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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

AMERITECH EMERGENCY PETITION FOR STAY

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April 9, 1998

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Pursuant to section 5(c) of the Communications Act as amended and sections 0.5(c), 0.91, 0.291, and 1.429(k) of the Commission's rules, the Ameritech Operating Companies (Ameritech) respectfully ask the Common Carrier Bureau (Bureau) to stay the effective date of the Second Report and Order (*Second Report)* in the above-captioned proceeding.[1]

In the *Second Report*, the Commission amended its rules to require operator service providers (OSPs) by July 1, 1998, to "[d]isclose audibly and distinctly to the consumer, at no charge and before connecting any interstate, domestic, interexchange 0+ call, how to obtain the total cost of the call, including any aggregator surcharge, or the maximum possible total cost of the call, including any aggregator surcharge, before providing further oral advice to the consumer on how to proceed to make the call." The Commission held, further,

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[1] *Billed Party Preference for InterLATA 0+ Calls,* CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, FCC 98-9, released January 29, 1998.

that consumers must be permitted to obtain applicable rate and surcharge quotations by dialing no more than two digits or by remaining on the line.

Concurrent with the filing of this emergency stay request, Ameritech is asking the Commission to clarify or rule on reconsideration that this rate disclosure requirement does not apply to 0+ interstate intraLATA service. Pending consideration of this reconsideration petition, Ameritech now asks the Bureau to stay the application of the *Second Report* to intraLATA interstate services, to the extent that the *Second Report* could, in fact, be deemed to apply to such services.[2]

As shown below and in Ameritech's Petition for Reconsideration and Clarification, a copy of which is attached hereto, there are ample grounds for the requested stay.[3] First, Ameritech has presented a compelling case in support of

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[2] Section 5(c) of the Communications Act authorizes the Commission, by published rule or by order, to delegate any of its functions to, among others, an "individual employee." Section 0.5(c) of the Commission's rules states: "Pursuant to section 5(c) of the Communications Act, the Commission has delegated authority to its staff to act on matters . . . in which immediate action may be necessary." More specifically, section 0.91 of the Commission's rules charges the Common Carrier Bureau with responsibility for, *inter alia*, "exercis[ing] such authority as may be assigned or referred to it by the Commission pursuant to Section 5(c) of the Communications Act of 1934, as amended." Completing the chain, section 0.291 delegates to the Chief, Common Carrier Bureau authority to perform all functions of the Bureau described in section 0.91, subject to certain exceptions, which do not apply here. Pursuant to these provisions, in light of the imperative for immediate action, it is clear that the Bureau has authority to issue the stay that Ameritech here requests.

[3] In determining whether a stay is warranted, courts typically consider four factors: (1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest implications of the stay. *See, e.g. Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996). Section 1.429(k) of the Commission's rules, however, permit a stay of the effective date of an order pending reconsideration for "good cause shown." As shown below, Ameritech clearly meets either test.

its requested clarification or reconsideration of the *Second Report* and, therefore, is very likely to prevail on the merits. In particular, Ameritech believes that the Commission did not intend, or certainly should not have intended, to apply the notification requirement adopted in the *Second Report* to interstate intraLATA toll services insofar as: (i) the Commission did not even discuss intraLATA toll services in this proceeding - much less explain why any of its proposals should apply to such services; and (ii) application of this requirement to 0+ interstate, intraLATA toll services, which are provided exclusively by Bell operating companies (BOCs) in their regions would be completely superfluous, since consumers are already protected from excessive rates for those services under the Commission's price cap regime. Moreover, to the extent the *Second Report* could be taken to require carriers to quote actual or maximum surcharges or premises-imposed fees (PIFs) for which a carrier does not bill or which are not expressly addressed in any contract, Ameritech (and undoubtedly others) *cannot* comply.

Second, Ameritech would be irreparably harmed if the Bureau does not expeditiously grant the requested stay. In order to meet the July 1 deadline, Ameritech would have to expend substantial sums of money ordering, testing, and implementing operator switch changes, establishing new protocols, training operators in those protocols, and hiring and training approximately 200 new operators. Moreover, because for unrelated reasons, Ameritech is already planning changes to most of its operator systems during the second half of 1998,

the investment that would be required to meet the July 1 deadline would be particularly wasteful. That is because Ameritech would have to modify, not only the new software that will be installed later this year, but the old software that is about to be replaced, if it is to meet the July 1 deadline. Stated differently, Ameritech would have to implement the necessary switch changes, not once, but twice, in order to comply with an apparent requirement that may well not apply, and certainly should not apply.

