safe harbor" benchmarks were adopted, we believe those OSPs whose rates currently are below those levels would have an incentive to increase their rates to those levels. Also, it could be argued that express or implied Commission forbearance from regulating tariffed rates that did not exceed the levels proposed by CompTel, constitutes federal agency approval of collusive price-fixing by OSP competitors.

34. Accordingly, we are persuaded by the comments of those opposed to our benchmark proposal that such a price regulatory approach is not the best answer to the problem of consumers being billed unexpectedly high charges for 0+ services. The anomalies in this segment of the interstate telecommunications market are directly attributable to consumers lacking sufficient information of the cost of service at the point of purchase. We believe that the oral disclosure requirements that we adopt today will help to ensure that consumers have the information they need to make informed decisions concerning whether they wish to make a 0+ call through a particular carrier or to place the call through one of hundreds of other OSPs competing in this market. We therefore find that the oral disclosure requirement adopted above will not only more readily achieve our goal of protecting consumers, but by providing consumers with access to information necessary to make informed choices, also accomplishes this goal in a manner more consistent with the pro-competitive goals of the 1996 Act.

V. BILLED PARTY PREFERENCE

A. Background

35. Under BPP, operator-assisted long-distance traffic would be carried automatically by the OSP preselected by the party being billed for the call.⁹³ This would be done by permitting a person signing up for a calling card to select the OSP that would carry that customer's interstate payphone traffic whenever that customer used the calling card. The network would be able to identify that OSP by checking a database listing the chosen OSP associated with each calling card. Based on the comments filed by parties in 1993, the Commission estimated that the cost of implementing BPP would be on the order of \$420 million in amortized annual costs.⁹⁴ This is based on an estimate of LEC costs of \$1.1 billion in non-recurring costs (including approximately \$500 million for end office software) plus \$60 million in recurring costs (most of which would be due to increased expenses for training and employing operators), and

⁹³ Further Notice, 9 FCC Rcd at 3320.

⁹⁴ Id. at 3325.

recurring OSP costs of about \$35 million per year.⁹⁵ Given the estimated cost of BPP, the Commission sought proposals for less costly alternatives.⁹⁶ We stated that we would mandate BPP only if its benefits outweighed its costs, and those benefits could not be achieved through alternative, less costly, means.⁹⁷ Two years later, we noted that, while the record indicated that the cost of BPP "would likely be quite substantial," local number portability was mandated by the 1996 Act and we intended to give further consideration to BPP as number portability developed.⁹⁸ We remarked that "[i]f local exchange carriers are required to install the facilities needed to perform database queries for number portability purposes for each call, the incremental cost to query the database for the customer's preferred OSP might well be less than the incremental benefits that BPP would provide."⁹⁹

B. Discussion

36. We decline to adopt BPP. As detailed in Appendix C, only a few parties continue to support BPP.¹⁰⁰ Moreover, there is no convincing evidence that the benefits of BPP outweigh its costs, and that those benefits can not be achieved through alternative, less costly, means.¹⁰¹ Thus, we decline to require this expensive change to the network as a means of reducing customer dissatisfaction with OSP rates. Rather, the increased consumer disclosures required by this Order will meet our objectives, including protecting consumers, and fostering rate competition, in a less burdensome manner.

37. In the OSP Reform Notice, we noted that the 1996 Act mandates local number portability and that we intended to give further consideration to BPP as number portability developed. We requested comment on our suggestion that "[i]f local exchange carriers are required, thus to install the facilities needed to perform database queries for number portability purposes for each call, the incremental cost to query the database for the customer's preferred OSP might well be less than the incremental benefits that BPP would provide."¹⁰² Based on the updated record, we cannot conclude that the implementation of local number portability will have this effect. In the absence of firm data that shows a favorable cost/benefit ratio, we are not

⁹⁵ Id. at 3325-26.

⁹⁶ Id. at 3325.

⁹⁷ Id.

⁹⁸ OSP Reform Notice, 11 FCC Rcd at 7277.

⁹⁹ Id. at 7277-78.

¹⁰⁰ See Appendix C at paras. 43-44.

¹⁰¹ Further Notice, 9 FCC Rcd at 3325.

