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April 21, 1989

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

Re: Alternative Operator Assist
Case No. TA-88-218

Dear Mr. Hubbs:

Enclosed please find original plus fourteen (14) copies of Application for Reconsideration, Rehearing and Stay for filing in the above referenced matter on behalf of International Telecharge, Inc.

Thank you for your assistance.

Very truly yours,

HENDREN AND ANDRAE

Richard S. Brownlee, III

RSB/k
ENclosures
cc: All Counsel of Record

HD

BEFORE THE PUBLIC SERVICE COMMISSION
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

APPLICATION FOR RECONSIDERATION, REHEARING AND STAY

International Telecharge, Inc., ("ITI" or "Applicant"), by its attorneys, pursuant to Section 386.500 RSMo. 1986, and 4 C.S.R. 240-2.160 of the Missouri Public Service Commission ("Commission") Rules of Practice and Procedure, hereby requests reconsideration and applies for a rehearing and stay of the Commission's Report and Order entered herein April 17, 1989, ("Order"), and in support of this Application states as follows:

121.

I. GENERAL CONSIDERATIONS

A. The Commission's Order Rejecting ITI's Tariff is Discriminatory, Unjust and Unreasonable Because the Concerns Raised by the Commission About ITI's Service to Traffic Aggregators Apply to the Service Proposed by All Competing Companies, Not Just ITI.

The Commission's Order rejecting ITI's tariff governing the provision of operator service to traffic aggregators while at the same time allowing Teleconnect, Dial U.S. and Dial U.S.A. to refile complying tariffs proposing service to traffic aggregators is discriminatory, unjust and unreasonable. The Commission's action reflects two fundamental misunderstandings. First, this Commission erroneously concluded that ITI does not recognize that its rates are subject to the approval of this commission for reasonableness. ITI explicitly acknowledges that this Commission has authority to require that ITI's intrastate rates be resonable. Second, this Commission erred in its understanding of the manner in which ITI and the other carriers provide service. This misunderstanding has resulted in an Order which is not supported by the law and the facts.

Specifically, the Commission, at pages 7-10 of the Report and Order expresses four basis concerns about service provided to end users from hotels, motels, and pay telephones (aggregators). These concerns can be summarized as follows:

1) Since the traffic aggregator chooses the operator service provider, "the end user has little direct influence in choosing the provider" (p. 7);

2) The traffic aggregator may block access to the particular service provider that the end user wishes to access (p. 8);

3) Even if the operator service provider identifies itself to the end user by means of announcements during the call or by signage, the end user may remain unaware of the significance of the notification (p. 8); and,

4) Notifying the end user of the identify of the carrier and providing rate quotes is of questionable value to the end user when the traffic aggregator has blocked access to the end users' carrier of choice (pp. 9-10).

In its Order, the Commission determines that Teleconnect, Dial U.S. and Dial U.S.A. may provide service to traffic aggregators because end users accessing these carriers from traffic aggregator locations "can choose another provider if dissatisfied with rates and service . . . " The Commission goes on to state ". . . the competitive market will influence such providers to offer qualify services at a reasonable price or suffer the consequences of losing customers." This reasoning is entirely illogical and unsupported by any interpretation of the evidence in the record.

Each of the concerns expressed by the Commission about service to traffic aggregators by ITI is equally applicable to these carriers even if they provide operator service "ancillary" to other long distance service. The erroneous and illogical reasoning of the Commission is demonstrated by the fact that each traffic aggregator is capable of subscribing its telephones at a particular location to only one operator service provider, be it Teleconnect, Dial U.S. or Dial U.S.A. or some other provider. However, many different guests, patrons, patients, etc., will be using the aggregators' telephones to access operator services. There is no guarantee that the operator service provider to which

the traffic aggregator has subscribed is the same as each of the end users' service provider of choice. In other words, just because a Missouri customer subscribes to Dial U.S. service at home does not guarantee that the hotel where he stays while away from home will also be subscribing to Dial U.S., even if Dial U.S. provides operator services on an "ancillary" basis. Given this basic fact, how is the end user at the hotel able to make his dissatisfaction with the provider's rates and services known?

Similarly, the erroneous reasoning is further shown by the fact that there is no guarantee that the mere provision of operator service by a provider as an "ancillary" service will ensure that the premise owner will not block access to the end users' carrier of choice, or that the provider will identify itself or provide rate information.

The Commission itself realizes this weakness in its decision even after authorizing "ancillary" operator services by requiring in Part IV of its Report and Order additional preconditions for operator service for Teleconnect, Dial U.S. and Dial U.S.A. before they may provide service to traffic aggregators. For example, at page 12 of the Order, the Commission requires that the provider identify itself to the end user and billed party. Also at page 12, the Commission requires the provider to quote rates on request at no charge. At page 16, the Commission determines that Teleconnect, Dial U.S. and Dial U.S.A. must provide access to other "authorized interexchange carriers and the LEC" where feasible.

Why would the Commission need to impose these restrictions on Teleconnect, Dial U.S. and Dial U.S.A. for service to end users at traffic aggregator points, if competition among "ancillary" operator service providers would control these qualitative and quantitative features of service? Obviously, the Commission believes that the provisions are necessary in order to ensure adequate and reasonable service to end users at these locations. However, the provisions are just as appropriate to regulate service by ITI to these same locations and in fact are similar to the regulatory provisions proposed by ITI in this case. Additionally, the restrictions are virtually identical to those imposed on ITI by the FCC in a recent case involving operator service providers. (See discussion of FCC TRAC Order below.)

These concerns apply to all providers including Teleconnect, Dial U.S. and Dial U.S.A. as well at ITI. The Commission has been able to address the concerns and implement standards of operation which will allow fair and reasonable access to operator services to end users at traffic aggregator locations. These standards also remove any need for trying to distinguish between the services of ITI and those of Teleconnect, Dial U.S. and Dial U.S.A. The Commission should grant rehearing and, upon rehearing, authorize ITI to provide operator service to traffic aggregators on the same terms and conditions as Teleconnect, Dial U.S., and Dial U.S.A.

B. The Commission's Order is Unreasonable and Arbitrary in That the Commission Adopted Standards Governing Service and Approved Companies That Could Not Comply With Those Standards, While Rejecting the Tariff of ITI, Who Can Comply.

The Commission's Order imposes conditions on the provision of operator service by the companies authorized to provide such service. The record demonstrates, however, that the companies authorized to provide operator service cannot all comply with the conditions imposed by the Commission. The record also demonstrates that ITI, whose tariffs were rejected by the Commission, can comply with those conditions of service. The Commission's Order is therefore arbitrary, discriminatory, and unreasonable.

The Commission's Order indicates that one carrier authorized by the Commission to provide operator services cannot comply with two of the service standards imposed in the Order and that the evidence was not clear whether all three carriers could comply with another standard. The Order requires operator service providers to quote rates upon the caller's request, to connect emergency calls to the appropriate local emergency provider in the quickest manner possible, and to provide splashback to other interexchange carriers and the LEC where it is feasible to list the actual point of origin of the caller. According to the Order, however, at the time of the hearing Teleconnect did not have the capability of providing either rate quotes or splashback in the manner required by the Commission. (Order at 12, 15) In its Order, the Commission further finds with respect to emergency calls that it is not clear from the evidence whether Teleconnect,

Dial U.S. or Dial U.S.A. can connect end users to their operators as rapidly as can the traditional providers of operator services. (Order at 17)

The record indicates that ITI, on the other hand, meets these conditions imposed by the Commission. ITI already has the capability of providing rate quotes upon request and can splashback calls such that the actual point of origin is listed. (Tr. 15 238, 263-64) ITI's witness, Mr. Paul Freels, testified that the company has found in tests that its operators can be accessed in as little as 4 to 6 seconds, and Mr. Freels further indicated that ITI would comply with any guidelines regarding speed of access to operators imposed by the Commission. (Tr. 15 180) The Commission ignored this evidence regarding ITI's capabilities and rejected ITI's tariff, while at the same time authorizing other carriers, who do not have the same capabilities, to provide operator service. Consequently, the Commission's Order is arbitrary, discriminatory, and unreasonable.

ITI is uniquely qualified to provide high quality operator services to callers in Missouri and can do so pursuant to the conditions imposed by the Commission in its Order. The Commission's Order reflects a fundamental misconception regarding ITI. ITI is the largest competitive provider of operator services in the country, earning revenues in 1988 of approximately $170 million. ITI processed its first operator assisted call in Dallas, Texas in September, 1985. Since that time, ITI has expanded its operations so that it now provides interstate

service in all 50 states and international service from 37 foreign countries. The company provides intrastate service in 39 of the 43 states which permit interLATA competition. Currently, ITI has over 2,000 employees and processes 400,000 calls on peak days, totalling over 10 million calls per month. ITI uses a nationwide switching network with regional centers in Dallas, Los Angeles, Chicago, Atlanta, Miami, and New York. As described in the testimony of Mr. Freels and Mr. Dennis Thomas, ITI provides a wide variety of services with its state-of-the-art software, ranging from standard operated assisted services such as person-to-person and credit card calling to many new and enhanced services such as message forwarding and teleconferencing. ITI believes that these services would bring substantial benefits to the State of Missouri. ITI is willing and able to provide its service under the terms and conditions established in the Commission's Order. The Commission should grant rehearing and, upon rehearing, allow ITI to provide operator services in Missouri pursuant to such terms and conditions.

C. The Commission Should Grant Rehearing to Take New Evidence Regarding Changed Circumstances in the Operator Assist Market.

The Commission's Order fails to take into consideration recent developments in the operator services market which have occurred since the hearing in this case but which bear directly on whether the provision of operator services by companies such as ITI is in the public interest. In its Order, the Commission

indicates that it will allow only companies who provide operator services ancillary to interexchange toll services to provide operator service in Missouri. (Order at 19) On page 7 of its Order, the Commission explains that it will permit only those companies to provide operator services because they provide service to persons who, if unhappy with the price and quality of the service, may choose another carrier. The Commission thus appears to only focus on the 1+ market. The Commission does not appear to understand that the provision of operator services to transient callers at payphones, hotels, motels, etc., is a very substantial and competitive market in which many carriers including ITI, Teleconnect, Dial U.S. and Dial U.S.A. are participating.

ITI competes nationwide against such companies as Teleconnect, Dial U.S., Dial U.S.A., MCI, and US Sprint to provide operator services to callers from such locations as private payphones, hotels, and motels. In addition, as a result of an Order entered by Judge Harold Green in U.S. v. WEstern Electric Co., Inc. (Civil Action No. 82-0192) on October 14, 1988, the operator services market has become even more competitive and substantial. Judge Greene held that the Bell Operator Companies' practice of routing all long distance traffic from their own pay telephones to AT&T violated the requirements of the MFJ. Judge Green required that the BOCs allow the premises select an

interexchange carrier[1] to handle 0+ calls originating from these payphones, thus opening these phones up to competition among operator service providers. The Order reveals the massiveness of this market -- approximately 1.7 million phones that yield $2.5 billion in annual revenue. The presubscription and balloting process that was implemented by the BOCs to effectuate Judge Greene's Order is similar to the process used several years ago for residential and business presubscription to companies that provide 1+ service. Judge Greene's October 14, 1988, Order is attached hereto as Exhibit A.

ITI participated in the public payphone presubscription process nationwide. Its name appeared on the ballot sent by Southwestern Bell to premises owners for public payphones in Missouri, along with the names of carriers such as Teleconnect, Dial U.S., Dial U.S.A., MCI, US Sprint, and AT&T. A copy of an example ballot for an end office in Missouri is attached hereto as Exhibit B. Under Judge Green's orders, service by presubscribed carriers to public payphones was implemented April 1, 1989.

The FCC has been involved in monitoring the public payphone presubscription process and issued an order concerning the presubscription packages and tariffs prepared by the various Bell Operating Companies. (DA 89-24, Order adopted Feb. 27, 1989, Released Feb. 28, 1989). The FCC also recently issued an order

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[1] The Order specifically recognizes that companies such as ITI are interexchange carriers for purposes of the Order and competition at public payphone locations.

requiring specific changes in the operator services industry. (In the Matter of Telecommunications Research and Action Center and Consumer Action v. Central Corporation, et al., ("TRAC") DA 89-237, Order adopted Feb. 24, 1989, Released Feb. 27, 1989). In its TRAC Order, the FCC required companies who offer operator services to provide notice to consumers of what company will carry and bill each call by posting this information in writing on the telephone and announcing it to the caller. In addition, the FCC ordered that rate information be made available and disclosed upon request to the consumer, and that complaint procedures be established for the consumers' convenience. Finally, the FCC outlawed call blocking. A copy of the FCC's Orders regarding the BOC payphone presubscription tariffs and TRAC complaint are attached hereto as Exhibits C and D, respectively. The FCC has explicitly indicated that these requirements are applicable to all operator services providers, including AT&T, US Sprint, MCI and ITI.

The Commission's Order does not reflect these events and therefore does not take into account the disruptive effect of its order on the massive competitive operator services market which has developed. The Commission should grant rehearing to correct this deficiency in the record.

II. FINDINGS

A. Findings of Fact

Notwithstanding the Commission's fundamental error in its ORder as identified above, ITI further submits that the following Findings of Fact are unlawful as they are:

(1) unsupported by substantial and competent evidence on the whole record in this proceeding in violation of Article V, Section 18 of the Missouri Constitution;

(2) unsupported by findings of fact based upon evidence in the record as required by Missouri law;

(3) inconsistent with the provisions of H.B. 360, now codified in Chapter 386 and 392, RSMo. 1987 Supp;

(4) contrary to applicable Missouri law; and

(5) unlawful, unreasonable, unjust, arbitrary, capricious, and discriminatory.

Findings of Fact Which Are Unlawful

1. That there is any distinct or definable category of interexchange carriers which are "AOS" companies for purposes of the Order.

2. That in the provision of operator services directly to end users ancillary to interexchange toll services, the end user selects the carrier he or she desires.

3. That evidence indicates there is a fundamental difference between the provisions of operator services to traffic aggregators (AOS) and the provision of operator service to end users ancillary to toll services (OS);

4. That operator services provided to traffic aggregators

are a distinct and separate service from operator services provided to end users.

5. That AOS providers respond to the competitive choice of the aggregators who might be primarily influenced by the size of the commission the provider will pay rather than the quality of the service and the reasonableness of the price.

6. That the interests of the aggregator and the end user might be in opposition to one another.

7. That to enable it to pay the most attractive commission, the AOS provider might be induced to charge the end user higher rates and to reduce the quality of service.

8. That the evidence indicates that the consumer might be unaware that he is using an AOS provider.

9. That even if the AOS provider announces its name at the beginning of the call and posts its name on the premises of the traffic aggregator, the consumer might remain unaware of the significance of this notification.

10. That the consumer's first meaningful notification that he has used an AOS provider might be receipt of a bill for operator services at prices higher than those to which he is accustomed.

11. That ITI asserts that its proposed tariffs are informational.

12. That ITI has not expressly recognized that its rates should be subject to the approval of this commission as to their reasonableness.

13. That even if the end user does understand the significance of the notification he has received, he still might be unable to reach his carrier of choice.

14. That by ordering AOS providers to announce their names at the inception of a call and post their names on the premises of the traffic aggregator, the Commission cannot ensure that the end user is made aware of the significance of the information.

15. If the end user is not educated as to the intricacies of using an AOS provider, he does not truly have a meaningful choice by virtue of the notification he has received.

16. That the end user of an AOS provider is bereft of a meaningful choice of carriers.

17. That the effect of the potential for harm from problems outweighs the benefits which have been set forth by the AOS advocates.

18. That is it not in the public interest to approve the tariffs filed by ITI.

19. That the Commission will reject the tariffs proposed by ITI.

20. That the Commission determines that operator services offered ancillary to long-distance service provided directly to end users is in the public interest.

21. That operator services offered to end users through traffic aggregators are in the public interest where the provider primarily renders such services directly to end users and proposes to offer operator services under the same terms,

conditions and rates to end users at traffic aggregators as to end users directly served.

22. That the public interest is served because the competitive toll market will influence the quality and price of the operator services thereby controlling potential abuses in the AOS market.

23. The conditions set forth in Section IV of the Report and Order are discriminatory and unlawful if they are not applied to ITI.

24. That only tariffed rates approved by this commission for certificated providers should be bundled into a single charge on local exchange billings with disconnection for nonpayment, and that location surcharges should not appear on the LEC's bills.

25. That the Commission views location surcharges as another example of the abuses to which the public has been subjected by the operator service industry and does not wish to lend to such surcharges any implied blessing by allowing this collection through LEC billing.

26. That the tariffs to be filed shall reflect the same tariffed rates for operator service to traffic aggregators as for operator service to end users, at the level proposed for the latter service.