In other, similar, contexts, the Bureau has stayed Commission orders pending Commission consideration of reconsideration decisions. Indeed, just two weeks ago, the Bureau stayed the application to independent LECs of the separation requirements prescribed in the *LEC Classification Order*.[4] In issuing that stay, the Bureau noted "it is in the public interest for the Commission to address and resolve, prior to the deadline for compliance, petitioners' claim that this requirement should not be applied to independent LECs, so such LECs need not incur compliance costs while the possibility of changes to this requirement still exists."[5] Indeed, this was the sole ground stated in the order for the stay.

Here, the same consideration exists - *i.e.*, the likelihood that compliance efforts will be wasted. In addition, though, there are other considerations that may be even more compelling. For example, unlike the situation with the *LEC*

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[4] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, Order, DA 98-556, released March 24, 1998.

[5] *Id.* at para. 3.

Classification Order, in this case, failure to grant a stay could cause irreparable harm to others. Specifically, if, as it should, the Commission grants Ameritech's request for clarification or reconsideration, the approximately 200 operators that Ameritech would have to hire and train in order to meet the July 1 deadline would no longer be needed. The wasted investment would be damaging to Ameritech, but it would be devastating to these individuals, particularly if they gave up other jobs or failed to pursue other job opportunities for their short-lived operator position.

On a broader basis, application of this requirement to intraLATA toll services would undermine the Commission's goal of promoting competition in telecommunications markets. Under section 251(b) and (c) local exchange carriers (LECs) must make their operator-based services available for resale. Incumbent LECs (ILECs) must also provide access to operator services as network elements.[6] Because other carriers, including so-called competitive LECs (CLECs) thereby use Ameritech's operator services (and the operator services of other LECs as well), Ameritech operators can only provide accurate rate information to consumers if they know the carrier that the consumer is using. Unless, however, a call comes in on a trunk group dedicated to a particular carrier, Ameritech operators do not currently know this information.

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[6] Interexchange carriers (IXCs) must also make their services available for resale, and the problem described below may afflict the interexchange industry, as well as the LEC industry. To the extent that this is true, the Commission may need to rethink the application of the *Second Report* altogether. Regardless of the scope of the problem, however, it is obvious that immediate action by the Bureau is essential to avoid irreparable harm to a number of carriers and is very much in the public interest.

In order to comply with the rate disclosure requirement, therefore, Ameritech operators would have to ask customers to identify their 0+ carrier.

Moreover, in order for carriers that use Ameritech's operator services to meet their own rate disclosure requirements, those carriers would have to either: (i) provide Ameritech (their competitor) with rate tables; or (ii) direct Ameritech to transfer each call to them. Obviously, a requirement that effectively forces some carriers (typically new entrants and smaller carriers) to share their rates with their competitors would be extraordinarily anticompetitive in design and effect.[7] The second option, however, is also unsatisfactory, since, once a caller was transferred to the 0+ carrier for rate information, the caller would have to resubmit all of the information (*e.g.* the dialed number) to the 0+ carrier, and then, after receiving a rate quote, if the caller chose to proceed, he/she could not complete the call without hanging up and redialing. Thus, the very purpose of the rule adopted in the *Second Report* - to permit consumers to obtain rate information without making a separate phone call - would be defeated. Moreover, LECs with their own operators (typically ILECs) would have a built-in advantage over other LECs, since ILEC customers would be able to obtain rate

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[7] *See Policy and Rules Concerning the Interstate Interexchange Marketplace, Order on Reconsideration*, CC Docket No. 96-61, FCC 97-293, released August 20, 1997 (prohibiting nondominant IXCs from filing tariffs on ground that, *inter alia*, tariffs facilitate tacit price coordination. Obviously, if *tariffs* can have anticompetitive effects, a requirement that effectively forces carriers to turn over their rate tables and surcharge information to their competitors would be even more anticompetitive. The fact that it would be only the smallest carriers (those without their own operators) that would have to turn over this information makes the requirement even more problematic from a public policy standpoint.

information from the ILEC operator, while CLEC customers would be subject to more cumbersome processes.

