State of Missouri

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December 5, 1988

Mr. Harvey G. Hubbs, Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Re: TA-88-218, et al.

Dear Mr. Hubbs:

Enclosed for filing in the above-referenced case please find the original and fourteen copies of the Initial Brief of the Office of the Public Counsel. Please "file" stamp the extra enclosed copy and return it to this office. I have on this date mailed or hand-delivered copies to all counsel of record.

Thank you for your attention to this matter.

Very truly yours,

Mark D. Wheatley
Assistant Public Counsel

MDW:kl
Enclosures

cc: Counsel of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of American Operator Services, Inc. for a certificate of service authority to provide Intrastate Operator-Assisted Resold Telecommunications Services.	)))))	Case No. TA-88-218
In the matter of Teleconnect Company for authority to file tariff sheets designed to establish Operator Services within its certificated service area in the State of Missouri.	)))))	Case No. TR-88-282
In the matter of Dial U.S. for authority to file tariff sheets designed to establish Operator Services within its certificated service area in the State of Missouri.	)))))	Case No. TR-88-283
In the matter of Dial U.S.A. for authority to file tariff sheets designed to establish Operator Services within its certificated service area in the State of Missouri.	)))))	Case No. TR-88-284
In the matter of International Telecharge, Inc. for authority to file tariff sheets designed to establish Operator Services within its certificated service area in the State of Missouri.	)))))	Case No. TR-89-6

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

I. PROCEDURAL HISTORY

On February 26, 1988, American Operator Services, Inc. (AOSI) filed an application for a certificate of public convenience and necessity with the Commission seeking authority to provide alternative operator-assisted long distance services to the public from facilities provided by institutional customers within the State of Missouri. The application of AOSI is pending as Case No. TA-88-218.

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By order of the Commission in Case No. TA-86-114, Teleconnect Company (Teleconnect) received a certificate of public convenience and necessity to provide intrastate intraLATA and interLATA toll telecommunications service effective June 1, 1987. On May 27, 1988, Teleconnect filed proposed tariffs with the Commission pursuant to which Teleconnect desires to establish and provide operator services within Missouri. On June 17, 1988, the Commission entered its Order suspending Teleconnect's proposed tariffs in order to determine if such services are in the public interest. Teleconnect's proposed tariffs are now pending as Case No. TR-88-282.

By order of the Commission in Case No. TO-84-223, Dial U.S. received a certificate of public convenience and necessity to provide intrastate intraLATA and interLATA toll telecommunications service effective August 26, 1986. On June 3, 1988, Dial U.S. filed proposed tariffs with the Commission designed to establish and provide operator services within Missouri. On June 17, 1988, the Commission entered its Order suspending the tariffs proposed by Dial U.S. in order to determine if such services are in the public interest. The proposed tariffs of Dial U.S. are now pending before the Commission as Case No. TR-88-283.

By order of the Commission in Case No. TO-84-223, Dial U.S.A. received a certificate of public convenience and necessity to provide intrastate intraLATA and interLATA toll telecommunications service effective August 26, 1986. On June 3, 1988, Dial U.S.A. filed proposed tariffs with the Commission designed to establish and provide operator services within the State of Missouri. On June 17, 1988, the Commission entered its Order suspending the tariffs proposed by Dial

U.S.A. in order to determine if such services are in the public interest. The proposed tariffs of Dial U.S.A. are pending before the Commission as Case No. TR-88-284.

By order of the Commission in Case No. TA-88-12, International Telecharge, Inc. (ITI) received a certificate of public convenience and necessity to provide intrastate intraLATA and interLATA toll telecommunications service effective October 15, 1987. On October 14, 1987, ITI filed proposed tariffs with the Commission pursuant to which ITI desired to establish and provide alternative operator services within the State of Missouri. ITI subsequently extended the effective date of the tariffs to July 1, 1988. On June 24, 1988, the Office of the Public Counsel (Public Counsel) filed with the Commission a Motion to Suspend, requesting that the Commission enter its Order suspending ITI's proposed tariffs pending further investigation by the Commission. On July 15, 1988, the Commission entered its Order suspending ITI's proposed tariffs in order to determine if such services are in the public interest. ITI's proposed tariffs are now pending as Case No. TR-89-6.