B. Conclusions of Law

The following conclusions of law are unlawful:

1. That the tariffs of ITI should be rejected as not being in the public interest.

C. Additional Grounds

Additional grounds for reconsideration and rehearing:

1. The rationale in the Commission's Report and Order for denying ITI's tariffs is not based on any ITI specific evidence, complaints or concerns, but rather on general determinations of what "might" occur regarding the industry as a whole. As such, the Commission's decision is unlawful and not based on substantial and competent evidence on the whole record as to ITI.

2. The Commission's finding that no amount of regulation can control operator services that are not ancillary to long distance service, is unfounded and not based on substantial and competent evidence on the whole record. This is especially true for ITI in that ITI has already agreed to substantially all of the restrictions and regulations outlined in the Report and Order and has stated that it would abide by any technically possible restrictions, regulations or safeguards that the Commission would wish to impose. The Commission, therefore, has determined that its regulatory and oversight power is a failure before it was exercised; a proposition for which there is no support in the record.

3. ITI has already been certificated as a telecommunications company in the State of Missouri. This certificate is identical to other companies who are currently providing operator services in the State of Missouri. Furthermore, the provision of operator services clearly falls into the telecommunications definition found in Chapter 386. While the Commission may have the authority to reject a specific tariff (assuming the evidence supports such a rejection), it is unlawful, unconstitutional and beyond the scope of the authority of the Commission to rule that not only will this tariff be rejected, but that all ITI operator services tariffs, regardless of what they contain, will be rejected.

4. The rejection of ITI's tariff is unlawfully discriminatory, as ITI proposes to allow service on the same basis as AT&T, U.S. Sprint and Teleconnect, which have certificates from the Commission identical to ITI.

5. The Commission prohibited ITI from providing intrastate operator services in Missouri. Intrastate and interstate traffic on public pay telephones cannot be handled by separate carriers. IN prohibiting ITI from carrying intrastate traffic in Missouri, the Commission has effectively prohibited ITI from carrying interstate traffic on public payphones as well. The Commission's order violates ITI's right to carry interstate traffic from public payphones and thus violates the Commerce and Supremacy Clauses of the United States Constitution.

D. Payphone Issues

The Commission failed to consider the impact on the private payphone industry when issuing this Report and Order. The implication of this Report and Order upon private payphones in the State of Missouri is as follows:

1. The Commission is denying private payphone owners the opportunity to earn revenues from payphones in the same manner that Southwestern Bell and other LECs in the State of Missouri have the ability to do.

2. In the Commission's Report and Order, they made the determination of what were fair and reasonable rates. The rates that Southwestern Bell charges from their payphones provides them a return on their investment in excess of 12-15% By not allowing the private payphone industry to get the same return on their investment, they discriminate against the COCOT industry in the State of Missouri. The Commission in this Report and Order made an arbitrary decision on what was and was not in the best interest of the ratepayers in the State of Missouri in applying these decisions allowing and disallowing certificates or tariffs for operator services. By disallowing operator services the ability to service traffic aggregators they are denying those traffic aggregators the same services and revenues that Southwestern Bell and other LECs now enjoy, all of which is discriminatory and unlawful.

3. The Commission specifically denied implementation and collection of surcharges for traffic aggregators. Unlike motels,

motels and hospitals, the COCOT industry has no other means of collecting surcharges but through the inclusion of its surcharge in the billing and collection by the LEC.

4. By denying operator service tariffs to ITI, the Commission has eliminated any possible hope for same and equal competition in the payphone industry in the State of Missouri.

E. Application for Stay

The Commission's April 17, 1989, Order jeopardizes all of ITI's contracts with Missouri premise owners and in particular its public pay telephone presubscription commitments. As a result of the rejection of ITI's tariffs, ITI will be unable to provide intrastate service to any of the locations described in the preceding paragraphs. Each of the hotels, motels, private pay telephone owners and public pay telephone premise owners who subscribe to ITI service will no longer be able to access ITI intrastate services as a direct result of the Commission's illegal and unauthorized action since ITI will be prohibited from providing service under its contractual obligations to each of these locations. IN addition, ITI will lose all interstate calls from Southwestern Bell-owned payphones in Missouri as described above. ITI also believes it will lose many private payphone customers as a consequence of the Commission's Order and consequently will lose the interstate calls from these phones as well. Based on its present number of customers in Missouri, ITI projects it will lose revenue of over $30,000 per month from

hotels and motels, over $200,000 per month from private payphones and approximately $1 million per month from public payphones for an annual loss of over $13 million. Since ITI will also lose its right to an allocation of additional public payphone locations and any increase in hotel and private payphone sites, the actual impact of the Commission's Order will be much greater than $13 million per year.

Even if ITI fully complies with all of the applicable administrative procedures for review of the Commission's decision and ultimately prevails by overturning the Commission's decision, there is no adequate remedy at law which will compensate ITI for the loss of these customers. In particular, each of the hotels, motels and public and private pay telephone owners that subscribes to ITI must immediately upon the effective date of this Order be denied ITI intrastate services and, in the case of public payphones, interstate service, and each will have to seek alternative means to provide operator service to end users ar their premises. Furthermore, ITI will lose its portion of the allocated Southwestern Bell public pay telephone traffic under the presubscription plan. Even if ITI is subsequently vindicated on rehearing, the victory will be of little practical significance since ITI will have already lost all its Missouri customers.

Pursuant to Section 386.500, RSMo. 1987 Supp., applicant hereby requests that the Commission stay its Report and Order so that the parties may have relief from complying with or obeying

said Report and Order. Applicant states that a stay will prevent irreparable harm in terms of its present operations in Missouri.

HENDREN AND ANDRAE

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Certificate of Service

I hereby certify that a true copy of the foregoing was mailed on April 24, 1989, by prepaid United States mail to all counsel of record.

Richard S. Brownlee, III

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants.

Civil Action No. 82-0192

OPINION

The issues before the Court concern Regional Company practices with respect to so-called "calling cards," that is, telephone credit cards, and with respect to telephones owned by the Regional Companies that are located in public places (e.g., airports, service stations, street corners). Unlike many of the recent controversies in this case, the current issues do not involve the line of business restrictions on the Regional Companies; what is claimed here by the Department of Justice, with support from a number of the interexchange carriers, is that the Regional Companies have been favoring AT&T in violation of the nondiscrimination and equal access provisions of the decree.

The Department of Justice has filed a motion[1] pursuant to the decree,[2] seeking an order to enjoin (1) the continuing assignment to AT&T of all long distance calls[3] made on Regional Company credit cards; (2) preferential treatment accorded by these companies to AT&T's calling cards; and (3) the routing exclusively to AT&T of long distance calls from public telephones owned by the Regional Companies. The Court grants the motion in substantial part, but it denies some aspects of the requested relief.

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[1] Motion of the United States for an Enforcement Order Relating to BOC Calling Card Practices accompanied by the Report to the Court and Memorandum in Support of the motion, filed January 29, 1988. This motion and report followed various motions by MCI, one of which sought the entry of an order directing the Department of Justice, inter alia, to take immediate enforcement action with regard to the Regional Company provision of interexchange calling card services.

[2] United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (hereafter AT&T). Jurisdiction to enforce the decree is vested in the Court by sections VII and VIII(I) of the decree. Id. at 231-232.

[3] Although there is a significant substantive difference between "long distance" on the one hand, and "interexchange" and "inter-LATA" on the other, that difference is largely not material for purposes of the questions discussed in this Opinion. Accordingly, for the sake of better understanding by the reader, the Court will generally refer to all three concepts as long distance, and to "intra-LATA" or "exchange" calls or services as local calls or services.

I

Regional Company Calling Cards

This is the first time the Court has considered in detail telephone calling cards in light of the decree. Calling cards have assumed considerable importance in consumer telecommunications, as roughly fifty percent of operator-assisted[4] telephone traffic is now conducted by means of such cards. It is appropriate to outline briefly the evolution of the processing of these charge cards for making telephone calls.

A. Background

Prior to divestiture, the Bell Operating Companies performed billing functions for all Bell System calls. In order to permit customers to credit calls to their accounts when away from their home telephones, these companies issued so-called "calling cards" which enabled the holder to charge both local and long distance calls to the account number appearing on the card. The customer could accomplish this task by punching the calling card number on a touchtone

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4 "0+" calls are operator-assisted calls made by dialing zero plus the desired telephone number. All calling card calls are made using this prefix. "0-" calls are operator-assisted calls for which the caller dials zero and waits for the operator to pick up the line and talk to the caller in order to complete the call.

telephone, by reading the number to an operator, or by inserting the card into the telephone.

Although with the breakup of the Bell System, AT&T and the Regional Companies issued separate calling cards, they continued to share information concerning the identity of the customers who held cards and the validity of these cards. This sharing was specifically authorized by the Plan of Reorganization.[5] Under the Plan, the Regional Companies received the Data Base Administration Systems (hereinafter referred to as the DBA systems) which are used, inter alia, to assign and maintain calling card numbers, while the so-called Billing Validation Application database, necessary, inter alia, to validate calling cards,[6] was assigned to AT&T.[7] By virtue of the Plan, the Regional Companies are required to provide data base maintenance service under

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[5] AT&T Plan of Reorganization at 33 (Dec. 16, 1982).

[6] There were valid reasons for these separate assignments. The multifunction DBA systems were assigned to the Regional Companies because these systems were used principally to support local, or intra-LATA operator services (in addition to the maintenance and updating of calling card numbers). Id. at 33. Conversely, the Plan of Reorganization assigned the billing validation database to AT&T because that database performed predominately long distance functions. Id. at 25-26.

[7] The plan for the division of assets was approved by this Court and ultimately affirmed by the Supreme Court. United States v. Western Electric Co., 569 F. Supp. 1057 (D.D.C. 1983), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983).

contract to AT&T.[8] The decree itself (in section I(A)(2)) gives the Regional Companies the right to continue to use AT&T's billing validation database for the limited purpose of validating local calling card calls.[9]

The existence and use of common databases not surprisingly led AT&T and the Regional Companies to adopt the same calling card number for any particular customer. Moreover, the contractual relations between the Regional Companies and AT&T resulted in the refusal of the former to share the information contained in these databases with any interexchange carriers other than AT&T; AT&T is therefore the only interexchange carrier to receive from the Regional Companies the information necessary to validate its calling cards.

The effect of these practices is that all long distance calls made with Regional Company calling cards are assigned to AT&T, and, as might be expected, the other interexchange carriers complain vociferously about this arrangement.

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[8] AT&T Plan at 33. The update information thus supplied includes changes in existing numbers and new card numbers issued to new customers.

As dictated by the Plan, the terms for the sharing of these facilities were embodied in the Shared Network Facilities Agreements between AT&T and the Regional Companies which expire in 1991.

[9] AT&T, 552 F. Supp. at 227.

After thorough examination, the Court has concluded, as did the Department of Justice, that these practices discriminate in favor of AT&T in violation of the decree.

B. The Decree Permits Regional Companies To Issue Calling Cards

MCI, US Sprint, and ALC Communication Corporation, all of them interexchange carriers, argue that the decree entirely forbids the Regional Companies to issue calling cards which may be used by the holder to charge long distance calls,[10] the argument being that the very issuance of such cards constitutes an interexchange telecommunications service prohibited to the Regional Companies by the decree.[11] However, the Court concludes that the issuance by the Regional Companies of calling cards is not part of the interexchange business, and that the availability for use of Regional Company calling cards for long distance calling is not otherwise inconsistent with the decree.

The issuance of calling cards does not constitute an interexchange telecommunication service; rather, it is an

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[10] See, e.g., MCI Response to the Department's Report at 6-10 (February 23, 1988). The companies do not dispute that the Regional Companies may issue calling cards for local telephone traffic.

[11] Section II(D)(1) states that "[a]fter completion of the reorganization . . . no [Regional Company] shall . . . provide interexchange telecommunications services . . . ." AT&T, 552 F. Supp. at 227.

"exchange access" service, a term which is defined in the decree as including the "provision of information necessary to bill customers."[12] This billing function permitted by the decree is not restricted to local calls; the Regional Companies are actually required by section II of the decree[13] to furnish exchange access services "for the interexchange services of any interexchange carrier."[14]

This understanding of the decree is further supported by the assignment of the DBA systems to the Regional Companies by the Plan of Reorganization. In fact, the Plan explicitly notes that these systems may be used to "update and maintain Calling Card and other billing information files . . . ."[15] More, the DBA systems lawfully update and maintain calling

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[12] Section IV(F) of the decree. AT&T, 552 F. Supp. at 228.

[13] Section II of the decree. AT&T, 552 F. Supp. at 227.

[14] Appendix B, paragraph (C)(2). AT&T, 552 F. Supp. at 234. ALC implicitly acknowledges that calling cards facilitate billing, contending that Regional Company "calling cards should not be permitted to be used for billing inter-LATA calls (emphasis added)." Comments of ALC Communications Corporation at 2; letter from Mitchell F. Brecher to Nancy C. Garrison (July 20, 1987).

[15] AT&T Plan at 33.

card information for both local and long distance calls.[16] Since the DBA systems properly handle long distance calls under the authority of the Regional Companies, it is appropriate to conclude that these companies were intended to be able to bill long distance calls made from their calling cards.

The issuance by the Regional Companies of calling cards for long distance calls not only does not offend the terms of the decree; it is also consistent with its purposes. The purpose underlying the prohibition against the provision of interexchange services by the Regional Companies is the prevention of competition by these companies with the interexchange carriers for long distance business. United States v. Western Electric Co., 627 F. Supp. 1090, 1100 (D.D.C. 1986). There is no threat of such competition in this instance.

Regional Company calling cards good for long distance calling create no incentives to favor their own long distance operations: the Regional Companies are prohibited from engaging in the long distance business. Moreover, the calling cards will not create incentives for the Regional

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[16] Id. In this light, the Plan provides that the Regional Companies furnish database maintenance services to AT&T under contracts for the sharing of multifunction facilities; however, AT&T does not have access to Regional Company proprietary information on DBA systems.

Companies to favor one interexchange carrier over another; once the appropriate changes are made (see Part III, infra) the calling card holder (Part VII-A) or other third parties (Part VII-D) -- not the Regional Company -- will select the interexchange carrier as well as any additional interexchange services.[17] Indeed, Regional Company calling cards for long distance calls may be said actually to promote long distance competition, for they will permit a customer to select an up and coming interexchange carrier which is as yet unable to supply its customers with a calling card of its own.[18]

It is also worthy of mention that calling cards are today a ubiquitous billing mechanism. They provide a convenient payment method for calls made away from the customer's usual telephone, an increasingly common

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[17] The issuance of calling cards is unlike Regional Company involvement with shared tenant services, which the Court concluded were "interexchange telecommunications services." United States v. Western Electric Co., supra, 627 F. Supp. at 1098-1104, rev'd in part on other grounds, 797 F.2d 1082 (D.C. Cir. 1986). With shared tenant services, the Regional Companies would have both selected the interexchange carrier for their customers and procured additional interexchange services for them. In addition, the companies would have bought interexchange services, marketed, and resold them to their customers in direct competition with other resellers and with facilities-based interexchange carriers.

[18] See Operator Assistance Network Opposition to MCI's Motion for an Order Compelling Enforcement of the Judgment (January 6, 1988) at 3 n.1 and 12.

occurrence. But they are a convenience to the customer only as long as they do not become too complicated for regular use. A prohibition on the use of the Regional Company calling cards for long distance calling would frustrate consumers who would be required to change cards every time they changed over from a local to a long distance call. In view of these customer complications, that kind of a prohibition is unwarranted in the absence of incentives for discrimination, and such incentives, as noted above, are absent.

Thus, on any basis -- the language of the decree, its purposes, and the maintenance of an important aspect of universal service -- the conclusion is inescapable that Regional Companies may issue calling cards usable not only for local but also for long distance calling -- provided, of course, that they do not discriminate among the various interexchange carriers with respect to these cards. The Court now turns to that subject.

II

Claimed Calling Card Decree Violations

Under the specific terms of the decree, the Regional Companies must offer exchange access as well as billing

services on an equal and nondiscriminatory basis.[19] This mandate applies to the provision of billing services through Regional Company calling cards as to any other billing service.[20] For the reasons stated below, the Court concludes that the Regional Companies have used their calling cards in ways that treat interexchange carriers unequally and discriminate in favor of AT&T.

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[19] Section II(A) of the decree requires that, subject to Appendix B, each Regional Company

> shall provide to all interexchange carriers and information service providers exchange, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality and price to that provided to AT&T and its affiliates.

Similarly, section II(B) of the decree states in part that:

> No [Regional Company] shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the . . . interconnection and use of the [Regional Company's] telecommunications service and facilities or in the charges for each element of service . . . .