For all of these reasons, a stay of the *Second Report* with respect to intraLATA, interstate services would clearly further the public interest. It would obviate the need for Ameritech (and other LECs) to expend resources complying with a requirement that is likely to be changed or clarified on reconsideration. Moreover, it would eliminate the need for Ameritech (and presumably other LECs) to hire and train a significant number of new operators, who, in turn, face the risk of losing their job after a reconsideration order was issued. And finally, it would help further the Commission's goal of promoting full and fair competition in telecommunications services. Especially considering that this proceeding has been pending for several years, enforcement of the rules now finally adopted surely can wait until the rules are clarified or fixed.

Ameritech suspects that the competitive issues it raises with respect to the *Second Report* may transcend intraLATA services and extend to interLATA services. In that event, the Bureau should stay the order altogether until these issues can be considered and addressed.

Respectfully Submitted,

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AMERITECH PETITION FOR CLARIFICATION OR RECONSIDERATION

Pursuant to section 1.429 of the Commission's rules, the Ameritech Operating Companies (Ameritech) respectfully file this Petition for Clarification or Reconsideration of the Second Report and Order (*Second Report)* in the above-captioned proceeding.[1] Concurrent with this request, Ameritech is filing an Emergency Request for Stay of that order.

I. INTRODUCTION AND SUMMARY

In the *Second Report*, the Commission amended its rules to require operator service providers (OSPs) by July 1, 1998, to "[d]isclose audibly and distinctly to the consumer, at no charge and before connecting any interstate, domestic, interexchange 0+ call, how to obtain the total cost of the call, including any aggregator surcharge, or the maximum possible total cost of the call, including any aggregator surcharge, before providing further oral advice to the consumer on how to proceed to make the call." The Commission held, further,

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[1] *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, FCC 98-9, released January 29, 1998.

that consumers must be permittted to obtain applicable rate and surcharge quotations by dialing no more than two digits or by remaining on the line.

Ameritech now asks that the Commission clarify or rule on reconsideration that this rate disclosure requirement does not apply to 0+ interstate intraLATA service. As discussed below, Ameritech believes that the Commission did not intend, or certainly should not have intended, to apply the notification requirement adopted in the *Second Report* to intraLATA toll services insofar as: (i) the Commission did not even discuss intraLATA toll services in this proceeding - much less explain why any of its proposals should apply to such services; and (ii) application of this requirement to 0+ interstate, intraLATA toll services, which are provided exclusively by Bell operating companies (BOCs) in their regions would be completely superfluous, since consumers are already protected from excessive rates for those services under the Commission's price cap regime. Moreover, to the extent the *Second Report* could be taken to require carriers to quote actual or maximum surcharges or premises-imposed fees (PIFs) for which a carrier does not bill or which are not expressly addressed in any contract, Ameritech (and undoubtedly others) *cannot* comply.

Application of this requirement to intraLATA toll services would also undermine the Commission's goal of promoting competition in telecommunications markets. Under section 251(b) and (c) local exchange carriers (LECs) must make their operator-based services available for resale.

Incumbent LECs (ILECs) must also provide access to operator services as network elements.[2] Because other carriers, including so-called competitive LECs (CLECs) thereby use Ameritech's operator services (and the operator services of other LECs as well), Ameritech operators can only provide accurate rate information to consumers if they know the carrier that the consumer is using. Unless, however, a call comes in on a trunk group dedicated to a particular carrier, Ameritech operators do not currently know this information. Moreover, this is as it should be insofar as this minimizes any possibility or appearance of discrimination. In order to comply with the rate disclosure requirement, therefore, Ameritech operators would have to ask customers to identify their 0+ carrier. Even worse, in order for carriers that use Ameritech's operator services to meet their own rate disclosure requirements, those carriers would have to either: (i) provide Ameritech (their competitor) with rate tables; or (ii) direct Ameritech to transfer each call to them. Neither option, however, serves the interest of fair and robust competition. Obviously, a requirement that effectively forces some carriers (typically new entrants and smaller carriers) to share their rates with their competitors would be extraordinarily anticompetitive in design and effect.[3] The second option, however, is also unsatisfactory, since,

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[2] Interexchange carriers (IXCs) must also make their services available for resale, and the problem described below may afflict the interexchange industry, as well as the LEC industry. To the extent that this is true, the Commission may need to rethink the application of the *Second Report* altogether.