On June 29, 1988, Public Counsel filed with the Commission its Motion to Consolidate which requested the Commission to consolidate the tariff cases of Teleconnect, Dial U.S., Dial U.S.A., and ITI with the certification application case of AOSI, TA-88-218, for the reasons that the cases involve related questions of law and fact and that their consolidation would allow the Commission to develop a uniform general policy regarding AOS providers.

On July 15, 1988, the Commission entered its Order granting Public Counsel's Motion to Consolidate and consolidating all of the

above cases into Case No. TA-88-218, which was designated as the primary case file in the consolidated case.

Commencing on September 20, 1988, a hearing of the consolidated case was held before the Commission and, following the conclusion of the hearing, a schedule allowing the parties to file these briefs was established.

II. ARGUMENT

A. The provision of AOS within the State of Missouri is not in the public interest and, therefore, should not be allowed by the Commission.

Although already illegally transacting business within the State of Missouri by providing intrastate operator services under the name of National Telephone Services, Inc. (NTS) (Bryan, T. 83), AOSI is seeking a Certificate of Public Convenience and Necessity from this Commission to have lawful authority to "provide intrastate resale of interexchange telecommunications services throughout Missouri." (AOSI Application, p. 3). ITI is similarly illegally transacting business in the state by providing intrastate operator services (Freels, T. 212-216) in that ITI was granted a Certificate of Public Convenience and Necessity to "provide intrastate intraLATA and interLATA toll telecommunications in Missouri" in Case No. TA-88-12, and not specifically alternative operator services (AOS). Moreover, although ITI's certificate became effective on October 15, 1987, it has not sought approval of any intrastate tariffs until the present case.

In this consolidated proceeding, both AOSI and ITI have attempted to portray themselves as typical toll resellers in order to avail themselves of the Commission's liberal requirement regarding the

public interest as set forth in Case Nos. TX-85-10 and TO-84-222. However, the evidence in this case clearly demonstrates that AOSI/NTS and ITI are anything but typical resellers.

In Case No. TX-85-10, In the Matter of the Regulation of All Providers of Interexchange Telecommunications Services in Missouri, at 10 Mo. Reg. 1048 (1985), the Commission made a statement of policy setting forth certain standards applicable to applicants requesting authority to provide interLATA telecommunications services. In Re: Investigation into WATS resale by hotels/motels, Case No. TO-84-222, et al., 28 Mo. P.S.C. 535 (effective August 26, 1986), the Commission decided to apply the same standards it had applied in Case No. TX-85-10 to applicants which desired to provide intraLATA toll services. In doing so, the Commission made the following finding regarding the statutory requirement that the Commission find that an applicant's services are in the public interest:

> Since the interLATA toll market has several competitors within it and the intraLATA toll market has been opened for competition, the Commission does not find it necessary to determine that there is a public need for each reseller's services. With the opening of these markets to competition, the market itself will eliminate any reseller for which there is no public need. (emphasis added).

Implicit in the Commission's determination is the consideration that consumers will have a choice in selecting the company which they desire to use for their home or office long distance service. The Commission obviously decided that through the offerings of various providers and the effects of true competition, consumers would patronize the toll providers which offered the best combination of service and prices and that, as a result, the providers which were unable to compete would be eliminated from the market.

Although AOS providers would like to be considered as typical toll resellers, and thereby subject only to the above determinations, such should not be the case. AOS constitutes a separate and unique class of telecommunications service whereby the AOS provider contracts with a business subscriber, usually a hotel, motel, university, dormitory, hospital, coin telephone owner, or other business which has telephones available for public use, to be the exclusive operator services provider for the telephones located on the subscriber's premises. (Ex. 12, Drainer Direct, p. 3). Since the end user of the service is not the subscriber, neither the subscriber nor the AOS provider has any incentive to keep the applicable rates low or service adequate. Instead, the subscriber will select the AOS provider to be used based upon the amount of commissions and additional surcharges to be received from the AOS provider.