[20] This is recognized in the Regional Company compliance plans submitted in 1984. See, e.g., Letter from Kenneth E. Milard, Senior Vice President and General Counsel of Ameritech, to James P. Denvir at 6 (Dec. 23, 1983) ("Calling card services will be provided by the Ameritech operating companies on a nondiscriminatory basis"); see also BellSouth compliance report dated June 28, 1984, at 3. The Regional Companies do not contend otherwise now.

In its enforcement motion, the Department of Justice asserts that the Regional Companies' calling cards are used to AT&T's advantage in three ways. According to the motion (1) most, if not all, the Regional Companies provide to AT&T commercially important calling card validation data[21] that they do not make available to other interexchange carriers; (2) some of these companies market or advertise their calling card in a manner that promotes AT&T's interexchange services over those of other interexchange carriers; and (3) several of the Regional Companies include an international number on their calling card that credits calls only to AT&T in circumstances where other interexchange carriers cannot obtain comparable international numbers. The Regional Companies have not, by and large, seriously contradicted this factual information. What remains to be decided is the consistency of these practices with the decree.

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[21] Validation data includes personal identification numbers (PINs) which are used to validate calling cards. The data also includes, among other things, working billable lines, and Toll Billing Exceptions (i.e., line numbers which cannot accept collect or third party calls).

III

Validation

With limited exceptions, the Regional Companies currently provide billing validation data[22] to AT&T, but not to other interexchange carriers.[23] At the time of divestiture, no other interexchange carrier offered operator services, and as a consequence only AT&T requested this validation information. That is no longer the case. US Sprint's predecessor GTE Sprint began to phase in operator services in early 1986,[24] and MCI expects to begin to do so shortly. Even some resellers and alternative service providers furnish the operator service necessary for the acceptance of calling card calls. None of these companies will or can[25] accept calls charged to Regional Company calling cards as long as the Regional Companies refuse to

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[22] Interexchange carriers need validation data from the Regional Companies to permit them to confirm that the calling card offered for a given call is legitimate as having actually been issued by a Regional Company.

[23] As used in this Opinion, the term "interexchange carriers" also includes alternative service providers.

[24] Reply Comments of US Sprint at 5 (March 7, 1988).

[25] If a Regional Company calling card is used fraudulently to make a long distance call, it is the interexchange carrier who will not receive payment for the call.

provide the information necessary to determine whether the caller is using a legitimate calling card.[26]

Obviously, AT&T derives a considerable competitive advantage from its sole access to the validation databases it shares with the Regional Companies. That advantage extends beyond the capture of direct calling card business. The inability of other interexchange carriers to accept calls made by way of Regional Company calling cards causes customer annoyance and discourages further attempts in other contexts to use any carrier other than AT&T. Beyond that, the lack of calling card validation capacity also hampers the attempts of competing interexchange carriers to persuade large businesses, hotels, and other major customers to presubscribe to their service.

All of the Regional Companies profess in their filings a willingness in theory to end their discriminatory validation practices,[27] but apparently only U S West and Pacific Telesis

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[26] BellSouth goes so far as to refuse to authorize interexchange carriers other than AT&T to accept its calling cards because of the risk of fraud. However, the company is unwilling to furnish to those same carriers the information necessary to protect against fraud. BellSouth Response at 6 (February 23, 1988).

[27] See Ameritech Response at 21; Bell Atlantic Response at 3-4; BellSouth Response at 4-5; NYNEX Response at 2-3; PacTel Response at 2-4; Southwestern Bell Response at 2-3; and Comments of U S West, Inc., regarding the United States' January 29, 1988 Motion for an Enforcement Order Relating to BOC Calling Card Practices at 5-6 (responses and comments

have offered validation data or validation service to companies other than AT&T since the time the Department filed its motion.[28]

Not only is the failure to provide validation information to AT&T's competitors discriminatory; unlike some other services that are part of the calling card service (see infra), validation is not technically difficult.[29] In fact, no Regional Company contends that the provision of validation data to the interexchange carriers is not feasible, and none has contradicted the Department's assertion that no serious technical difficulty exists. Nevertheless, it is apparent

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filed February 23, 1988).

[28] Service Link, a subsidiary of U S West, provides validation services to US Sprint. This arrangement is permitted by the decree. Since validation is an integral part of the billing process authorized by Appendix B, paragraph C(2), it is "information necessary to bill customers," which the Regional Companies may provide as part of exchange access "in connection with the origination or termination of interexchange telecommunications." Section IV(F), AT&T, 552 F. Supp. at 228.

[29] The Department of Justice observes that many of the issues require an understanding of technological and logistical issues, and the Department commendably secured from the Regional Companies technical and other information pursuant to section VI of the decree. Department of Justice Report at 6-7 and note 6.

that the companies will not actually make the data available[30] unless there is a court order.[31]

Accordingly, the Court is ordering[32] the Regional Companies to cease discriminating in favor of AT&T in the

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[30] The Department characterizes the negotiations with the Regional Companies as making only "slow progress." Department of Justice Report at 20-21.

[31] Several of the Regional Companies claim to be "exploring" various alternatives (letter from BellSouth to the Department, dated November 10, 1987); or to be "plan[ning] to develop" a validation service (letter from Pacific Telesis to the Department, dated December 28, 1987); or that they are "willing to negotiate" (letter from Southwestern Bell to the Department, dated January 14, 1988).

[32] Southwestern Bell contends that no order is necessary because it is "acting or will act in all relevant areas." Response at 1-2. Other Regional Companies have filed similar comments. See, e.g., Ameritech Response at 20-21. But the companies' actual commitments are far less certain than these comments indicate. Southwestern Bell itself, for example, refers to the need to coordinate "complex tasks," an undertaking that "will be dependent not only on SWBT's efforts, but those of a third party." Response at 3.

provision of validation data on or before January 1, 1989.[33] Each Regional Company must certify to the Court on or before that date that it is currently making available and will continue to make available to all interexchange carriers requesting it the same validation data[34] for its calling

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[33] The 75-day lag time should be sufficient to permit the Regional Companies to assemble the data for dissemination and to reach the necessary agreements. It may be observed in this connection that the Regional Companies have been on notice of the need to correct discriminatory calling card arrangements since 1984, when MCI pointed to the unreasonableness of the companies' arrangements. MCI Comments on the BOC Compliance Plan at 35 (August 21, 1984). US Sprint directly requested validation information toward the end of 1986. Comments of US Sprint at 4-5 (February 23, 1988). US Sprint strongly intimates that some of the Regional Companies have been using technical and pricing issues to delay coming to agreements on validation. The Court does not expect to tolerate such tactics with respect to the deadline it is establishing here and in the accompanying order.

[34] There is considerable discussion in the papers as to whether the Regional Companies should provide validation data or validation services. Two Regional Companies -- NYNEX and U S West -- have agreed to provide the data; others have only promised services or suggested that they would provide data only through an independent third party. US Sprint objects to the provision of validation services on two grounds: (1) such a system would require the interexchange carrier first to screen each Regional Company card to determine the particular Regional Company to which the validation query should be sent -- a complex and costly procedure, and (2) since validation services differ from the validation data that are provided to AT&T, it would be extremely difficult to ensure equality with AT&T on price, terms, and conditions. Reply Comments of US Sprint at 6-8 (March 7, 1988). The Court agrees with this assessment, and accordingly it requires the furnishing of the data themselves, and, since the data are provided to AT&T without a middleman, they must be provided to the other interexchange carriers on the same basis.

cards that the company provides to AT&T, at the same prices, and on the same terms and conditions as are extended to AT&T.[35] Certification must include a description of the validation data, including updates that are available, and state the prices, terms, and conditions on which the Regional Companies validation data are available to AT&T and to the other interexchange carriers.[36]

IV

Marketing and Advertising

Beginning in 1987 with the issuance of the Regional Companies' magnetic-encoded plastic calling cards, some of

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[35] Since the Regional Companies furnish to AT&T what are called "raw data," they must also provide such data to the other interexchange carriers. Some of the companies, i.e., NYNEX and U S West, have indicated their intention to do so; others, e.g. Southwestern Bell, have not. Equal treatment would not be provided unless the raw data are furnished.

However, the Court perceives no basis upon which it should require the Regional Companies to produce the shared Network Facilities Agreement and other documents governing their production of validation data to AT&T, as some interexchange carriers request. E.g., MCI's Reply at 10 (March 4, 1988). If there are questions about compliance with the Court's order herein, the Department can secure the necessary data pursuant to section VI of the decree.

[36] The Court rejects the US Sprint request that it provide "firm guidance" or "establish procedures" on the question of price. Reply Comments at 19, 23 (March 7, 1988). Obviously, however, the Regional Companies may not provide the data to AT&T at cost and make a profit on the same data as they are being furnished to the other interexchange carriers.

the Regional Companies began to advertise the cards for both long distance and local calls. For example, Bell Atlantic campaigned that its card "lets you charge local and long distance calls directly to your phone bill." These advertisements did not reveal that the Regional Companies automatically routed interexchange service to AT&T, nor did they inform the public, contrary to the implication in their announcements, that the Regional Companies themselves do not provide long distance service (which they are of course prohibited from doing).

On March 27, 1987 MCI requested a Department of Justice enforcement investigation which led to a June 5, 1987 letter from the Department to the Regional Companies advising them of the impropriety of such advertising.[37] The Department's advice was, of course, entirely correct. Any Regional Company advertising at this juncture will have the direct foreseeable effect of promoting AT&T services over those of

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[37] Letter from Charles F. Rule to Laurence W. DeMuth, Jr., General Counsel to U S West (June 5, 1987). In that letter, the Department concluded that the current Regional Company calling card system "clearly" discriminated in favor of AT&T and that their advertising of their cards regarding long distance calling was misleading. The Department emphasized that "the [Regional Companies] were never authorized [by the Department or the Court] to promote the use of their cards for interexchange calling, particularly under circumstances where inter-LATA calls billed to those cards can be carried only by AT&T, or to suggest that the BOCs themselves are providing integrated inter-LATA service. Similarly, the Department never sanctioned such conduct."

the other interexchange carriers.[38] This violates the nondiscrimination provisions of the decree.

Shortly after they received the Department's letter, most Regional Companies ceased such advertising,[39] and all of them have now recognized that these advertisements promoting the use of their calling cards for long distance use are improper. However, what they contend is that, in view of the changed situation, a court order is unnecessary.[40] That is the principal question still before the Court on advertising at this time.

Although under the law injunctive orders will issue where the possibility remains that the prohibited conduct will recur,[41] the Court is reluctant to issue such orders here where that may be redundant or unnecessary. See also, note 38, supra. Accordingly, and since all the Regional

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[38] After January 1, 1989, once the required validation procedure and the presubscription plans for public telephones are in effect, this may no longer be true. However, such advertising may still mislead customers into believing that their long distance calls made with Regional Company calling cards will be carried by the Regional Companies themselves.

[39] Southwestern Bell initially refused to terminate its long distance calling card advertising. Letter from Linda S. Legg to Charles F. Rule (June 25, 1987) at 2.

[40] The Department of Justice, MCI, and others, affirmatively request a court order.

[41] See, e.g., United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968); United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

Companies have discontinued their objectionable advertising, the Court will at this time refrain from dealing with the marketing and advertising subject by such an order. Of course if the Regional Companies, or any one of them, should in any way evade the prohibition on false[42] or misleading[43] advertising, prompt judicial action will follow.

Notwithstanding the Court's decision not to issue an order at this time on the general subject of advertising, it is necessary in view of past practices identifying the Regional Company calling cards with AT&T, that misleading impressions be cleared up and that customers be informed that they have a free choice. In spite of the fact that Regional Company calling card instructions have specifically stated that long distance calls should be dialed on an 0+ basis, neither the cards nor the related information advised customers that when they dialed on such a basis, i.e., without an access code, their long distance calls were and still are carried by AT&T rather than by their own

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[42] Any advertising or marketing portraying the Regional Companies as providers of interexchange services would be inconsistent with the express prohibitions of section II(D)(1).

[43] Ameritech has advised the Department of Justice that it is not engaged in advertising that is not "lawful and proper." Letter of General Counsel of Ameritech to Charles F. Rule (July 2, 1987). It is unclear what that phrase is designed to convey.

presubscribed interexchange carrier.[44] To remedy the effects of the prior discriminatory practices, the Regional Companies must, by January 1, 1989, notify their calling card customers that (1) any interexchange services charged to the card will be provided by an interexchange carrier, not by the Regional Company; (2) the interexchange carrier will not always be the carrier the customer selected in the presubscription process;[45] and (3) the customer should contact interexchange carriers for information about alternative methods of charging interexchange calls.

V

International Numbers

International numbers which appear on calling cards permit the holder to charge calls made from many foreign

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[44] Once this Court's order as to validation takes effect, and once public as well as private phones are serviced by interexchange carriers other than AT&T, long distance calls charged to Regional Company calling cards will not all be carried by AT&T. Nevertheless, such calls may still not be carried by the customer's presubscribed carrier, but by the carrier servicing the phone.

[45] In some cases, if the caller wanted to be certain that the carrier would be the one he had selected at home, he would have to dial an access code rather than 0+.

countries to the United States.[46] Five Regional Companies[47] use the same international calling numbers on their cards as AT&T uses on its cards.[48] Thus, all inbound international calls made using these Regional Company calling cards are automatically credited to AT&T. This practice, too, violates the decree's nondiscrimination provisions.

To make an inbound international call with one of these calling cards, the card holder provides to a foreign telephone agency, usually the governmental PTT (Post, Telephone, and Telegraph department), the account number appearing on the card. If the number fits the International Telegraph and Telephone Consultative Committee (CCITT)

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[46] A regular calling card number can be used to make a call from the United States to a foreign country.

[47] Ameritech, Bell Atlantic, BellSouth, Pacific Telesis and U S West. The other two Regional Companies do not offer international calling numbers on their cards.

[48] In contrast to domestic calling card numbers, international numbers are not used by the Regional Companies to charge for local telephone services. Furthermore, the international numbers do not appear to have a role in the Regional Companies' authorized billing functions. The companies apparently do not validate the international numbers, and the foreign telecommunications providers forward the billing data directly to AT&T.

It seems therefore that the international numbers are placed on Regional Company calling cards as a convenience to the customers, but they are also a promotional device to encourage the use of Regional Company calling cards.

standard and the AT&T numbers,[49] the PTT allows the call to go through. Although Bellcore has assigned to interexchange carriers other than AT&T some blocks of numbers, foreign PTTs recognize only AT&T, and they automatically credit AT&T for all international calls made using a calling card that has an account number based on a home telephone number or a regional accounting office code --AT&T's calling card format. They do not permit any other carrier to transmit such a call. Thus, the user of a Regional Company calling card with an international number has no choice as to which United States carrier transmits the call; it is always AT&T.

While the Regional Companies are not responsible for PTT policies which favor AT&T, they cannot, consistently with the decree, be allowed to perpetuate those policies as the use of

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[49] CCITT has established a standard format for international telephone numbers: 1 M XXX YYY YYYY Z. The "1" is the regional designation for North America; "M" indicates the validity period of the card; and "XXX" is the international calling code (INC), which identifies the international carrier that will receive the revenue from the call.

AT&T's calling card numbers use either NPA (area code) NXX XXXX, i.e., the customer's home telephone number, or RAO (regional accounting office code) YYY YYYY, for calling cards that are not based on home phone telephone numbers, e.g., some business accounts.

what is in effect an AT&T international calling card number has some tendency to do.[50]

Nevertheless, for a variety of reasons, the Court does not consider it necessary, as several interexchange carriers as well as the Department of Justice suggest, to order the Regional Companies to cease the issuance of calling cards that bear an international number[51] and to withdraw or replace all such cards.

The international numbers on the calling cards provide an important benefit to American travellers: a simple and familiar way to pay for calls from abroad, particularly since the alternatives frequently involve a high hotel service charge, the necessity for paying for the call in foreign currency, or placing it at a foreign post office. Notwithstanding these considerations, the Court would order a halt to the current practice, without more, either (1) if the Regional Companies were responsible for the discrimination

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[50] Regional Company use of an international number which has the effect of crediting calls only to AT&T tends to promote the use of AT&T international carriage and service; to reduce PTT incentives to alter their policies so as to permit international service competition with AT&T; and to lead customers to believe that that number is the only way to make a call to the United States.

[51] The suggestion is that the use of such numbers should await the time when it will be possible for interexchange carriers other than AT&T to obtain international numbers that can be used in a manner comparable to AT&T's international number. No one can know how long that will be.

against the non-AT&T carriers, or (2) if such action by the Court would rectify the problem. Neither of these assumptions is correct, however.