[3] *See Policy and Rules Concerning the Interstate Interexchange Marketplace, Order on Reconsideration*, CC Docket No. 96-61, FCC 97-293, released August 20, 1997 (prohibiting nondominant IXCs from filing tariffs on ground that, *inter alia*, tariffs facilitate tacit price

once a caller was transferred to the 0+ carrier for rate information, the caller would have to resubmit all of the information (*e.g.* the dialed number) to the 0+ carrier, and then, after receiving a rate quote, if the caller chose to proceed, he/she could not complete the call without hanging up and redialing. Thus, the very purpose of the rule adopted in the *Second Report* - to permit consumers to obtain rate information without making a separate phone call - would be defeated. Moreover, LECs with their own operators (typically ILECs) would have a built-in advantage over other LECs, since ILEC customers would be able to obtain rate information from the ILEC operator, while CLEC customers would be subject to more cumbersome processes.

These issues are discussed more fully below. First, however, Ameritech sets forth in some detail the background for the *Second Report*. Ameritech provides this detailed history because it demonstrates two critical facts: (i) problems in the operator services industry - and legislative and regulatory responses to those problems - have been confined to the interLATA marketplace; and (ii) neither the Commission nor the parties to this proceeding focused on, or even discussed, intraLATA services at any point prior to the issuance of the *Second Report* in this proceeding.

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coordination. Obviously, if *tariffs* can have anticompetitive effects, a requirement that effectively forces carriers to turn over their rate tables and surcharge information to their competitors would be even more anticompetitive. The fact that it would be only the smallest carriers (those without their own operators) that would have to turn over this information makes the requirement even more problematic from a public policy standpoint.

II. BACKGROUND

The *Second Report* is the latest in a series of consumer protection measures that Congress and the Commission have taken during the past decade to address abuses in the operator service industry. These abuses first began to occur in the late 1980s when so-called "alternate operator service" (AOS) providers entered the operator service marketplace by competing with AT&T for presubscription contracts from aggregator locations.[4] AOS providers were able to secure presubscription contracts from aggregator locations by offering commission payments to aggregators on 0+ interLATA traffic. Because their competitive efforts were directed at aggregators, not at consumers, AOS companies provided little, if any, benefit to consumers. Indeed, to the contrary, their entry into the market generated a wave of consumer abuses, in the form of excessive rates and unreasonable practices, such as access code blocking.

In 1988, the Telecommunications and Research Action Center (TRAC) and Consumer Action, two consumer groups, filed a formal complaint at the FCC against five AOS providers. Among other things, the complainants alleged that the interstate interLATA rates of these AOS providers were unjust and unreasonable, and they asked the Commission to regulate AOS providers as dominant carriers under the Commission's *Competitive Carrier* regime. They also

[4] In response to AOS provider complaints that the term "alternate operator service" implied second-rate status, the Commission abandoned the term AOS provider in favor of the term OSP.

asked the Commission to rule that the blocking of access codes by the defendant AOS providers or their aggregator customers was unlawful.

The Commission granted their complaint in part, holding that access code blocking was an unreasonable practice under section 201(b) of the Act and ordering the defendant AOS providers to cease such actions. The Commission, however, rejected complainants' rate complaint, and it rejected their request that AOS providers be treated as dominant carriers under Commission rules, holding that any such change in status could only be effected through a rulemaking proceeding.[5]

The *TRAC Order* did little to stem the wave of consumer complaints about AOS provider rates and practices. Therefore, in order more effectively to address the abuses of the AOS provider industry, Congress enacted the Telephone Operator Consumer Services Improvement Act (TOCSIA). The stated purpose of that legislation was "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[6] To this end, TOCSIA required OSPs, *inter alia,* to: identify themselves and provide their rates

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[5] Telecommunications Research and Action Center and Consumer Action v. Central Corporation, File Nos. E-88-104 thorugh E-88-108, DA 89-237, released Feb. 27, 1989.