Both AOSI/NTS and ITI clearly fit the definition of an AOS provider. Both companies' subscribers are not the end users of their services. (Ex. 12, Drainer Direct, p. 3). The end user is generally "transient" and unaware that he is using an AOS provider. Both AOSI/NTS and ITI play upon the transient end user's lack of information regarding the existence of AOS by accepting AT&T calling cards (Bryan, T. 89; Freels, T. 258-259), charging rates in excess of those charged by typical IXCs (Bryan, T. 124-125, 137; Freels, T. 224), collecting surcharges in addition to the already exorbitant rates (Bryan, T. 96, 133; Freels, T. 226-227), and charging these excessive rates and surcharges for incompleted calls. (Ex. 12, Drainer Direct, Schedule 1-11 proprietary; Freels, T. 255-257). The unsuspecting end user is often unaware that he has used an AOS

provider until he gets his bill from his local exchange company, with which AOSI and ITI have billing and collection contracts. (Bryan, T. 89; Ex. 12, Drainer Direct, Schedule 4; late-filed Ex. 21, GTE; and late-filed Ex. 23, SWB; both of which have been deemed to be proprietary by the sponsoring companies). As a consequent the end user may have his local exchange service disconnected if he does not pay his AOS charges.

In short, the ultimate end user of AOS, the "captive" customer, has no choice as to the AOS provider to be used and, therefore, the effects of true competition, as envisioned by the Commission in Case No. TX-85-10 and Case No. TO-84-222, are nonexistent. Since true competition does not exist in the context of AOS providers, this Commission must view AOS as a separate and unique type of service requiring a more extensive public interest review than is presently required by the Commission for typical toll providers.

Such a distinction between AOS providers and typical IXCs was made by the North Carolina Utilities Commission, in The Matter of an Investigation of Alternative Operator Services, Docket No. P-100, Sub 101 (October 21, 1988), in which that commission considered the effect of certificating AOS providers in view of its prior treatment of interexchange carriers (IXCs). The North Carolina Commission's treatment of IXC certification has been very similar to the above described development in Missouri. In finding that the provision of AOS services within the State of North Carolina was not in the public interest, the North Carolina Utilities Commission stated as follows:

> The Utilities Commission began implementation of G.S. 62-110(b) in its February 22, 1985, Order authorizing intrastate interLATA competition in long distance services.

At that time, the Commission had never heard of AOS and could not reasonably contemplate their future existence. Rather, as it was framing the Order, the Commission was thinking of the IXC which is primarily in the business of selling long distance services and whose customers and end-users are one and the same. The Commission anticipated that in a free and open market, the customer/end-user would have the opportunity and time to make studied comparisons of the various options. Hence, the danger of unreasonable charges or practices was substantially mitigated.

Consequently, so as to simplify the regulatory process, the Commission ruled in the February 22, 1985, Order that the applicant would not separately have to prove his service was in the public interest. The Order stated:

> An applicant for interLATA long-distance operating authority will not be required to offer documentation to establish that its proposed service will be required to serve the public interest effectively and adequately as required by G.S. 62-110 for the reason that the Commission has found and concluded in this Order that authorization of interLATA competition is in the public interest and will not jeopardize reasonably affordable local service.

Obviously, AOS providers do not fit into this analysis. Although AOS providers are a type of IXC, they differ radically from the types of IXCs which the Commission has hitherto certified. As noted above, AOS providers compose a distinct class, or category, of the general class of IXCs.

> As a result, . . . the question of whether AOS providers are in the public interest is the ultimate issue. The Commission therefore finds the above citation from the February 22, 1985, Order to be inapplicable to AOS providers.

Public Counsel strongly urges the Commission to conclude, as did the North Carolina Utilities Commission, that the provision of AOS is a separate and distinct type of telecommunications service subject to a strict determination of whether such services are in the public interest. To this end, the present Applicants, whether presently certificated or not, should be subject to a strict public interest determination.

In making such a public interest determination, this Commission should consider the conclusions, set forth in the following discussion, made by numerous other state commissions which have considered the impact of AOS upon the public interest.

The Tennessee Public Service Commission reviewed the AOS industry in Re South Central Bell Telephone Company, 91 PUR4th 172 (March 29, 1988). In its decision the Tennessee Commission stated that "essentially an AOS is a high-priced, long-distance telephone company" and concluded that "the business practice of the AOS companies are unethical at best, illegal at worst."

The Tennessee Commission stated that "although each AOS in this proceeding claimed that its operators, upon request, will transfer calls to another carrier, other evidence indicates that AOS operators discourage such request and sometimes refuse to transfer calls" (Id at 174) and further found that "the most questionable AOS practice is that of accepting AT&T credit cards -- leading the customer to believe he is receiving AT&T service -- while providing the customer with AOS service at AOS rates." (Id. at 174).