If the foreign PTTs are unwilling to recognize any American interexchange carrier other than AT&T, that is of course deplorable from the point of view of American antitrust and pro-competition policies. However, it is not a matter that is within the power of the Regional Companies, or indeed of this Court, to change. What the Court could do, as indicated above, would be to stop all use by the Regional Companies of international numbers on their calling cards. That would not have the effect of altering foreign PTT policies; those foreign telecommunications agencies that recognize only AT&T could confidently be expected to continue to do so.

Indeed, such a court order would likely be counterproductive. To the extent that foreign telecommunications providers and their officials become more acquainted with interexchange carriers other than AT&T (see infra), they might become more sympathetic to the need to permit calls to be made through the medium of such carriers. Except for that possibility, the only real effect of such an order by the Court would be to make it more difficult for American travellers abroad to charge their calls.

Here, as in other matters, it is not necessary to cut off service completely or to do nothing. At least one Regional Company (BellSouth) has suggested that it is prepared to place on its cards the international number of any interexchange carrier to which the customer may have presubscribed. In the Court's view, such a solution, if required across the board, will adequately remedy the discrimination for which the Regional Companies are actually responsible.

Accordingly, the Court is ordering that the Regional Companies shall by January 1, 1989,[52] recall all their calling cards that carry the same international number as is used by AT&T. However, these companies may continue these cards in circulation, as limited to AT&T customers, if by that same date they issue calling cards which list, instead of the number that identifies AT&T, the international number

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[52] Here again in the light of history, a 75-day deadline is plainly not unreasonable. NYNEX recognized the impropriety of including the AT&T number on its cards as early as 1984, Response at 26 n.40, and all the Regional Companies were on notice of the unlawful nature of the practice since the Department of Justice's letter of June 5, 1987, sixteen months ago.

of any interexchange carrier other than AT&T to which the customer may have presubscribed.[53]

VI

Regional Companies' Acceptance Only of AT&T Calling Cards

The Regional Companies will currently accept AT&T calling cards for local calls; they will not do this, however, for any other interexchange carrier. For example, a caller attempting to use a US Sprint FONCARD to charge a local call will receive a Regional Company operator response that the calling card is not valid. The effect of this practice is to permit AT&T, and only AT&T, to offer a universal calling card, that is, a card that may be used for both local and long distance calls -- a significant competitive advantage.

The reason given by the Regional Companies for accepting AT&T's cards for local calls is that they are able to use the

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[53] MCI and others (but not US Sprint) contend that the Court should impose sanctions for the failure of the Regional Companies to cease distributing cards with international numbers after the Department of Justice, on June 5, 1987, advised them to do so. The Department itself urges the Court not to impose sanctions, on the theory that its own decree interpretations were tentative. In fact, the Regional Companies' view of the decree on this issue were hardly so deliberately violative of the Court's authority as to warrant criminal contempt or other sanctions. Accordingly, the Court will not initiate sanction proceedings with regard to this subject.

DBA systems to validate calls charged to AT&T, but that they lack the necessary information to validate the calling cards of other interexchange carriers. However, the Regional Companies have long known that they were required to file, and they presumably did file, written commitments that they would provide "equal access to the interexchange carriers with respect to all LATAs within [their] control, on a non-discriminatory basis, for intra-LATA as well as for inter-LATA traffic."[54] Obviously, with respect to the use that may be made of interexchange carriers' calling cards, exchange access is not being provided on an non-discriminatory basis.

The current discrimination would be removed if the Regional Companies stopped validating AT&T's calling cards until they had the ability to validate the calling cards of all interexchange carriers who wanted their calling card to have access to the local market. This remedy, however, runs the risk that the Regional Companies will never achieve that ability having no incentive to do so, and that they will instead entrench their own cards as the only universal calling cards. The only productive remedy therefore is to

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[54] United States v. Western Electric Co., 569 F. Supp. 990, 1006 (D.D.C. 1983). Accordingly, the claim made by some that the equal access provisions of the decree do not apply to local calling, Bell Atlantic Response at 16 n.41, is not only erroneous but inconsistent with and violative of the companies' prior undertaking.

achieve validation of the cards of all interexchange carriers, not merely AT&T's.

The Department of Justice states that, notwithstanding the current violation, it cannot ask the Court for remedial action because it does not know how, technologically, the Regional Companies can validate the calling cards of interexchange carriers other than AT&T.[55] Likewise, neither the Regional Companies nor the interexchange carriers have informed the Court how the existing technological problems may be solved.

It appears that the principal difficulty is the receipt by the Regional Companies of the necessary data from the interexchange carriers and the need to program Regional Company equipment to permit it to recognize the issuing carriers' cards for validation purposes. This clearly should not be an insuperable problem if the parties will work together toward that end.[56] The several Regional Companies have suggested in various ways that within the next few

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[55] Report to the Court at 32-33 (January 29, 1988).

[56] The Department of Justice suggests that the difficulty may be that interexchange carriers might be reluctant to provide that customer information to the Regional Companies. Report at 32. If that be so, it would constitute a valid reason for Regional Company failure to proceed with the required remedy.

months they will be able to submit to the Court their proposed remedies.[57]

On this basis, the Court is ordering the Regional Companies to submit to the Court by January 1, 1989 proposed remedies that would afford to the calling cards of the interexchange carriers the same acceptance as is now given to AT&T cards.[58]

VII

Regional Company-Owned Public Telephones

The Regional Companies own large numbers of public telephones that are located on premises owned or controlled by others, including pay telephones in such places accessible to the public as airports, hotel lobbies, service stations, and bars. These public telephones generate enormous revenue: there are said to be 1.7 million Regional Company public telephones, yielding $2.5 billion in annual revenue.[59]

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[57] Ameritech Response at 27-28; Bell Atlantic Response at 16; BellSouth Response at 14-15; NYNEX Response at 7; Southwestern Bell Response at 15; U S West Response at 8-9.

[58] Others may file comments suggesting remedies of their own, and they may of course also respond to the submissions of the Regional Companies.

[59] Reply Comments of US Sprint at 51 (March 7, 1988).

With respect to the matter of payment for the calls, two types of long distance calls are made from such public telephones: (1) calls which are paid for by coins deposited in the telephone mechanism, also known as 1+ or coin sent-paid[60] calls, and (2) all other calls, also known as 0+ or operator-assisted[61] calls. It is appropriate to consider first the 0+ calls since they constitute by far the majority of the public telephone traffic.

A. Operator Calls

The Regional Companies route all 0+ calls[62] from their public telephones to AT&T, yielding that company over one billion dollars annually,[63] even though other interexchange

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[60] On these calls, the caller dials a number direct, 1+, and pays for it in advance by depositing coins in the public telephones. Such calls account for less than ten percent of long distance calls originating from public stations. The remaining ninety percent are 0+ calls.

[61] These calls are collect, third-number billed calls, and calls made by the use of calling cards. The term "operator-assisted" calls is no longer entirely accurate because so-called "smart" calling cards can now often be used to complete calls without the intervention of an operator.

[62] Outbound international calls made from public telephones, also known as 01+ calls, are likewise routed exclusively to AT&T. The considerations discussed below that are relevant to the 0+ traffic also apply to these international calls.

[63] Forty-six percent of the calls made from Regional Company public telephones are 0+ long distance calls, yielding $1.1 billion in revenues, almost all of it to AT&T. Reply Comments of US Sprint at 51 (March 7, 1988).

carriers now have the operator systems capacity to handle these calls. There is no serious dispute that this practice is discriminatory and violative of sections II(A) and II(B) of the decree, and the Court so concludes. The question is what system is to take its place.[64]

The Regional Companies, the Department of Justice, and others all agree that a system which permits the billed party to select the interexchange carrier of his choice simply by

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[64] After the Department filed its motion and report on calling cards in the equal access context of the decree, U S West took steps to implement its own plans for the treatment of calls made from public telephones. MCI filed a motion to preserve the status quo which the Court granted, as it would have been entirely inappropriate to permit U S West by its unilateral action to implement its own plans on a subject which was then pending before the Court. Indeed, that Regional Company was not ignorant of the fact that the matter was sub judice, having filed pleadings with the Court on the matter of the Department's motion. Comments of U S West (February 23, 1988). The Court has decided that, on this occasion, it will not go proceed against U S West beyond issuance of the injunction previously handed down.

However, the Court observes that it will not tolerate a repetition of the types of maneuvers AT&T at times engaged in during the days of its monopoly, when, as between the FCC and the local regulators, it not infrequently claimed that the other had jurisdiction. So here, U S West's reliance on the FCC in implementing its plan was misplaced, not only because equal access is a specific subject of the decree, but also because the FCC had not issued a final order and had been relatively inactive on the issue in question during the last three years. See note 83, infra.

dialing O+ most perfectly comports with the language and purposes of the decree.[65]

That is clearly correct. Section (A)(2)(ii) of Appendix B of the decree unambiguously requires the Regional Companies to

> offer . . . access that permits each subscriber automatically to route, without the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation (emphasis added).

Under such a system, all interexchange carriers offering service from a given telephone could be reached by the carriers' customers by dialing O+; none would require the dialing of an access code. Moreover, access to all interexchange carriers would be equal, and it would be in the form most convenient to all callers because (1) a caller would not have to remember a long, complex access code, and

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[65] For example, BellSouth believes this approach "best performs the function of providing equal access from public telephones." BellSouth Comments at 4 (August 26, 1988). Even those who advocate other plans as consistent with the decree prefer the customer choice approach. Ameritech says it "provides the most efficient, sensible and convenient handling" of dial O calls. Ameritech Memorandum at 12 (August 26, 1988). NYNEX likewise supports the use of a system to route all O+ calls to the interexchange carrier selected by the party paying for the call. NYNEX Comments at 5 (August 26, 1988). Southwestern Bell refers to it as "the ultimate solution." Southwestern Bell Memorandum at 4 (August 26, 1988). US Sprint contends that the Regional Companies should be required to provide billed party preference on a national basis.

(2) he would be charged for his calls by the same company to which he had presubscribed at his home.

Moreover, the choice of an interexchange carrier would lie, and appropriately so, with the one who paid for the call. On a calling card call, the call would be transmitted by the carrier preferred by the end user to whom the card was issued; on a collect call, the subscriber of the called number would determine the preferred carrier; and on calls billed to a third number, the subscriber at that number would designate the preferred carrier. In short, the interexchange carrier for each call would be the preferred carrier of the billed party, providing only that it served the originating and terminating locations of the call. Such a system would eliminate any threat of discrimination by the Regional Companies.

That kind of a system does exist in concept. The Line Identification Data Base (LIDB), which the Regional Companies are in the process of developing, will permit the routing of 0+ calls to the interexchange carrier selected by the customer, and it will also permit the necessary validation for billing purposes. Each Regional Company's LIDB will contain all valid telephone numbers and calling card numbers in its region, and each number will be associated with the appropriate indicators relevant to

billing validation. These indicators will include means for identifying those customers who have specified in advance that they will or will not accept third-party billing or collect calls and to identify public coin telephones. The LIDB will also indicate the preferred carrier of the party to be billed.

So far so good. There is, however, one problem: the LIDB system is not technically perfected at this time. Depending upon the source of the information, a functioning LIDB system would appear to be between two and three years away.[66]

Thus, the question is whether alternative means exist to provide equal access from public telephones between now and then, for the Court cannot and will not permit the Regional Companies to delay implementation of this important aspect of the decree for several years more. Numerous options have been proposed in the responses to the Court's August 5, 1988 request for briefs. The principal proposals

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[66] Ameritech states that an automated system which would permit the customer to choose the interexchange carrier would take about eighteen to twenty-four months to implement. Ameritech Comments at 11 (August 26, 1988). Southwestern Bell states that once all regulatory requirements are met, deployment will probably take at least a year. Southwestern Bell Memorandum at 4 (August 26, 1988). BellSouth, the most pessimistic company, states that this solution to the equal access problem for 0+ calls could be employed by the mid-1990s. BellSouth Response at 6 and 8 (August 26, 1988).

made in these briefs are as follows: (1) a requirement of the use of a five-digit access code to reach an interexchange carrier -- the Court will refer to this method as blocking since long distance calls made by a customer who dialed only 0+ would be blocked; (2) allocation of dial 0+ long distance public telephone traffic among the various interexchange carriers; (3) replacement of most of the existing Regional Company public telephones with new instruments equipped with carrier selection buttons; and (4) presubscription by the owner of the premises on which the Regional Company telephones are located.

A. Blocking

MCI and ALC propose that equal access be provided by eliminating 0+ interexchange dialing from Regional Company-owned public telephones. All such calls would be blocked, and use of any Regional Company public telephone for a long distance call would require the caller to use a 10XXX0+ access code[67] to reach an interexchange carrier. This proposal does not comport with the language or the spirit of the decree.

Access to interexchange carriers would surely be equal under this plan since all long distance callers from Regional Company public telephones would be burdened with a complex

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[67] Each interexchange carrier has his own code.

access code. To put it another way, long distance dialing would be equally inconvenient for all. However, the decree requires not only equality. By its language, it requires that the Regional Companies offer access "that permits each subscriber automatically to route, without the use of access codes, all the subscriber's interexchange communications . . . (emphasis added)."[68] Blocking therefore would be inconsistent with the very terms of the decree.

Beyond that, with blocking, all callers would be required to acquaint themselves with access codes in order to effect long distance calling from a Regional Company public telephone. Every single long distance collect call, third-party billed call, and calling card call would require additional dialing, be it five or more digits, instead of a single digit -- 0. This would be a gross inconvenience to the public; unending public confusion and dissatisfaction would be inevitable if the great bulk of the long distance calls from public telephones could not be completed because the caller could not remember his access code -- as many could not. It is precisely because five-digit access codes are inconvenient and difficult to remember that the equal

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[68] Section (A)(2)(ii) of Appendix B, AT&T, 552 F. Supp. at 233.

access provisions of the decree mandate the universal use of the single digit.

The confusion would be compounded by the fact that pay telephone companies other than the Regional Companies would be able to offer 0+ dialing. Consequently, a caller would first have to determine who owns the telephone before he could know whether 0+ dialing was possible. Similarly, local, or rather intra-LATA, 0+ calls, from Regional Company telephones would continue to be completed since they would be technically feasible and there could not be a prohibition on such use. Not even studious callers would be likely to have researched whether a particular call would have to cross LATA boundaries.

Customer inconvenience led the Court to reject the blocking of long distance calls from telephones where the customer had not presubscribed to an interexchange carrier for his own home or place of business. United States v. Western Electric Co., 578 F. Supp. 668, 673-75 (D.D.C. 1983). As the Court then said, "if a choice must be made between accommodating the interests of the public and those of various competitors in the interexchange market, the interests of the public must take precedence." Id. at 674.

The public has long been accustomed to the advantages of 0+ dialing without the use of access codes, and the decree

expressly requires that this beneficial public convenience continue. Consequently, the Court will not require the Regional Companies to block the 0+ calls.

B. Allocation

Some of the parties have suggested that all Regional Company public telephone traffic be allocated among the interexchange carriers, providing each carrier with a share of Regional Company public telephone 0+ access. The plans vary as to how the allocation is to be determined, which poses the initial difficulty of determining what is a fair formula.[69] But allocation reduces to more fundamental problems.

As the Court said when allocation was proposed in the context of the routing of undesignated traffic from homes and business, enterprises, a court-imposed allocation scheme would be "as foreign to its Tunney Act responsibilities as it would be fraught with . . . practical obstacles." United States v. Western Electric Co., supra, 578 F. Supp. at 673. Moreover, allocation would not promote competition; rather, it would protect current competitors. Almost by definition,

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[69] Would all interexchange carriers receive the same share? Would the share be adjusted in accordance with the size of their existing clientele? Would the shares be allocated on a nationwide, a regional, or some other basis? These problems are reduced to manageable proportions in the context of limited allocation of defaulting subscribers following a balloting procedure. See Part VII-D, infra.

allocation would require that presubscription be shared by the existing interexchange carriers, to the exclusion of new ones, in contravention of the purposes of the antitrust laws.

As the Court has also previously noted, citing such decisions as Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977), the "antitrust . . . laws are intended to protect the competitive process, not to assure positive results for competitors." United States v. Western Electric Co., supra, 578 F. Supp. at 672. And, of course, there is no reason to believe that the interexchange carrier to which a particular customer was assigned was one with which he wanted any relationship, except by relatively remote coincidence.[70]

For these reasons, the Court also rejects the imposition of allocation.

C. Telephones With Carrier Selection Buttons

ALC proposes that equal access can be met by Regional Company replacement of their current public telephone stock with new public telephones equipped with carrier selection buttons.[71] These new telephones would permit the caller to reach his preferred interexchange carrier by pushing a

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[70] In that respect, an allocation scheme would not be much of an improvement over the current system which assigns everyone to AT&T.