[6] Telephone Operator Consumer Services Improvement Act of 1990, Senate Report # 101-439, 101st Cong, 2d Sess. at 1. *See also* H.R. Rep. No. 213, 101st Cong. 1st Sess. 2 191989) ("The purpose of [the Act] is to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.")

to the consumer on request; withhold commissions from aggregators that block access codes; and file informational tariffs with the FCC.[7]

While the definition of operator services in TOCSIA, on its face, could be deemed to apply to all providers of operator services, the legislative history of TOCSIA makes clear that Congress intended for the term to apply only to the AOS companies and AT&T."[8] This, of course, made sense because the abusive rates and practices that spawned TOCSIA were limited to interLATA services. Indeed, intraLATA interstate services had not yet even been opened to presubscription competition so AOS providers could not at the time (and still cannot) provide 0+ interstate intraLATA services.

The informational tariff filing requirement likewise was narrower than the words of the statute might facially imply. Thus, as the Commission has recognized, the legislative history of TOCSIA makes clear that Congress meant for this requirement to apply only to carriers who were treated as nondominant under Commission rules and who were, at the time, otherwise subject to the Commission's tariff forbearance policy.[9]

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[7] As initially introduced, TOCSIA would have also required the FCC to review the rates of OSPs and to require OSPs to demonstrate that their rates were just and reasonable and cost-based. At a congressional hearing, however, an FCC representative testified that it would be terribly burdensome for the Commission to examine the costs of each OSP and that any such examination would not necessarily result in lower OSP rates, insofar as OSPs' costs may be greater than those of AT&T. Based on this testimony, Congress decided to rely solely on informational tariffs, unblocking and disclosure requirements to check OSP abuses. *Id* at 21.

[8] *Id.* at note 3.

[9] *Id.* at 20. *See also National Telephone Services, Inc. Petition for Declaratory Ruling that the Untariffed Payment of Commissions by Dominant Carriers to Customers Violates Section 203 of the Act,* Memorandum Opinion and Order, 8 FCC Rcd 654 (1993) at note 15: "TOCSIA's legislative

In 1991, the Commission adopted rules and regulations to implement TOCSIA. Those rules, which remain in effect today, require OSPs, *inter alia*, to provide an audible identification prior to completion of a call and before any charge is incurred. They also prohibit aggregators from blocking access codes and OSPs from paying commissions to aggregators that fail to permit dial-around traffic. In addition, the rules require OSPs to provide rate quotes on request, and they require aggregators to disclose to consumers how to obtain such rate quotes. In adopting these rules, the Commission adopted verbatim TOCSIA's definition of operator services and operator service providers - and thus, arguably, the limitations that Congress meant to incorporate into those definitions.[10]

Although TOCSIA and the Commission's implementing regulations undoubtedly had a positive impact in the market, consumers continued to be victimized by high OSP rates for interLATA services. In particular, it appeared that many consumers did not understand that if they used a LEC calling card for an interLATA call, their call might be handled by an OSP with which their LEC had no affiliation. In addition, despite the posting, branding, and rate disclosure requirements, many consumers failed to protect themselves from

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history, however, makes it clear that the informational tariff filing requirement does not apply to dominant carriers such as AT&T."

[10] *See* 64 CFR § 708(g) and (i). *See also Policies and Rules Concerning Operator Service Providers*, Report and Order, 6 FCC Rcd 2744 (1991).

excessive OSP rates by dialing around high-priced OSPs, presumably because they found access code dialing to be burdensome and/or confusing.

It was largely for this reason that the Commission initiated this proceeding in 1992 by proposing a "billed party preference" routing methodology for 0+ interLATA traffic. Since under billed party preference, 0+ interLATA calls would be routed automatically to the IXC presubscribed to the billed line, billed party preference would have obviated the need to use access codes in order to avoid excessive OSP interLATA rates. In a 1994 Further Notice, the Commission estimated that, by enabling consumers to avoid the higher-priced OSPs, billed party preference could save consumers approximately $280 million per year in interLATA service charges.[11]

Despite these significant potential savings, the Commission was never quite convinced that the benefits of billed party preference outweighed its considerable costs. The Commission also was concerned that these benefits would diminish over time as consumers became more accustomed to using access codes from public phones.