In response to the AOS companies' claims of enhanced competition, the Tennessee Commission stated "AOS carriers do not 'compete' for business; they profit from ignorance and trickery." (Id. at 174). "AOS 'customers' are not ratepayers; they are residential institutions and coin-telephone owners who want to share in the revenues generated from operator-assisted calls. They are the only ones who benefit from AOS 'competition'." (Id. at 175). Finally, in considering the practice of accepting AT&T credit cards, the Tennessee Commission stated, "that is not 'competition'; it's fraud". (Id. at 174).

The provision of AOS was also considered by the Kentucky Public Service Commission in The Matter of Application of International Telecharge, Inc., Case No. 10002 (August 24, 1988). Among several considerations, the Kentucky Commission was particularly concerned with the effect of AOS upon intrastate access revenues.

At the hearing before the Kentucky Commission, Mr. Paul Freels, who also testified before this Commission, acknowledged that intrastate calls handled by ITI actually consisted of two interstate calls carried by separate IXCs. This result occurred because an intrastate call originating in Kentucky was first transferred to ITI's point-of-presence in Atlanta, Georgia for operator handling. This first "leg" appeared to be an interstate call between Kentucky and Georgia and, therefore, no intrastate access revenues were paid by ITI or the underlying IXC. In a similar manner, the second or return "leg" of the call from Georgia back to Kentucky consists of a second interstate call which also results in no intrastate access charges being paid. In view of this situation the Kentucky Commission concluded that "ITI's unusual use of the services of other carriers seems to be an inefficient use of the network" which "results in a misallocation of access revenue". (Id. at 6).

After reviewing additional considerations such as consumer confusion as to the identity of the carrier, credit card billing and the "unreasonable" use by ITI of the billing and collection services of local exchange companies to collect customer determined surcharges, the Kentucky Public Service Commission stated as follows:

> ITI's service appears to offer little to the ratepayers of Kentucky. ITI's customers may have their objectivity clouded by the promise of high commissions and the ability to collect unlimited surcharges. Only these financial

considerations could account for the sudden, widespread appearance of ITI service within Kentucky. ITI's growth is certainly not fueled by the demands of end-users, to whom ITI is basically unknown. In our opinion, ITI's business practices, taken as a whole, seem less than reasonable.

Another commission which has considered AOS is the Alabama Public Service Commission in Re International Telecharge, Inc., 92 PUR4th 211 (March 24, 1988). In arriving at its decision the Alabama Commission discussed the fact that ITI had no time-of-day, offpeak or weekend discounts, and that ITI billed higher operator surcharges and additional customer surcharges. The Alabama Commission also reviewed the practice of accepting calling cards of AT&T and Alabama LECs but billing the calls made at higher rates. Of additional concern to the commission was the loss of intrastate access revenues in Alabama since ITI's traffic was diverted from Alabama to Dallas, Texas for operator handling and then returned to Alabama on a system similar to the patterns reviewed by the Kentucky Public Service Commission in its decision discussed previously.

In considering the access revenue issue, the Alabama Commission concluded, at page 214, as follows:

> . . . this Commission is concerned about the loss of contribution to intrastate revenues and the application of interstate access charges. No evidence was put into the record to show that this would not occur, and such an occurrence could affect the rates of all subscribers in Alabama in a negative fashion, a circumstance this Commission is not eager to see come about.
>
> Therefore, it is our finding that the benefits to telephone subscribers in the State of Alabama through the availability of the Applicant's service would be minimal at best, and are nonexistent to the majority of such subscribers.

In view of its findings, the Alabama Commission concluded that:

> The Commission, upon consideration of the record in this proceeding, is of the opinion that the service proposed

> by the Applicant does not appear to benefit the subscribers of Alabama, which is the primary concern of this Commission. . . . Competition should equate to customer choice, however, we fail to see how this service promotes competition to callers in this state. (Id. at 213).

The North Carolina Utilities Commission, in its decision previously cited, also considered the practices of AOS providers such as the failure to identify itself, insufficiency of notice regarding rates and charges, acceptance of the credit cards of a Bell operating company, AT&T or other carrier but billing at a different rate, and the threats of disconnection of local service by LECs due to nonpayment of AOS charges due to the fact that "the popular perception of the LECs' power may induce the payment of bills to an AOS which might otherwise be disputed." (Id. at 5).