[71] ALC Memorandum at 6 (August 26, 1988).

single button on the telephone instrument reserved for that carrier.

Obviously, as long as the telephones provided as many interexchange carrier buttons as there were interexchange carriers desiring to service that telephone, access would be equal. But if enough buttons (or room for enough buttons) were not available, serious problems would exist. For example, a telephone with twelve interexchange carrier buttons would not provide equal access in the Colorado market which is apparently serviced by over seventy interexchange carriers.[72] Moreover, in that market, even if each of the seventy carriers could be given a button of its own, the public would be stymied by the array of buttons. Thus, public inconvenience might suggest that equal access be provided another way.

More fundamentally, however, the instruments with buttons currently exist in only a few locations.[73] Not only would mass replacement of virtually all Regional Company

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[72] Memorandum of U S West at 14 n.35 (September 9, 1988). Indeed, in airports, train stations, and the like, where travellers congregate from all over the United States, buttons might have to be installed for all American interexchange carriers.

[73] Several of the Regional Companies are installing this type of telephone in a few areas which have high long distance usage, such as airports and hotels. ALC Memorandum at 4 (August 26, 1988).

telephones be costly, ALC itself concedes that the process might take as long as five years.[74] This is a far longer period than has been estimated for the institution of the far better billed party preference plan discussed in Part VII-A, supra.

In sum, while a carrier-select telephone plan may work on an ad hoc basis, it does not appear to be a solution which can readily be applied throughout any Regional Company's territory, let alone on a nationwide basis.

D. Premises-Owner Presubscription

U S West, NYNEX, Bell Atlantic, and Ameritech have proposed plans which would permit the owners of the premises on which the public telephones are located to choose which Regional Company to presubscribe with respect to these telephones.[75] While these plans differ in important respects, their common feature is to permit any premises owner to preselect the interexchange carrier which could be reached from the public telephones on his property without the use of an access code. If the caller dialed 0+, he would be connected with the interexchange carrier that was so

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[74] ALC Memorandum at 6 (August 26, 1988).

[75] Southwestern Bell has also indicated that it intends to propose amendments to its equal access compliance plan to implement a premises owner presubscription plan. That company, as well as NYNEX, would default to AT&T all long distance calls from its unsubscribed public telephones.

presubscribed, and he could be billed either through the interexchange carrier's calling card (if he had one), or, once validation had become effective (see Part III, supra), through the Regional Company's calling card. Any other interexchange carrier could be reached through the use of an access code.

MCI and several others challenge this system even on an interim basis, raising a number of objections, which the Court has carefully considered, as follows.

First, MCI protests that under this proposal the choice of carrier would not be made by the "subscriber" or the "customer" placing the call, as required by section (A)(2)(ii) of Appendix B of the decree. The Court rejects that interpretation of the decree. To the extent that anyone can be said to be a "subscriber" in the public telephone context, it is the owner of the premises.

This is clearly so with respect to telephones in semi-public services (e.g., in bars, service stations). To be sure, one could conceivably conclude that it is the individual making the call, rather than the premises owner, who is the "customer," if not the "subscriber" in the context of truly public telephones (e.g., in airports, at street corners) although that is by no means certain even as a purely technical matter. However, since it is not

technologically feasible at this time to provide the caller with the opportunity to exercise a choice of interexchange carriers by dialing 0+, it makes sense during the interim period to consider the premises owner as that individual's surrogate.[76]

Second, MCI makes the closely related contention that the premises owner is a "wholly illogical actor" with no relationship to the public telephone.[77] While it is true that the premises owner is virtually never the one who places or pays for calls from a public telephone on his property, he, more than anyone else, has an ongoing relationship with that instrument. Akin to the subscriber of a residential or business telephone, the premises owner decides whether to have public telephones at all (and how many), what type the telephones should be,[78] what kinds of services they should offer, where they should be installed, and in some instances when they may be used, and when they should be removed. In

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[76] In significant ways, the choice exercised by the premises owner is like that of the owner of a hotel or of a public telephone not affiliated with a Regional Company. These owners exercise the choice of an interexchange carrier for those using their facilities.

[77] MCI's Motion to Preserve the Status Quo at 12-13 (July 29, 1988).

[78] The premises owner will of course be free to buy or use a pay telephone from a private pay telephone business instead of allowing a Regional Company to install one of its instruments on his property.

short, the owner has ultimate control over the public telephones on his premises and a closer relationship with these telephones than anyone else.

Third, American Public Communications Counsel (APCC) contends that the premises owner would in reality be an "agent" or a person in active concert or participation with the Regional Companies.[79] But the Regional Companies would have no control over the selection of an interexchange carrier by the premises owner, and the premises owner would in fact be free to offer pay telephones which were not owned by a Regional Company.

Fourth, MCI claims that AT&T will continue to have an advantage with respect to public telephones because it uses the same telephone number as the Regional Companies and only its calls and callers are verified by these companies. That objection is well taken at this time. However, as explained in Part III, supra, exclusive validation of AT&T calling cards will cease within about two months, and the objection will then be mooted.

Finally, MCI contends that AT&T will continue to have an advantage over its competitors in that, with its traffic base from which to derive revenue for commissions and its greater knowledge of traffic patterns, it will most likely outbid the

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[79] APCC Comments at 13 (August 26, 1988).

other interexchange carriers for presubscription to public telephones.[80] That, however, is not an objection that has validity under the terms and purposes of the decree. The decree is designed to remove artifical obstacles to fair competition; neither it nor the antitrust laws on which it rests can or were meant to erase all inequalities among the various carriers. Each carrier is of course free to spend its revenues as it sees fit, including for franchises on public telephones.

In short, the objections of the opponents are not sufficiently weighty to support a rejection by the Court of the option of selection of a presubscribed interexchange carrier by the owner of the premises, particularly when that option is considered in relation to the only other currently existing alternative -- the blocking of all 0+ calls made from Regional Company-owned public telephones. At a minimum, it is clear that premises owner presubscription would be a significant advance over the present system.

Accordingly, the Court will approve on an interim basis (see infra) presubscription by the owner of the premises on which particular public telephones are located; it will be up to that owner to decide on the interexchange carrier that

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[80] MCI Reply at 5-6.

will be reached when O+ is dialed on his telephone.[81] This solution also has the virtue, inter alia of being consistent with a 1985 Federal Communications Commission ruling on this subject.[82] See Allocation Order, 101 F.C.C. 2d 911, 921 n.37, 932 (1985) (petition for reconsideration pending).[83]

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[81] Of course, if the Regional Companies "rewarded" premises owners who selected AT&T or penalized those who did not, as MCI, among others, fears, MCI Reply at 19-20, they would be in violation of the decree and subject to sanctions.

[82] The Court has also striven in the past to avoid conflicts with FCC rulings in "overlap" areas where that has been possible. See, e.g., United States v. Western Electric Co., Inc., C.A. No. 82-0192, slip op. at 49-50 (D.D.C. March 7, 1988).

[83] However, the Commission's apparent view that the subject of equal access is best addressed on a local basis, Allocation Order, supra, 101 F.C.C. 2d at 921 n.37, may not be consistent with a decree which has nationwide application and requirements. The Court also rejects the position, espoused by U S West, Memorandum of August 10, 1988, at 4-5, that on this issue "the doctrine of primary jurisdiction would dictate that the Court defer to the FCC." See United States v. Western Electric Co., Inc., No. 87-5063, slip op. at 24 (D.C. Cir. May 10, 1988); United States v. AT&T, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978). The decision cited by U S West in support of its proposition, Far East Conference v. United States, 342 U.S. 570, 574-75 (1972), has no relevance whatever to the issue for which it is cited, for it does not deal with the construction and enforcement by a court of its own judgment. Moreover, the FCC does not appear to have progressed beyond issuance of its 1985 preliminary order with respect to public telephones, "nor has the FCC conducted further proceedings to consider and adopt industry-wide guidelines for implementing public telephone equal access." AT&T Memorandum to the Court dated August 26, 1988, at 4-5.

To make presubscription by the premises owner meet the purposes of the decree, it will be incumbent upon the Regional Companies to inform these owners not later than January 1, 1989, that they may presubscribe to an interexchange carrier of their choice for their public telephones, and to institute by that date a system of balloting and allocation similar to that instituted by the Federal Communications Commission for presubscription in homes and business offices. See Allocation Order, supra, Appendix B at 927 (1985).

Thus, the Regional Companies will have to mail ballots for the selection of interexchange carriers to the premises owners by January 1, 1989 in the same manner as they provide ballots for presubscription of residence and business telephones. If a premises owner fails to return his ballot, the 0+ long distance traffic from the public telephones on his premises will be allocated by the several Regional Companies among the interexchange carriers proportionately to the carriers' selection rate from the ballot process.[84] The Regional Companies will also have to affix on the face of each of their public telephones the name of the

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[84] This system, proposed by U S West, was found satisfactory by the Department of Justice, Memorandum of the United States at 7-9 (September 9, 1988), and it is deemed satisfactory by the Court.

interexchange carrier that will transmit 0+ calls from that instrument.[85]

E. Arrangement for the Future

It must be recognized that presubscription by the owner of the premises is not entirely satisfactory on several levels.

First, except coincidentally, the interexchange carrier selected by the premises owner is not likely to be the same carrier as the one the caller selected for his home or business telephone. When that occurs -- as it probably will in most instances except where AT&T is the carrier -- the 0+ option will not be available.[86] On this basis, while premises owner presubscription will be an advance over the present system where all public telephone long distance traffic is transmitted by way of AT&T, it will not achieve equal access on the basis of 0+ calling to the extent that

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[85] All callers would, of course, maintain the ability to reach their own interexchange carrier by dialing its five-digit access code.

[86] With respect to all such traffic, the caller will need to use the more complex access code. If, as will be true in many instances, he does not know or remember the access code of his home interexchange carrier, he will have to make two calls: one to that carrier to obtain the code, the second to place the long distance call. MCI Motion to Preserve the Status Quo at 15 (July 29, 1988); U S West Motion to Vacate at 14-15 (August 8, 1988). This is of course no different from the current situation for customers now using an interexchange carrier other than AT&T.

the decree contemplates or to the extent that would be achieved by a system which would permit the billed party to make the interexchange carrier selection.

Second, customer confusion will exist to a significantly greater degree under the premises-owner option than under a system which permits the individual callers themselves to select the interexchange carrier of their choice simply by dialing 0+. For example, under the premises-owner option the customer of a particular interexchange carrier could make a long distance call from one public telephone simply by dialing 0+ while from another public telephone, even in the same region or town, he might have to dial a five-number access code. This is obviously undesirable.

Third, some customers not only will not know how to reach a particular carrier because of these problems, but many of them will use whatever carrier to which a given public telephone was presubscribed, and this carrier in most cases is likely to be AT&T -- once again perpetuating that company's existing advantage and thus frustrating true equal access.

Fourth, in their choice of an interexchange carrier, many premises owners are likely to subordinate quality of service and price -- that are of paramount importance to the end users as well as to the purposes of the decree -- to the

amount of commission they may receive from particular interexchange carriers. This, too, would be inconsistent with the fundamental purposes of the decree.[87]

For these reasons, while the Court approves the premises owner option at this time and orders its implementation, that is with the reservation that this option does not fully meet the requirements of section (A)(2)(ii) of Appendix B of the decree. The Court expects that the Regional Companies will continue expeditiously to perfect the LIDB system[88] which, when placed into service, will permit full compliance with the decree. The Court will revisit this issue at a future date to determine what further arrangements and orders, if any,[89] are necessary.

VIII

Coin Sent-Paid Calls

In 1984, the Court granted a waiver to permit 1+ traffic, or coin sent-paid calls, from these telephones to be

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[87] See BellSouth Comments at 11 (August 26, 1988); see also Department of Justice Competitive Impact Statement, 47 Fed. Reg. 7170, 7176 n.21 (February 17, 1982).

[88] See Part VII-A, supra.

[89] It may be that in the meantime the FCC will proceed further with its 1985 proceeding, see supra, and, just as it did by the adoption of its balloting and allocation plan for residential and business customers, Allocation Plan, supra, render further action by the Court unnecessary.

defaulted to AT&T, but the waiver was to be effective only "until such time as the Operating Companies are able to overcome the technological limitations which presently prevent them from handling inter-LATA sent-paid coin calling from multiple carriers."[90] Over four years have passed since that waiver was granted -- a waiver which carried with it the expectation that the Regional Companies "will work with the carriers to develop the necessary technology to overcome the obstacles on an expeditious basis."[91] The responses to the Department's motion on calling cards and equal access to 0+ calls from Regional Company public telephones indicate that it is time for the Court to revisit the grant of February 6, 1984 waiver permitting the automatic routing of all sent-paid traffic to AT&T.[92]

Some Regional Companies assert that the software is not yet available to enable interexchange competition for calls made by depositing coins directly into the telephone apparatus, while others have proposed plans for providing

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[90] United States v. Western Electric Co., Civil Action No. 82-0192, slip op. at 10-11 (D.D.C. Feb. 6, 1984).

[91] Id. at 11 n.17.

[92] These responses in essence suggest that nothing significant or concrete has been done.

equal access for coin sent-paid calls.[93] Those claiming inability to provide this equal access point to AT&T, a major vendor of switches, for the development of technology that, it is claimed, would provide equal access by way of access tandem switches over the same common trunk used with all other traffic.[94] U S West, on the other hand, represents that Northern Telecom has developed an equal access software capability for its switches.[95]

It is not clear from the papers filed with the Court why AT&T has not developed such software or technology, or why the Northern Telecom method cannot be used here. Consequently, the Court is ordering the Regional Companies, and any other interested parties, to submit by January 1, 1989 proposed remedies on whether and on what basis the Court should remove its waiver of the decree obligation to provide equal access to coin sent-paid public calling.

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[93] See, e.g., Letter from Jeffrey S. Bork, U S West, to Nancy C. Garrison at 2 (July 1, 1988); Comments of NYNEX Corporation at 9 (August 26, 1988).

[94] Ironically, AT&T claims that a default to it is unnecessary because the technology for equal access with respect to 1+ calling already exists. AT&T Memorandum at 6 n.* (August 26, 1988).

[95] Memorandum of U S West at 32 (August 10, 1988).

Conclusion

The requirement that equal access be provided to all interexchange carriers is one of the key components of the decree, ranking closely behind the divestiture itself and the line of business restrictions on the Regional Companies.[96] Equal access with respect to credit cards and public telephones has assumed particular importance as the public relies more and more heavily upon these features, and as a number of the smaller interexchange carriers have acquired the capability to compete in these areas.

As the discussion above indicates, most of the obstacles to the achievement of that access can be overcome in relatively short order and without undue technological or other complications. This is particularly true since the Regional Companies have been on notice for months and even years that they are required to act in the areas under consideration. There is a general consensus that any necessary additional work[97] can be completed in two to three months. The Court has accordingly set January 1, 1989 as the

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[96] Indeed, some would rank equal access higher than that.

[97] With respect to some subjects (e.g., validation of credit cards) the process can be completed in that period of time; with respect to others (e.g., coin sent-paid calling from public telephones) the technological and logistical issues can be laid before the Court during that interval.

deadline for the completion of these tasks. It is indeed appropriate that the necessary equal access steps be taken by that date, the fifth anniversary of the AT&T divestiture. Five years is long enough for the attainment of the crucial objective as between AT&T and its long distance competitors in the credit card and public telephone sectors, and the Court expects the parties to meet its deadline.

October 14, 1988

HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants.