As time passed, and no action was taken, some consumer groups became concerned. In February 1995, the Telecommunications Subcommittee of the Consumer Protection Committee of the National Association of Attorneys General (NAAG) and the attorneys general of 23 states petitioned the

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[11] Billed Party Preference for 0+ InterLATA Calls, Further Notice of Proposed Rulemaking, 9 FCC Rcd 3320 at ¶ 11 (1994).

Commission to adopt disclosure requirements to protect consumers from excessive interLATA rates, pending implementation of billed party preference or as a substitute therefor. In seeking this interim or alternative relief, NAAG noted:

> [C]onsumers report that long distance calls made from public phones have resulted in charges of more than ten times the charge that a dominant carrier would have billed for the call. The failure of some OSPs to inform clearly prospective customers that charges will be many times greater than charges by dominant carriers for comparable calls is unfair and deceptive. Many callers, particularly those using their local or long distance carrier's calling card, believe that they automatically will be connected to their carrier when they make the calls on public phones.[12]

NAAG asked the Commission to require OSPs whose rates and connection fees and other charges are not at or below dominant carrier rates to so notify consumers before completing any 0+ call. The following month, an industry group, led by CompTel, filed a counter-proposal – which, like the NAAG proposal, would only have applied to OSPs that charged excessive rates (although the CompTel group took a more lenient view as to what was "excessive").

Significantly, neither the NAAG nor the CompTel proposal would have applied to intraLATA interstate rates. Neither proposal discussed intraLATA toll service, and neither suggested any benchmark for that service. Indeed, any

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

discussion of benchmarks for intraLATA interstate toll rates would have been nonsensical, since all such calls were handled by ILECs, whose rates were regulated and who, therefore, were not the source of the problem to which these petitions were directed. Indeed, to the contrary, as the above quote indicates, the problem was that consumers using a dominant carrier calling card *were not* necessarily being billed dominant carrier rates.

The Commission issued a public notice on these proposals, and then a Second Further Notice of Proposed Rulemaking. In that Second Further Notice, the Commission indicated that it would implement some form of disclosure requirement in lieu of billed party preference and seemed to conclude that this requirement would apply only to OSPs whose rates exceeded some benchmark. It stated: "Based on all of the comments we have received, we find that the record supports the conclusion that we should establish benchmarks, based on the reasonable expectations of consumers, for OSPs' interstate rates and associated charges that consumers must pay for operator services."[13] Moreover, although it asked, briefly (and, frankly, in perfunctory fashion), whether a price disclosure requirement should apply to all 0+ calls, it went on to devote the ensuing 22 paragraphs to discussing how benchmarks might be used to target OSPs with excessive rates. After considering various alternatives, the Commission tentatively concluded that "the most useful benchmark for

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[13] *Billed Party Preference for InterLATA 0+ Calls*, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 (1996) at para. 23.

protecting consumers against unexpectedly high OSP prices would be one set at a level approximating the average price charged by AT&T, MCI, and Sprint."[14]

In discussing the various benchmarking possibilities, the Commission referred, for the first time in this proceeding, to interstate, rather than interLATA, services. In switching terminology, however, the Commission made no mention of intraLATA toll services *per se*. To the contrary, all of the proposals discussed, including the proposal the Commission tentatively decided to adopt, were tied to the rates of "the three largest OSPs" - AT&T, MCI, and Sprint - thereby implying that the Commission was using the terms interstate and interLATA interchangeably. Presumably, if the Commission had intended to establish benchmarks for intraLATA toll service, it would have at least discussed the merits of using Bell operating company rates in the benchmark, since the BOCs were, and continue to be, not merely the largest providers of intraLATA interstate traffic, but the *default* providers of that traffic in their regions. The Commission, however, did not mention BOC rates at all, nor did the Commission even distinguish between the interLATA and intraLATA toll rates of AT&T, MCI, and Sprint. To put it bluntly, intraLATA toll service was not on the radar screen.