¹⁰² OSP Reform Notice, 11 FCC Rcd at 7277-78.

willing to mandate BPP, and the proponents have not provided us with such data. No one has challenged the LECs' assertions that implementation of number portability will not render BPP more economically feasible to implement.¹⁰³ The fact that local number portability [LNP] databases will not exist in all areas also militates against reliance on LNP as a basis for mandatory BPP.¹⁰⁴ Moreover, as some commenters argue, the increased advertisement and use of dial-around will yield the same result as BPP at no cost to upgrade the network. We are cognizant of assertions that to continue to leave open the possibility of BPP as a possible long-term solution to the problem of high OSP rates is harming OSPs in the capital markets.¹⁰⁵ We also agree that it would be unwise to implement BPP in the inmate calling environment, given the need for special security measures there.¹⁰⁶

38. Equally as important, and as discussed in detail in the previous sections, we find that the oral price disclosure requirement will achieve the same benefits, at significantly less cost, and in a manner consistent with the pro-competitive goals of the 1996 Act. Accordingly, we decline to adopt BPP to redress the problem of high rates of OSPs and providers of operator services to prison inmate phones.

VI. FORBEARANCE FROM APPLYING SECTION 226 TARIFF FILING REQUIREMENTS

A. Background

39. Under the 1996 Act, we must forbear from applying any regulation or provision of the Communications Act if we determine that such forbearance is consistent with the statutory criteria listed in Section 10(a) therein.¹⁰⁷ In our OSP Reform Notice, we sought comment on

¹⁰³ See, e.g., BA/BS/NYNEX Comments at 9; SWBT Comments at 2; U S WEST Comments at 12-14.

¹⁰⁴ See Appendix C at para. 45.

¹⁰⁵ See, e.g., CompTel Comments at 22.

¹⁰⁶ Inmate Calling Services Providers Coalition Comments at 7. See also Gateway Technologies, Inc. Comments at 4 (Commission cannot legitimately provide for carrier choice in the inmate services environment).

¹⁰⁷ The 1996 Act enacted new Section 10(a) of the Communications Act which provides as follows:

REGULATORY FLEXIBILITY. -- Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications

whether we should forbear from applying Section 226 tariff filing requirements to nondominant interexchange OSPs if they either provide an audible disclosure of the applicable rate and charges prior to connecting any interstate 0+ call from a payphone location, or certify that they will not charge more than FCC-established benchmarks for such calls. We noted that TOCSIA authorizes us to waive the requirement for informational tariffs if we determine that such tariffs no longer are necessary to: (1) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and (2) ensure that consumers have the opportunity to make informed choices in making such calls.¹⁰⁸ We tentatively concluded that a requirement that OSPs disclose the specific price of a call to the consumer before connecting a call would better protect consumers from unexpectedly high charges than the filing of "informational" tariffs, which are effective without prior notice and provide very limited protection at the time of purchase.¹⁰⁹ Based on this analysis, we sought comment on whether the most effective long-term solution for protecting consumers is to provide them with a mechanism for exercising choice, such as by entering into a long-term relationship with carriers, by having an audible brand stating the price of any call before the call is connected, or additional branding stating the price of any call that would exceed benchmarks that we might establish.¹¹⁰

40. We also sought comment on whether price information at the point of purchase, rather than the availability of pricing and other material information from the public tariffs of rivals, is more likely to allow consumers to exercise rational purchasing decisions, encourage OSPs to initiate price reductions and other competitive programs, and impose market-based discipline on abusive OSPs.¹¹¹

carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
(3) forbearance from applying such provision or regulation is consistent with the public interest.

1996 Act at § 401 (adding Section 10(a), 47 U.S.C. § 160(a)).

¹⁰⁸ OSP Reform Notice, 11 FCC Rcd at 7296, citing 47 U.S.C. § 226(h)(1)(B).

¹⁰⁹ Unlike the effective date of rates in tariffs filed pursuant to Section 203 of the Act, which the Commission may suspend, rates and surcharges in informational tariffs filed pursuant to Section 226 are effective without prior notice to the public and the Commission. See Section 226(h)(1)(A) ("changes in [informational tariff] rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.")

¹¹⁰ OSP Reform Notice, 11 FCC Rcd at 7297.

¹¹¹ Id.