Civil Action No. 82-0192

FILED

OCT 14 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of the motion of the United States for an enforcement order relating to Regional Company Calling Card Practices, the briefs, reports, and memoranda filed, directly or indirectly, with respect to the issues discussed therein, and the entire record, and in accordance with the Opinion issued contemporaneously herewith, it is this 14th day of October, 1988

ORDERED that each Regional Company shall certify to the Court, on or before January 1, 1989, that it is currently making available and will continue to make available to all interexchange carriers requesting it the same validation data for its calling cards that the company provides to

AT&T, on the same prices, terms, and conditions as are extended to AT&T; and it is further

ORDERED that each Regional Company shall, on or before January 1, 1989, notify its calling card customers that (1) any interexchange services charged to the card will be provided by an interexchange carrier, not the Regional Company; (2) the interexchange carrier will not always be the carrier the customer selected in the presubscription process; and (3) the customer should contact interexchange carriers for information about alternative methods of charging interexchange calls; and it is further

ORDERED that the Regional Companies shall on or before January 1, 1989, recall all their credit cards that carry the same international number as is used by AT&T, provided that, if as of that date they have issued calling cards which list the international number of any interexchange carrier other than AT&T to which the customer may have presubscribed, they may continue in circulation the cards issued to AT&T customers; and it is further

ORDERED that the Regional Companies shall submit to the Court, on or before January 1, 1989, memoranda detailing proposed remedies that would afford to the calling cards of other interexchange carriers the same acceptance as is now given to AT&T cards for intra-LATA calls; oppositions or

other responses thereto shall be filed not later than January 20, 1989; and any replies thereto shall be filed not later than February 9, 1989; and it is further

ORDERED that the Regional Companies shall provide for premises owner presubscription of public telephone in a manner conforming with that delineated in Appendix B to In the Matter of Investigation of Access and Divestiture Related Tariffs, 101 F.C.C. 2d 911, 927-34, and that they shall mail interexchange carrier selection ballots to all public telephone premises owners in implementation of such presubscription on or before January 1, 1989; and it is further

ORDERED that the Regional Companies and any other interested parties shall, on or before January 1, 1989, submit to the Court memoranda detailing proposed remedies on whether and on what basis the Court should remove its waiver of the decree obligation to provide equal access to coin sent-paid public calling; oppositions or other responses thereto shall be filed not later than January 20, 1989; and

any replies thereto shall be filed not later than February 9, 1989.

Harold H. Greene

HAROLD H. GREENE
United States District Judge

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	DA 89-244
Pay Telephone Presubscription	)	
The Bell Atlantic Telephone Companies Tariff F.C.C. No. 1	)	Transmittal No. 276
The BellSouth Telephone Companies Tariff F.C.C. No. 1	)	Transmittal No. 204
Southwestern Bell Telephone Company Tariff F.C.C. No. 68	)	Transmittal No. 1742
New York Telephone Company Tariff F.C.C. No. 41	)	Transmittal No. 947
New England Telephone Company Tariff F.C.C. No. 40	)	Transmittal No. 960
The Ameritech Operating Companies Tariff F.C.C. No. 2	)	Transmittal No. 251
The Pacific Bell Telephone Company Tariff F.C.C. No. 128	)	Transmittal Nos. 1391 and 1401
The Nevada Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal Nos. 73 and 79

ORDER

Adopted: February 27, 1989 ; Released: February 28, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Most public and semi-public pay telephone traffic from Bell Operating Company (BOC) payphones is currently routed to American Telephone

EXHIBIT B

and Telegraph Company (AT&T).[1] To enable other interexchange carriers (ICs) to enter the BOC payphone market, the United States District Court for the District of Columbia issued an Order which established guidelines for implementation of pay telephone presubscription. That Order required, among other things, that the Bell Operating Companies (BOCs) issue ballots implementing payphone presubscription not later than January 1, 1989.[2] The Court directed the BOCs to base their presubscription procedures on the Commission's Allocation Order for business and residential customers.[3] The Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), Southwestern Bell Telephone Company (SWB), New York Telephone Company (New York), New England Telephone Company (New England), the Ameritech Operating Companies (Ameritech), the Pacific Bell Telephone Company (Pacific), and the Nevada Bell Telephone Company (Nevada) have each filed tariffs implementing presubscription balloting and allocation of ICs for pay telephones.[4] These payphone tariffs are scheduled to become effective on March 1, 1989.

2. By this Memorandum Opinion and Order, the Common Carrier Bureau rejects all of the above-mentioned tariffs, except for those of BellSouth and SWB.

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1 Public pay telephones are those payphones located in public areas such as airports, bus and train stations, hotel or office building lobbies, and public streets which are available for use by the general public. Semi-public payphones are located in areas used for both business and public calling such as service stations, laundromats, and restaurants. Bell Atlantic Description and Justification (D&J) at 1-2.

2 United States v. Western Electric Co., CA No. 82-0192, Order (D.D.C. Oct. 14, 1988) (October 14 Order).

3 Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order).

4 On November 15, 1988, Bell Atlantic filed Transmittal 276. On November 23, BellSouth filed Transmittal 204. SWB filed Transmittal 1742 on December 2, 1988. On December 8, New York filed Transmittal 947, and on December 9, New England filed Transmittal 960. Ameritech filed Transmittal 251 on December 28. On December 30, Pacific filed Transmittal 1391 and Nevada filed Transmittal 73. The SWB tariff is unopposed. It also should be noted that Southern New England Telephone Company filed a pay telephone presubscription tariff in Transmittal No. 458 on February 2, 1989. That tariff, scheduled to take effect on March 9, 1989, will be addressed in a subsequent Order.

II. BACKGROUND AND PLEADINGS

A. Bell Atlantic

1. In General

3. Bell Atlantic submits that to be eligible for "Coin Presubscription and Allocation," interexchange carriers must (1) comply with all applicable federal, state, and local regulations; (2) accept and validate the Bell Atlantic calling card on 0+ dialed interLATA calls from Bell Atlantic public telephones; and (3) provide continuous operator services, including interexchange emergency calls and assistance to the handicapped. Bell Atlantic states that calls should be answered, on average, within five seconds, and asserts that the interexchange carrier must identify itself at the beginning of each call and provide charges and rates upon request. Bell Atlantic Description and Justification (D&J) at 2-1 to 2-2.

4. In addition to the criteria detailed above, Bell Atlantic requires that interexchange carriers participating in payphone allocation, among other things, must not charge end users rates "exceeding the highest rates tariffed by a dominant interexchange carrier for comparable calls without the affected end user's consent," and must maintain quality at least equal to the quality of service provided from public telephones on other premises they serve. Id. at 2-2 to 2-3. Bell Atlantic states that interexchange carriers may be required to provide announcements specifying the rates charged for certain calls in response to subscriber or regulatory complaint. Id. at 2-3.

2. Contentions of the Parties

5. AT&T filed a petition to suspend and investigate Bell Atlantic Transmittal 276 on November 30, 1988. Also on November 30, MCI Telecommunications Corporation (MCI) and US Sprint Communications Company (Sprint) filed petitions to reject or suspend and investigate Transmittal 276. Bell Atlantic replied on December 12.[5]

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5 On January 9, 1989, National Telephone Services (NTS) filed comments opposing the pricing limitation proposed by Bell Atlantic. Because NTS filed its comments after the pleading cycle had closed, and since NTS raises no issues beyond those already advanced by petitioners, we do not consider the NTS comments. On January 19, 1989, Cleartel Communications (Cleartel) submitted a letter opposing all of the BOCs' payphone presubscription plans. Cleartel also does not raise any new issues and its comments likewise are not considered.

On February 9, 1989, PayCom Systems Corporation (PayCom), a

6. AT&T argues that Bell Atlantic's calling card requirement and pricing limitation are outside the scope of Bell Atlantic's role as the provider of access and create unnecessary and unwarranted barriers to the provision of equal access. AT&T Petition at 2-3. It asserts that Bell Atlantic's calling card requirement is an impermissible bundling of tariffed equal access services with unregulated, untariffed billing services and has no relation to the tariffed provision of access services. Id. at 4. AT&T further argues that the requirement that participating ICs limit their rates to those of the "dominant" IC would create arbitrary price ceilings and would be "an unwarranted intrusion into the competitive interexchange market" by a carrier which has no interest in overseeing ICs' rates. Id. at 5-6. Due to the advent of competition in the long distance industry, AT&T submits, no "dominant" IC exists. Id. at 5 n.**. In addition, AT&T contends that the minimum service quality standards proposed by Bell Atlantic are unduly stringent and do not relate to the provision of access service, particularly the requirement that ICs answer operator-assisted calls within five seconds. Id. at 6-7. It doubts Bell Atlantic's claim that such restrictions are necessary to protect Bell Atlantic's reputation, since the IC will be identifying itself to the end user. Id. at 6 n.*.

7. MCI similarly contends that Transmittal 276 is an attempt to bundle calling card service with the balloting and allocation of payphones. MCI Petition at 1-2.[6] MCI further objects to Bell Atlantic's requirement that participating ICs answer operator-assisted calls within five seconds. MCI notes that it placed several test calls from Bell Atlantic payphones and that the Bell Atlantic operator took 10 seconds to answer the call. Id. at

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On February 9, 1989, PayCom Systems Corporation (PayCom), a Customer-Owned Coin-Operated Telephone (COCOT) vendor, submitted a letter noting disparities in the assessment of carrier access line charges (CALCs) on pay telephone providers. PayCom asserts that while COCOT vendors must pay local exchange carriers monthly CALCs of $6 per line, the BOCs will not pay CALCs for their pay telephones since the BOCs will not assess such charges on themselves. PayCom Letter at 1. PayCom maintains that this will harm competition and submits that either the premises owner should be responsible for paying the charges, or the BOCs should be required to assess CALCs on themselves. Id. at 2.

6 MCI notes that the United States Department of Justice has written to each of the Bell Operating Companies (BOCs), expressing concern that the BOCs will impose restrictions which exceed the requirements of the Allocation Order. MCI Petition at n.2.

3. MCI contends that, not only does Bell Atlantic require performance beyond that which it provides, it has no authority to impose such a restriction of interstate telecommunications services. Id. MCI submits that if Bell Atlantic wishes to change any of the requirements of the Allocation Order, it should request that the Commission institute a rulemaking. Id. at 4.

8. Sprint also contends that Bell Atlantic has exceeded its authority. Sprint asserts that Bell Atlantic does not adequately explain what it means by "emergency call handling." Sprint Petition at 2. Sprint deems it unlikely that callers seeking emergency assistance would contact the IC, and notes that the United States Department of Justice has proposed to allow the BOCs to complete interLATA 911 calls. Id. & n.1 (citing Motion of the United States for a Waiver of the Modification of Final Judgment To Permit the BOCs To Provide MultiLATA 911 Service, D. D.C., C.A. No. 92-0192, filed Nov. 17, 1988). Similarly, Sprint argues that because Bell Atlantic fails to define "assistance to the handicapped," interested ICs cannot assess the costs and benefits of providing such services. Id. at 3.

8. In addition, Sprint contends that Bell Atlantic is not the proper arbiter of the ICs' appropriate response time. Id. at 3-4. Sprint further argues that the IC should not have to identify itself at the beginning of each call, since such identification is not standard industry practice and since many credit card calls can be processed automatically without a prerecorded computer announcement identifying the presubscribed carrier. Id. at 5. In addition, Sprint argues that Bell Atlantic's identification requirement is superfluous, since the October 14 Order requires the BOCs to identify the presubscribed IC on their pay telephones. Id. Sprint also objects to the requirement that it provide rate announcements. Id. at 5-6.

9. Bell Atlantic responds that the criteria it has proposed are reasonable. Bell Atlantic submits that all Bell Atlantic payphones display its logo and list its subsidiaries, and it observes that no petitioner claims that the petitioner cannot satisfy the challenged requirements. Bell Atlantic Reply at 1-2. Bell Atlantic argues that its limitation of prices to the highest rates charged by a dominant carrier was mandated by the Commission for business and residential presubscription. Id. at 2 (citing Allocation Order, 101 FCC 2d at 934). Bell Atlantic also notes that the price limitation is not a prerequisite to a carrier's inclusion on the ballot, but is a condition for participation in the allocation process. Id. at n.3.

10. In addition, Bell Atlantic submits that callers should be able to expect that their Bell Atlantic calling cards will be accepted at Bell Atlantic payphones, and notes that AT&T already honors the Bell Atlantic calling card and that MCI has announced plans to do so. Id. at 3. Bell Atlantic also maintains that the operator service criteria it specifies will curb end user complaints, which it contends will most likely be directed at

Bell Atlantic. Id. Bell Atlantic adds that the identification requirement is one of the standards promulgated by the Operator Service Providers of America, and notes that Bell Atlantic and AT&T meet this standard. Id. at 3-4. Bell Atlantic contends that end users have the right to know which carriers the end users are using, and argues that instruction placards placed on payphones could be removed or defaced. Id. at 4 & n.9. Bell Atlantic similarly defends rate announcements as protecting end users from the exorbitant charges imposed by some companies. Id. at 4-5.

11. Bell Atlantic further explains that its requirement that carriers be equipped to handle emergency calls mandates that carriers be able to complete calls to emergency locations such as hospitals and police stations or to transfer such calls to the BOC operator. Id. at 5. Bell Atlantic also states that its assistance to the handicapped requirement means helping a disabled person place a call. Id. In addition, Bell Atlantic asserts that its five-second response time is based on that of the pre-divestiture Bell System and that which Bell Atlantic imposes upon itself. Id. at 5-6. Bell Atlantic notes that the 10-second response time recorded by MCI represents total call setup time, not the response time for the total operator system, which is the subject of the five-second requirement. Id. at 6 n.16.

B. BellSouth

1. In General

12. BellSouth introduces "preselection" into its payphone plan to denote the period of time during which compliance with the court's Order does not permit observance of IC notification requirements stated in the Commission's Allocation Order.[7] BellSouth states that preselection, a retroactive balloting and allocation procedure, applies to public and semi-public pay telephones served by end offices converted to equal access on or before March 31, 1989. BellSouth D&J at 2. BellSouth avers that other public and semi-public pay telephones will be included in its ongoing implementation schedule for equal access conversion. Id.

2. Contentions of the Parties

13. On December 7, 1988, International Telecharge, Inc. (ITI) filed a petition to reject or suspend and investigate BellSouth Transmittal 204. MCI filed a petition to suspend and investigate Transmittal 204 on December 8. BellSouth replied on December 19.[8]

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7 Investigation of Access and Divestiture Related Tariffs, Memorandum Opinion and Order, 101 FCC 2d 911 (1985) (Allocation Order).

14. MCI argues that the BellSouth presubscription plan is contrary to the Allocation Order in that it does not provide for 90 days between balloting and conversion of the end office but proposes to implement its plan on February 1, 1989, rather than April 1, 1989. MCI Petition at 3-4. MCI contends that the 90-day waiting period would allow carriers adequately to market their services to premises owners and submits that BellSouth's expedited implementation would unfairly favor AT&T. Id. at 3-4. MCI further objects to BellSouth's distinguishing between "preselection" and "presubscription" as unsupported by the Allocation Order. Id. at n.11.

15. ITI argues that BellSouth fails to include in its tariff all of the relevant practices and regulations it included in the version of its plan filed with the court. ITI Petition at 5-7. Basing its contentions on the plan filed with the court, ITI deems unlawful the requirement that participating ICs obtain state certification to carry intrastate traffic. Id. at 7-8. ITI argues that the state certification requirement would benefit AT&T at the expense of smaller carriers like itself, and that the requirement is not included in the Allocation Order. Id. at 9.

16. ITI further contends that the BellSouth plan to limit participants' rates to those of the "dominant" carrier is unlawful, since charges assessed by non-dominant ICs are presumptively lawful. Id. at 10. ITI notes that supporters of this requirement have argued that it is justified by an erratum to the Allocation Order which states that non-dominant carriers receiving interexchange traffic through allocation could not charge rates for services which exceeded those charged "by a dominant interexchange carrier for MTS-type service without the customer's consent." Id. at 11 (citing Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Erratum to June 12, 1985, Memorandum Opinion and Order, Mimeo No. 5337, released June 24, 1985). ITI contends, however, that the language of that erratum refers to allocated customers, not presubscribed customers. Id. at 11-12. ITI asserts that such a rate restriction would alter the Commission's rules regarding the rates of non-dominant carriers and thus should only be considered via a rulemaking proceeding. Id. at 11, 12. In addition, ITI asserts that a carrier's rates may not be arbitrarily tied to those of another carrier. Id. at 13 (citing Aetna Insurance Co. v. Hyde, 275 U.S. 440, 447 (1928)).

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8 On January 9, 1989, NTS filed comments regarding Transmittal 204. BellSouth responded to the NTS comments on January 24. Because NTS filed its comments after the pleading cycle had closed, and since NTS raises no issues beyond those already advanced by petitioners, we do not consider the NTS comments.

17. ITI further submits that only a few ICs are able to terminate collect international calls. Id. at 13-14. In addition, ITI objects to the restriction that participating ICs cannot share information regarding premises owners' names and addresses with outside marketing staff. Id. at 14. ITI contends that this restriction limits the marketing efforts of ITI and other smaller non-dominant ICs. Id. ITI doubts that these data are proprietary since AT&T already has such information due to its monopoly status. Id. at 15.

18. BellSouth, in response to ITI, contends that neither the Communications Act nor the Commission's rules require that a carrier include in its tariff every provision related to a service offering. BellSouth Reply at 4-5. In addition, BellSouth asserts that the Commission has recognized the authority of the states to regulate intrastate services of alternative operator services (AOS) providers. Id. at 6 (citing Letter from Chairman, Federal Communications Commission, to Chairman, Committee on Energy and Commerce, U.S. House of Representatives, May 2, 1988). BellSouth also deems insufficient ITI's argument that state restrictions may hinder its marketing efforts, and notes that the Commission has recognized that any state regulation may somehow burden entry into the marketplace. Id. at 7 (citing People of the State of California v. Federal Communications Comm'n, 798 F.2d 1515, 1519 (D.C. Cir. 1986)). BellSouth further asserts that, under its plan because state certification is a prerequisite only to the delivery of pay telephone traffic, it may be obtained after balloting but before implementation of equal access. Id. at n.13.