Despite the tentative conclusions of the *Second Further Notice*, and despite broad support from carriers and consumer groups for targeted disclosure

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[14] *Id.*

requirements, the Commission abandoned the concept of benchmarks in the *Second Report* and required, instead, rate quotes on all 0+ interstate traffic. Although this requirement is framed in terms that are broad enough to cover all 0+ interstate traffic, the Commission in no way suggested that it intended to apply this rule to intraLATA, as well as interLATA traffic, and it certainly did not purport to explain why such application would be appropriate or necessary.

III. ARGUMENT

A. The Commission Did Not Intend or Should Not Have Intended to Apply the Notification Requirements Adopted in the *Second Report* to IntraLATA Toll Services.

As this history makes clear, the Commission did not intend, or certainly should not have intended, to apply the notification requirements adopted in the *Second Report* to intraLATA toll services. From the inception of this proceeding in 1992 until the issuance of the *Second Report,* the Commission and all participating parties have focused exclusively on regulations governing the provision of *interLATA* services. Thus, the Commission explicitly limited its billed party preference proposal to interLATA 0+ traffic - a limitation that is reflected in the caption of this proceeding. Likewise, the NAAG and CompTel proposals, which laid the foundation for the disclosure requirement adopted in the *Second Report,* addressed interLATA services only, as did the *Second Further Notice,* which proposed benchmarks for interLATA service rates, but not intraLATA rates.

To be sure, the *Second Further Notice* contains a single paragraph in which, without any elaboration or discussion, the Commission asks, in the alternative, whether disclosure requirements should apply to all 0+ interstate traffic. In context, however, that inquiry appears simply to raise the issue of whether or not disclosure requirements should apply only to carriers whose interLATA rates exceed whatever interLATA benchmark was adopted, not whether such requirements should be expanded to encompass intraLATA, as well as interLATA services. Indeed, in abandoning its tentative conclusion in favor of this alternative proposal, the Commission explained itself only by discussing why benchmarks would be inappropriate; it in no way suggested any specific intent to extend disclosure requirements to intraLATA services.

This lack of discussion of intraLATA services in any phase of this six-year proceeding is telling. Presumably, if the Commission was actually contemplating an expansion of the scope of this proceeding to intraLATA services, it would have suggested that it was considering such a step and provided some ostensible rationale for it. It did not, and it should now clarify that this was not its intent.

Indeed, even if the Commission did intend in the *Second Further Notice* to propose an expansion of this proceeding to intraLATA services, the Commission did not adequately convey that intent. The only evidence of any such intent in the *Second Further Notice* is the use of the term "interstate," as opposed to "interLATA." Not only is that change in terminology completely unexplained, it

is also without consequence because, in its discussion of benchmarks in that Notice, the Commission used the term "interstate services" to describe what were, in reality, interLATA services. Thus, the shift in terminology from interLATA to interstate hardly presents anything close to adequate notice under section 553 of the Administrative Procedure Act of any intent to adopt rules governing intraLATA services.[15] That being the case, the Commission *must, as a matter of law,* hold that the *Second Report* does not apply to intraLATA services.[16]

Such clarification is warranted, not only as a matter of law, but as a matter of policy. As demonstrated above, the problems that have plagued the operator services industry during the past ten years were the direct result of entry into the industry by so-called AOS providers. More specifically, the problems and consumer complaints stemmed from the fact that: (i) competition in the industry was aggregator-focused, not consumer-focused; and (ii) the rates of these new entrants were unregulated.

None of that is true, however, of interstate intraLATA service. On the contrary, because BOCs were - and continue to be - the default providers of interstate intraLATA services, the commission-oriented, aggregator-focused

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[15] *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990); *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[16] Ameritech notes, further, that the term "OSP" is ambiguous. As shown above, the legislative history of TOCSIA clearly evidences Congress' intent to limit the term "OSP" to AT&T and so-called AOS providers - as opposed to LECs. Since the Commission has incorporated TOCSIA's definition of OSP into its rules, that same limitation presumably must be read into the Commission's use of the term. Since the regulations adopted in the *Second Report* apply to OSPs, it is not clear that those rules could be deemed to apply to LECs.