With reference to the above practices of the AOS companies, the North Carolina Commission stated that "some of these practices are merely egregious. Others raise questions as to fraud and unfair and deceptive trade practices". (Id. at 7). As a result, the North Carolina Commission concluded that the intrastate certification of AOS providers is not in the public interest.

In deciding the initial public interest determination which this Commission must make, it is extremely clear that abundant problems exist with the provision of AOS as set forth in the previous discussion. For these reasons, Public Counsel respectfully requests that this Commission find that the provision of AOS within the State of Missouri is not in the public interest and that, as a result, that this Commission deny AOSI's Application for a Certificate of Public Convenience and Necessity and deny approval of ITI's proposed AOS tariffs.

B. If the Commission grants AOSI/NTS a certificate and/or authorizes ITI to file AOS tariffs, the Commission should condition the provision of AOS to ensure that the public is afforded minimum protections against price gouging and inadequate service.

Clearly, the evidence in this case indicates that the provision of AOS is contrary to the public interest and therefore should not be authorized. If, however, in spite of the evidence the Commission authorizes the provision of AOS, the public must be protected against inadequate service and price gouging by the AOS providers. Toward this goal, Public Counsel proposes that the following conditions as set forth in Public Counsel witness Drainer's direct testimony be placed on an AOS provider's authority at a minimum to protect the public. (Ex. 12, Drainer Direct, p. 11).

First, as a condition of certification, the AOS provider must submit proof of Articles of Incorporation, demonstrate financial ability to support proposed service offerings, demonstrate technical ability to support proposed service offerings, describe type of service, and file tariffs on rates of services to be provided.

Second, as a condition of certification, the AOS provider must route all emergency zero minus (0-) calls in the quickest possible way to the proper local emergency service provider.

Third, as a condition of certification, the AOS provider must file tariffs on rates of services to be provided which are deemed just and reasonable.

Fourth, as a condition of certification, the AOS provider and/or business subscriber (i.e., COCOT payphones, hotel, motel, hospitals, universities, etc.) must be limited to only billing the end user the duly authorized tariffed rates. In other words, surcharges, unless authorized by the tariffs, should not be billed to the end user.

Fifth, as a condition of certification, the AOS provider must: (A) post and display in prominent fashion the name of the AOS provider and detailed complaint procedures; (B) pre-announce to the end user the name of the provider handling the call; (C) upon request verbally quote rates charged to the end user; and (D) post and display instructions that inform the end user how to reach the local exchange operator and authorized interexchange carriers.

Sixth, as a condition of certification, the AOS provider must provide toll free access to all other authorized interexchange or local exchange carriers in a manner which provides end users with a local billing point.

Seventh, as a condition of certification, the AOS provider must guarantee the Commission that it will not charge end users for incomplete calls. (Exhibit 12, Drainer Direct, p. 11).

These conditions are primarily based on the NARUC recommended guidelines, do not impose any undue burden on the AOS providers, and are more than reasonable in light of the circumstances. With regard to the specific AOS providers' authority at issue in this case, ITI and AOSI/NTS, Public Counsel recognizes that ITI has already been awarded a certificate by the Commission. However, that certificate is defective for at least two reasons. First, Public Counsel was not served with copies of the application as required by Section 386.710(2), RSMo 1986. Second, ITI came in under the Commission's expedited policy/procedures for certification of IXCs, and clearly ITI is not offering or proposing to offer what is thought to be typical IXC services. Instead, ITI is an AOS provider and AOS was not known or contemplated by the Commission or other interested

parties at the time the Commission developed its IXC certification policies. For both of these reasons, either of which is sufficient to negate any arguments put forth by ITI that it has already been authorized to provide AOS in this state and nullify ITI's authority to provide IXC services, the Commission should amend that certificate to reflect these proposed conditions.

C. Conclusion.

For the reasons set forth herein, Public Counsel respectfully requests that this Commission find that the provision of AOS within the State of Missouri by AOSI and ITI is not in the public interest and that, therefore, this Commission deny AOSI's Application for a Certificate of Public Convenience and Necessity and deny approval of ITI's proposed AOS tariffs.

Alternatively, in the event this Commission should conclude that the public interest is served by allowing alternative operator services within Missouri, Public Counsel respectfully requests that the Commission impose upon such authorized providers, at a minimum, the requirements and conditions set forth in Section B of this brief.

Respectfully submitted,

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I hereby certify that a copy of the foregoing has been mailed or hand-delivered to all counsel of record on this 5th day of December, 1988.

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