19. In addition, BellSouth argues that its rate limitation is supported by the Allocation Order, and notes that it applies this requirement to allocated customers but not presubscribed customers. Id. at 10 n.18. BellSouth also contends that the requirement that carriers be able to process international traffic imposes no significant hardship on ICs and that impairment of international service would be detrimental to the public interest. Id. at 11. In addition, BellSouth contends that it will allow release of subscriber information to outside marketing agents as long as the designated agent will assume the same responsibilities for use and protection of proprietary data as are required of the IC. Id. at 12. BellSouth submits that removing all restrictions from release of customer data would enable COCOT providers to solicit specific customers so as to increase their share of the payphone market. Id. at 13.

20. Moreover, BellSouth contends, the 90-day requirement of the Allocation Order only referred to the interval between balloting and conversion of the end office to equal access and therefore does not apply to end offices already converted such as those now in question. Id. at 14. BellSouth asserts that its payphone proposal fits within the retroactive billing provisions of the Allocation Order, which establish an interval of 30 days between the mailing of ballots and implementation of changes of the primary IC. Id. (citing Allocation Order, 101 FCC 2d at 932). Furthermore,

BellSouth notes, the Common Carrier Bureau rejected the same argument when advanced by MCI in relation to US West's pay telephone plan. Id.[9]

C. SWB

21. SWB's payphone tariff, which is unopposed, proposes to ballot locations which have converted to equal access or have committed to do so before June 1, 1989. SWB plans to include other end offices in its ongoing ballot and allocation schedule for business and residential customers. SWB D&J at 1-2. Like the proposals of the other BOCs, the SWB plan leaves the choice of IC to the premises owner, or "agent" of the end user. Id. at 1-1. SWB's plan is similar to the US West plan, which became effective as scheduled.[10]

D. New York and New England

1. In General

22. New York and New England propose to make available for purchase by ICs customer name and address lists, which include the billing and working telephone numbers of the public telephones located on their property. New York D&J at 4; New England D&J at 4. New York and New England will also provide interLATA traffic data by premises for each public telephone. New York D&J at 4; New England D&J at 4-5. They assert that payphones located on New York Telephone and New England Telephone premises will be allocated among carriers in the same manner as other pay telephones for which a presubscribed carrier has not been chosen during the balloting process. New York D&J at 5; New England D&J at 5.

23. New York and New England require, among other things, that participating ICs must accept calls made with a New York or a New England calling card, must not charge a rate higher than the highest rate charged by the dominant IC for like MTS-type services without the payphone end user's consent, and must comply with all applicable federal, state, and

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9 This issue is moot. On January 5, 1989, the court issued an Order which stated that no pay telephone customer shall be converted prior to 90 days after ballots were mailed to that customer, or April 1, 1989, whichever is later. United States v. Western Electric Co., C.A. No. 82-0192, Order (D. D.C. Jan. 5, 1989).

10 See Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal Nos. 174 and 210, DA 88-1886, Order, released Dec. 7, 1988.

local regulations. New York D&J at 7; New England D&J at 7-8. The New York and New England plans also provide that carriers participating in the allocation process must, among other things, not impose any fixed monthly or nonrecurring charges to allocated premises owners without their consent.

2. Contentions of the Parties

24. On December 27, AT&T petitioned to suspend and investigate New York Transmittal 947. Also on December 27, ITI and United Artists Operator Services Corporation (UAOSC) filed petitions to reject or suspend and investigate Transmittal 947, and NTS filed for partial rejection of the tariff. In addition, AT&T filed a petition to suspend and investigate New England Transmittal 960. ITI and UAOSC petitioned to reject or suspend and investigate Transmittal 960, and NTS filed for partial rejection.[11] New York and New England, responding together, filed an opposition to the petitions on January 9, 1989.

25. AT&T argues that the requirement that an IC must accept New England and New York calling cards is an impermissible bundling of tariffed equal access services with unregulated, untariffed billing services and has no relation to the tariffed provision of access service. AT&T Petition at 4. AT&T submits that the Commission has ruled improper a carrier's attempt to condition provision of access on resolution of billing matters. Id. at 5 n.* (citing Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1613, DA 88-318, released Mar. 9, 1988, at para. 8). In addition, AT&T argues that the price restriction imposed by New York and New England would lead to "anticompetitive and arbitrary price ceilings." Id. at 5-6. AT&T contends that New York and New England have no legitimate interest in overseeing the rates charged by ICs, and submits that a "dominant" IC does not exist. Id. at 6 & n.*.

26. ITI submits that, by virtue of the proposed pricing restriction, New York and New England effectively usurp the Commission's authority and attempt to regulate the rates of non-dominant carriers. Id. at 5-6. ITI argues that the BOCs may not restrict the flexibility of non-dominant carriers by setting both BOC rates for validation and billing and collection services and the ICs' rates for pay telephone service. Id. at 6. If the Commission's rules regarding non-dominant carriers are to be changed, ITI contends, those rules must be changed via a rulemaking and not a tariff

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11 While all petitioners filed separately regarding the New York and New England tariffs, the two pleadings filed by each petitioner are substantially similar. As a result, references to a party's petition opposing the New York and New England tariffs will be to the petition against the New England tariff unless otherwise noted.

proceeding. Id. at 7. Furthermore, ITI asserts, this restriction is inconsistent with the mandate that rates cannot be confiscatory and maintains that a carrier's rates may not be arbitrarily tied to those charged by another carrier. Id. (citing Aetna Insurance Co. v. Hyde, 275 U.S. 440, 447 (1928)).

27. ITI also questions the relevancy of the erratum to the Allocation Order. ITI argues that the erratum to the Allocation Order referred only to allocated customers and is thus not applicable to presubscription. Id. at 6. ITI additionally observes that the erratum applied to MTS-type rates and to customers, not end users. Id. at 9. In the payphone presubscription situation, ITI contends, the premises owner, not the end user, is the IC's customer. Id. ITI notes that the Allocation Order prohibits the imposition of a non-recurring charge on assigned customers without their consent. It argues that "customer" cannot denote "end user" in this instance because end users of pay telephones are transient and can therefore be assessed nothing but non-recurring charges. Id. at 10. Nor can an IC give a transient end user of a payphone 30 days' notice of a change in criteria as required in the Allocation Order, ITI maintains. Id. Furthermore, ITI contends, if the erratum is interpreted to limit rates to the MTS-type rates charged by the dominant carrier, all payphone providers would violate the Allocation Order because all operator-assisted payphone calls are billed at rates higher than MTS-type rates. Id. at 11.

28. ITI also doubts that a "dominant carrier" exists in light of changes in the pay telephone marketplace, and questions how carriers will determine end user consent. Id. at 11-12. ITI postulates that end user consent could be inferred by the end user's decision to place a call over a payphone clearly labeled with the identity of the IC. Id. at 12. In addition, ITI contends that the presubscription process is not the appropriate vehicle by which to enforce IC compliance with state certification, and that only the Commission is empowered to impose such a restriction. Id. at 15 n.6. ITI asserts that the state certification restriction favors AT&T to the detriment of smaller ICs. Id. at 17. Furthermore, ITI argues, this type of restriction is not included in the Allocation Order, which the October 14 Order dictated should govern payphone balloting and allocation. Id. at 17.[12] ITI also asserts that the Allocation Order does not require that participating ICs be able to terminate international calls. Id. at 19. Because the New York and New England plans require that all carriers be able to handle international and collect calls, ITI argues, New York and New England must intend that participating ICs should be equipped to handle international collect calls, a complicated task in light of billing differences between countries. Id.

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12 See October 14 Order at 3.

29. UAOSC contends that the rate limitation proposed by New York and New England would unlawfully interfere with the states' regulation of intrastate communications, since that restriction applies to intrastate interLATA and intraLATA calls as well as interstate calls. UAOSC Petition (NYT) at 3-4. UAOSC notes that the New York Public Service Commission is currently considering whether a rate limitation should be adopted for AOS providers operating in New York. UAOSC Petition (NYT) at 4. UAOSC further contends that the plan proposed by New York and New England conflicts with the Allocation Order in that the price limitation mentioned in the erratum to that Order refers to allocated customers, not presubscribed customers. UAOSC Petition (NYT) at 5 & n.3.

30. UAOSC also claims that by referring to "the dominant" IC in its tariff rather than "a dominant" IC as used in the Allocation Order, New York narrows the Commission's plan. UAOSC Petition (NYT) at 7. UAOSC claims that the proposed rate limitation would impose substantial burdens on smaller ICs, such as forcing them to adopt different rate tables and rate structures for interstate, intrastate interLATA, and intrastate intraLATA traffic depending upon which carrier is the dominant carrier in each of those jurisdictions. Id. at 7.[13] Even if the smaller carriers could make such changes, UAOSC maintains, it may not be cost effective for such carriers to adopt one set of rates for payphone end users and different rates for other end users.

31. NTS submits that the erratum to the Allocation Order applies only to assigned customers, not those who are presubscribed. NTS Petition at 2-3. In addition, NTS notes that the Allocation Order requires the consent of the customer to exceed the price limitation, while the New York and New England proposal requires the consent of the end user. Id. at 3. In the public telephone situation, NTS contends, the customer is not the end user but the premises owner. Id. NTS further contends that the rate limitation may ensure the continued dominance of AT&T, and argues that extension of the rate limitation to presubscription should only take place after careful consideration in the context of a full public hearing. Id. at 4. It observes that NYNEX has argued to the court that callers from non-allocated payphones should be treated like callers from allocated business and residential phones since neither has agreed in advance to use a certain carrier. Id. at 5. NTS argues that this is inaccurate since the end user, although he or she is not the presubscribed party, will be adequately

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13 UAOSC presumes that New York Telephone would be deemed the dominant carrier in New York, but notes that New York Telephone maintains different rate schedules for the different New York LATAs. UAOSC Petition (NYT) at 8.

informed of the identity of the presubscribed carrier and will have the chance to make another choice.

32. NTS also questions what constitutes consent in the payphone situation and maintains that the requisite consent should be given by the premises owner. Id. at 6-7. If end user consent is required, NTS argues, consent should be inferred in that the caller has received reasonable notification of the identity of the IC to which the payphone is presubscribed and has been informed of his or her ability to obtain rate information. Id. In addition, NTS submits that the Commission should not establish payphone presubscription guidelines via these tariff proceedings due to the lack of uniformity among the BOCs. Id. at 8-9.

33. In their joint opposition, New York and New England argue that the pricing restriction they propose is necessary to protect customers from excessively high rates. New York and New England assert that the United States District Court for the District of Columbia noted in its December 23 Memorandum[14] that end users of presubscribed and allocated payphones are akin to allocated business and residential customers and thus need similar protection against excessive rates. New York and New England Opposition at 3. New York and New England submit that the Commission and some states have acknowledged the questionable pricing practices of AOS companies. Id. at 4 & n.5. New York and New England also argue that since NYNEX provides carriers with the data necessary to validate calls made with a NYNEX calling card, ICs should be required to accept such calls from NYNEX payphones. Id. at 5. Failure to do so, they argue, would lead to customer confusion and dissatisfaction. Id.

34. In addition, New York and New England observe that, while the December 23 Memorandum held that a carrier may not require that an IC be state certified or have applied for certification as a condition to being listed on the ballot, the court recognized that a carrier must obtain state certification or transfer calls to a certified carrier in order to provide presubscribed payphone service. Id. at 5-6. New York and New England note that the court ordered the BOCs to allocate any pay telephones that are presubscribed to a carrier that has failed to make arrangements to provide intrastate interLATA service by the time presubscription is implemented. Id. at 6. Those BOCs assert that their state certification requirement comports with the court's holding because it applies to the commencement of service and not to the balloting process. Id. New York and New England also argue that their tariffs do not require the IC to terminate international collect calls, but merely require that the IC allow for the

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14 United States v. Western Electric, C.A. No. 82-0192, Memorandum, Issued Dec. 23, 1988 (December 23 Memorandum).

completion of originating international calls either directly or via transfer to another carrier.

E. Ameritech

1. In General

35. Ameritech believes that the restrictions its plan imposes are necessary for both presubscribed and allocated payphones because "[t]he carrier choice of the premises owner may not be in the best interest of the pay telephone user." Ameritech D&J at 1. Like the payphone presubscription plans of other BOCs, Ameritech's plan includes a rate restriction tied to the rates of the dominant IC, a state certification requirement, and an identification requirement. Id. at 1-2. Ameritech also requires, among other things, that the IC arrange for receipt of calls with the LATA of origin and that the IC subscribe to FGD access service in the end office where the payphone is located. Id. at 2. Ameritech states that such a requirement is necessary because it cannot provide interLATA service and because presubscription is only available with FGD. Id. Ameritech further provides that ICs must accept charge card, collect, and third number calls so as to "minimize the difference between the procedures for intraLATA and interLATA calls," and that ICs honoring Ameritech calling cards must do so on an automated basis in a manner equivalent to that used by Ameritech for its intraLATA traffic. Id. In addition, Ameritech requires that ICs use Automatic Number Identification (ANI) to record the telephone number of the originating station instead of asking the end user. Id.

2. Contentions of the Parties

36. On January 12, 1989, AT&T and MCI filed petitions to suspend and investigate Transmittal 251. Also on January 12, ITI and OSPA filed petitions to reject in part or suspend and investigate the Ameritech tariff, and NTS filed a petition for partial rejection. Ameritech filed its opposition to these petitions on January 26.

37. AT&T opposes Ameritech's price limitation, arguing:

> Such artificial restrictions on the factors, such as price, that differentiate the offerings of competing carriers have nothing to do with a LEC's provision of access services, and represent an unwarranted intrusion into the competitive interexchange market by a LEC that has no legitimate interest in overseeing [ICs'] rates.

AT&T Petition at 3. AT&T further argues that it would be discriminatory for Ameritech to deny equal access to an IC which does not abide by its pricing policies. Id. Moreover, AT&T asserts, IC rates and services are not matters to be discerned via a LEC's access tariff. Id.

38. MCI opposes Ameritech's requirement for automated validation of its calling card and contends that ICs should be allowed to process BOC calling cards in any way they choose. MCI Petition at 3. MCI further submits that Ameritech should make clear in its tariff that carriers are not required to accept Ameritech's card. Id. at n.5. Similarly, MCI argues that Ameritech may not dictate how ICs will accept charge card, collect, and third number calls, and may not force ICs to use ANI. Id. at 3-4. In addition, MCI notes that the United States District Court for the District of Columbia has held that state certification requirements in the BOC pay telephone proposals should be deleted. Id. at 4-5 (citing December 23 Memorandum). Finally, MCI maintains, regardless of the fact that the Allocation Order imposed price limitations on only allocated customers, Ameritech has not justified its proposed pricing restriction. Id. at 5.

39. ITI also opposes Ameritech's pricing restriction as an attempt to regulate the rates charged by non-dominant carriers in violation of the Commission's Rules. ITI Petition at 3-4. ITI submits that this issue would be more appropriately addressed in the context of a rulemaking proceeding and does not belong in a carrier's tariff. Id. at 4. ITI further argues that such a restriction is inconsistent with the principle that rates must not be confiscatory but must be calculated so that a carrier may recover its costs and earn a reasonable return. Id. at 5. As a result, ITI submits, a carrier's rates may not be restricted to those assessed by another carrier. Id. (citing Aetna Insurance Co. v. Hyde, 275 U.S. 440, 447 (1928)). ITI further observes that Ameritech's charges for access, validation, and billing and collection may account for half of the charge for a given call, and therefore contends that the ICs must be afforded reasonable rate flexibility. Id. ITI also asserts that the erratum to the Allocation Order applied only to allocated customers and deems the definition of "dominant carrier" unclear. Id. at 6-8. ITI further questions the determination of end user consent in the payphone context. Id. at 9.

40. In addition, ITI objects to Ameritech's state certification requirement and reiterates the arguments it raised regarding the state certification provisions of New York and New England. Id. at 10-12. ITI also opposes the Ameritech provision which mandates that ICs must subscribe to FGD in the end office where the payphone is located. ITI questions whether this proposed requirement means that an IC must establish its own FGD facilities as opposed to the current industry practice of relying on shared or resold facilities to access local exchanges. Id. at 13. If so, ITI asserts, the provision is discriminatory because AT&T is the only IC now able to comply. Id. Similarly, ITI maintains that since ANI is not always available with shared or resold FGD service, Ameritech's ANI requirement favors AT&T. Id. at 14. ITI further contends that Ameritech has offered no reason why ICs cannot choose their own methods of accepting credit card, collect, and third number calls. ITI also finds Ameritech's language

regarding automated acceptance of its calling cards ambiguous, and opposes Ameritech's identification requirement as beyond its authority. Id. at 14-15.

41. ITI then objects to a moratorium on release of premises owner information which is not included in Ameritech's tariff filing but does appear in its payphone presubscription plan. ITI notes that the Ameritech plan prohibits IC release of premises owners' names and addresses with outside marketing staff unless the IC enters into a license agreement. Id. at 15-16. ITI asserts that it must employ outside marketing staffs in order to compete for premises owners, and maintains that Ameritech's limitation is not relevant to the presubscription process. Id. at 16-17. ITI doubts that premises owner data are proprietary since AT&T already possesses this information. Id. at 17 n.17.[15]

42. NTS opposes Ameritech's rate limitation, and argues that the erratum to the Allocation Order only applied to presubscribed customers. NTS Petition at 2-3. NTS further observes that the Allocation Order required the consent of the customer if an IC exceeds the rate cap and that Ameritech requires the consent of the payphone user or caller. Id. at 3. NTS asserts that the customer of a pay telephone is the premises owner and not the caller. Id. at 3. NTS further maintains that imposition of a rate limitation based on AT&T's rates "runs the risk of enshrining AT&T as a price leader." Id. at 4. NTS also disputes Ameritech's argument likening payphone end users to allocated customers, especially since the end user will be alerted to the identity of the presubscribed carrier and will have the opportunity to make another choice. Id. at 5. NTS further submits that consent should be inferred where the caller has been notified of the name of the IC and has been instructed how to obtain rate information via a placard on the phone. Id. at 6-7. NTS also contends that, due to the lack of uniformity among the BOCs, the rate limitation issue should be addressed on a national basis in the context of a rulemaking proceeding. Id. at 8-9.

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15 ITI also notes that Ameritech has objected to a provision contained in the agreements between ITI and premises owners whereby public payphones may be replaced with COCOTs, and that Ameritech maintains that ITI wants usage data for this purpose and not to facilitate presubscription. ITI asserts that Ameritech thus "impermissibly ties" presubscription to the replacement of payphones merely because they appear in the same agreement, and requests the Commission to declare such conduct a violation of the Communications Act. ITI Petition at 16 n.15. We conclude that the argument ITI raises is outside the scope of this proceeding.

43. OSPA also notes that the price limitation in the Allocation Order applied only to allocated customers. OSPA Petition at 7. OSPA further asserts that the identification requirement is beyond Ameritech's authority, and objects to the state certification requirement. Id. at 7-8. OSPA then contends that the provision regarding acceptance of credit card, collect, and third number calls is vague and does not comply with the Allocation Order. Id. at 8-9. OSPA argues that if the BOCs wish to expand the Commission's presubscription rules, they should petition for a rulemaking proceeding. Id. at 9-10.

44. While Ameritech concedes that the Allocation Order applied only to assigned customers, it argues that the price limitation described in that Order should extend to the payphone presubscription process. Ameritech asserts that payphone end users are assigned customers since the end users are assigned to an IC by the premises owner. Ameritech Opposition at 7. Ameritech submits that the end user of a payphone is even more deserving of protection than is the allocated business or residential user because payphone users receive no ballots and because the IC will be chosen by the premises owner, who may have interests which conflict with those of the end user. Id. at 7-8. Ameritech further asserts that the ever-increasing rates of non-dominant carriers, as well as surcharges imposed by premises owners, could lead to abuse of the presubscription process. Id. at 9-11.

45. Ameritech also observes that credit card, collect, and third-party calls are part of MTS service, thereby providing a proper frame of reference for the rate limitation. Id. at 12. In addition, Ameritech argues that the type of customer consent required by its pricing limitation need not be written consent, but must be more than inferred consent. Id. at 13-15. Ameritech proposes that the Commission require a statement that the charge for the call being placed will exceed the highest tariffed rate that applies to similar calls. Id. at 15. It notes that carriers that object may avoid the requirement by maintaining rates below those of the dominant carrier. Id. at n.32.

46. In response to the December 23 Memorandum regarding state certification, Ameritech asserts that it will consider its state certification requirement met if a carrier that is not certified arranges to transfer intrastate calls to a state-certified IC. Id. at 16. Ameritech also asserts that the NECA provision rejected by the Commission, which is cited by ITI, would have prevented an end user from presubscribing his or her line to an IC that carries only interstate traffic. Id. at 16-17. Ameritech notes that the NECA tariff would have restricted an entire class of end users -- those whose calls were virtually all interstate. Id. at 17. In this proceeding, Ameritech argues, the customers in question are transient and a substantial amount of traffic from its pay telephones is intrastate. Id. If its state certification requirement is not permitted, Ameritech contends, intrastate calls from some public payphones might be blocked, leading to end user confusion that damages the reputation of

Ameritech. Id. at 17-18. Ameritech further notes that, while the Allocation Order addressed only interstate service, its proposal necessarily involves intrastate service because it purports to eliminate the current practice of routing all calls, both interstate and intrastate, to AT&T. Id. at 19-20.

47. Although it will be affixing placards to the face of its pay telephones which name the primary IC, Ameritech submits, the requirement that ICs provide a recorded message will further alert the caller, will benefit visually-impaired end users, and will compensate for potential defacement of the placards. Id. at 23-24. In addition, Ameritech notes that the provision in its tariff that ICs accept charge card, collect, and third number charge arrangements is not really a requirement but is a description of pay telephone presubscription. Id. at 24-25. Ameritech further argues that the requirements that ICs use ANI and automated acceptance of the Ameritech calling card are extensions of the notion that ICs should strive to minimize the differences between intraLATA and interLATA procedures. Id. at 25-26. Ameritech contends that these requirements are necessary to reduce customer confusion and thereby protect its reputation. Id. at 26. Ameritech emphasizes that carriers are not expected to eliminate all differences, and notes that interexchange carriers may offer any additional billing arrangements they choose, such as bank credit cards, even though such arrangements are not presently accepted by Ameritech. Id.

48. Moreover, Ameritech asserts, its ANI requirement does not favor AT&T. Ameritech submits that the requirement applies to all ICs and will prevent erroneous billing if the number of the payphone is obscured or the user is visually-impaired. Id. at 27. It contends that the ANI requirement should not prove difficult for an IC since it is part of FGD service and the IC must have ordered FGD to receive undesignated interLATA payphone traffic. Id. Similarly, Ameritech argues that the requirement that all carriers accepting its calling card do so by automated means applies equally to all carriers, and is necessary to protect Ameritech's reputation. Id. at 28. Ameritech also observes that automated calling card procedures prevent the misuse which could result if persons other than the caller overhear the caller giving an operator his or her calling card number. Id.

49. Ameritech also asserts that its requirement that a carrier obtain FGD in the end offices where its payphones are located is appropriate since use of FGA and FGB would necessitate the dialing of additional digits. Id. at 29. Ameritech responds to ITI's argument that its requirement would preclude reliance on shared or resold facilities by observing that it has arranged with ITI to route ITI calls to another IC's trunk group via end office facilities. Id. at 29-30. Ameritech notes that ITI thereby will subscribe to FGD but need not construct its own facilities. Id. at 30.

50. Ameritech further argues that its restrictions on release of premises owner information ensures that such data will not be used for purposes unrelated to the presubscription process. Id. It notes that it has agreed to provide interLATA traffic data for each of its payphones by location once the IC completes a license agreement. Id. at 31. Ameritech also permits ICs to release the information to outside marketing agents (who are not also pay telephone providers) as long as the agents aver that the data will be used solely for purposes of presubscription. Id. Ameritech observes that the court denied ITI's motion for a rehearing regarding this issue, and argues that it does not already provide AT&T with aggregated premises owner data. Id. at 32 & n.58.

F. Pacific and Nevada

1. In General[16]

51. Pacific introduces "preselection" into its payphone plan applicable to public and semi-public pay telephones served by end offices converted to equal access on or before April 1, 1989. Pacific D&J at 1. Pacific avers that other public and semi-public pay telephones will be included in its ongoing implementation schedule for equal access conversion. Id.

2. Comments of the Parties

52. On January 17, 1989, NTS submitted a letter opposing the Pacific plan, and ITI filed a petition to reject or suspend and investigate the tariff. Pacific submitted its reply to the ITI petition on February 1.[17]

53. NTS notes that the Pacific tariff does not contain any express conditions on IC participation in pay telephone presubscription, but asserts that the Pacific plan filed with the United States District Court for the District of Columbia mandates that ICs may not charge more than 110 percent of the dominant carrier's rates. NTS Letter at 1-2. NTS argues that Pacific should place in its tariff any conditions it intends to impose on participating ICs. Id. at 3. If Pacific amends its proposal to include

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16 Because the Pacific and Nevada tariffs are virtually identical, all references made herein will refer to the Pacific tariff.

17 Pacific asserts that its reply comments were filed late because it did not become aware of ITI's petition until January 27. Pacific notes that the petition was served via first class mail to the wrong Pacific Bell executive. See Pacific Motion To Accept Late Filed Reply, filed Feb. 1, 1989.

the rate restriction, NTS submits, it will oppose the Pacific tariff. Id.

54. ITI incorporates by reference the arguments it raised in its petition against the BellSouth payphone tariff (except regarding the use of premises owner information, which has not been restricted by Pacific). ITI Petition at 2. ITI contends that Pacific's tariff fails to state all of the restrictions Pacific plans to impose on participating ICs since many limitations were included in the pay telephone plan Pacific filed with the court. Id. at 3. ITI objects to some restrictions contained in Pacific's plan for the same reasons it opposed similar requirements proposed by other BOCs, particularly the state certification requirement, the limitation of rates to not more than 10 percent above those of the dominant carrier, and the requirement that ICs be able to handle collect international calls. Id. at 4. ITI further notes that, like Ameritech, Pacific mandates that an IC must order FGD directly from the LEC and that the IC must identify itself to the end user before he or she is assessed any charge. Id. at 5. ITI reiterates the arguments it made in opposition to these provisions of the Ameritech tariff. Id. at 5-6.

55. The Pacific reply states that it will file tariff revisions to incorporate the restrictions it proposes to place on participating ICs. Pacific Reply at 3. Pacific plans to require (1) that ICs be able to offer service to any point within the continental United States; (2) that ICs do not impose any fixed monthly or non-recurring charges on the allocated premises owner without his or her consent; (3) that ICs accept the Pacific Bell or the Nevada Bell calling card; (4) that ICs charge rates for interLATA intrastate calls that do not exceed those of the dominant carrier by more than 10 percent; (5) that ICs order Pacific's FGD services; (6) that ICs have their own access customer name abbreviations (ACNAs) and carrier identification codes (CICs); (7) that the ICs be ANI and screen code sensitive; (8) that ICs provide international calling on their own or through a reseller or that they make arrangements with another carrier to provide such service; (9) that ICs accept collect and third number billing arrangements; (10) that ICs identify themselves to end users before any charges are incurred; and (11) that ICs comply with all applicable state and federal regulations. Id. at 3-9.[18]

56. Pacific asserts that its nationwide service requirement is necessary because pay telephone premises owners, not end users, will be making the presubscription choice. Id. at 4. Pacific also claims that its restriction regarding fixed monthly or non-recurring charges protects

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18 Pacific and Nevada have since amended their tariffs to include IC restrictions via Transmittal No. 1401 and Transmittal No. 79, respectively.

premises owners who fail to presubscribe. Id. at 4-5. In addition, Pacific submits that its calling card requirement is necessary to avoid customer confusion and dissatisfaction since approximately 50 percent of operator-assisted traffic involves calling cards. Id. at 5-6 (citing October 14 Order at 3, 9-10). Pacific also argues that its rate limitation is more flexible than that established in the Allocation Order in that it permits ICs to charge up to 10 percent above the dominant carrier's rates, but asserts that it still protects end users from exorbitant charges. Id. at 6. Pacific contends that the price limitation should apply to both allocated and presubscribed pay telephones because the premises owner, who makes the presubscription decision, has interests different from those of the end user. Id. at 6-7.

57. Pacific further asserts that its FGD requirement mirrors that of the Allocation Order, and argues that its ACNA and CIC requirements are necessary to assure proper end office translations, routing, and application of access charges. Id. at 7. Pacific also notes that ICs must be ANI and screen code sensitive because some pay telephones use specialized screening to minimize fraud. Id. at 7-8. Regarding international service, Pacific notes that there is a significant demand in California and Nevada for the ability to place international calls from pay telephones. Id. at 8. In addition, Pacific submits that because many end users opt to place collect and third-number-billed calls rather than calling card calls, ICs should be prepared to accept such arrangements. Id. at 8-9. Pacific also observes that, although each of its pay telephones will carry a placard identifying the presubscribed IC, its identification requirement is necessary because such placards might be vandalized. Id. at 9. Finally, Pacific contends that ICs must be required to comply with state and federal regulations "to protect end users and premise owners from being forced to deal with entities that refuse to comply with applicable laws and regulations." Id.

III. DISCUSSION

58. The majority of the payphone presubscription tariffs now under consideration contain various interexchange carrier restrictions. These restrictions include, for example, requirements that ICs charge rates no higher than those of the dominant carrier, obtain state certification, accept BOC calling cards, and process international calls. Other matters raised by petitioners include the definition of customer consent, the release of premises owner information, and the imposition of service quality requirements (particularly the 5-second response time mandated by Bell Atlantic). In addition to these tariffed restrictions, it is evident that certain LECs anticipate imposing interexchange carrier restrictions that are not described in their tariffs.

59. Upon extensive review of the proposed restrictions and related pleadings, the Common Carrier Bureau finds that these requirements do not constitute just and reasonable regulations and therefore are unlawful under

the provisions of Section 201(a) of the Act. We also conclude that such provisions were not contemplated by the Commission's Allocation Order, which stated that the LECs should determine presubscription procedures for pay telephones "and inform the [ICs] of their decision."[19] The Commission, in calling for the development of payphone presubscription procedures by the LECs, did not contemplate the imposition by the LECs of broad restrictions upon the choice of interexchange carriers or LEC-imposed restrictions upon interexchange carrier rates or practices. US West correctly interpreted this limited reference to payphone presubscription by filing a tariff which does not impose myriad restraints on participating ICs.[20] Because SWB and BellSouth have done the same, we are accepting the SWB and BellSouth tariffs without suspension or investigation. All other payphone presubscription tariffs under consideration in this Order are rejected.

60. The Commission and this Bureau have previously rejected restrictions on customers' use of services. For example, the Commission's Carterfone Decision[21] ordered AT&T to modify its tariff so as not to prohibit use of an interconnection device. The Commission based its finding on the holding in the Hush-A-Phone Decision[22] "wherein it was held that tariffs cannot be sustained which impose an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."[23] Similarly, this Bureau's May 20 WATS Order concluded that the LECs' imposition of use restrictions which permitted only certain access lines to be used for WATS, or restricted the type or amount of traffic to be transmitted over any special access line "violate the intent and purpose of the access charge rules."[24]

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19 Allocation Order, 101 FCC 2d at 932.

20 See Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal Nos. 174 and 210, DA 88-1886, Order, released Dec. 7, 1988 (US West Payphone Order).

21 Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968), recon. denied, 14 FCC 2d 371 (Carterfone Decision).

22 Hush-A-Phone Corporation v. United States, 238 F.2d 266 (D.C. Cir. 1956) (Hush-A-Phone Decision).

23 Carterfone Decision, 13 FCC 2d at 439.

24 Annual 1986 Midyear Access Tariff Filings, Memorandum Opinion and Order, Mimeo No. 4621, released May 20, 1986. recon. denied, 1 FCC Rcd 1247 (1986) (May 20 WATS Order).

61. Similar considerations lead us to conclude that the restrictions imposed by these payphone prescription plans are unlawful. The LECs are required, because of their obligations as common carriers and because of the provisions of the Commission's access rules, to provide access service free of LEC-initiated restrictions. To the extent that LECs seek to encumber the general availability of their access services by forcing customers to abide by a range of requirements and restrictions in order to be eligible to receive the access services, the LECs are in effect seeking to turn themselves into regulators of the manner in which the interexchange carriers may utilize access services. That responsibility has not been delegated to the LECs.

62. LEC-imposed restrictions upon users of their access services also create the risk that LECs will engender restrictions which further the LECs' own interests. For example, the requirement that ICs must accept BOC credit cards in order to be eligible to participate in the presubscription process would seem to have more to do with promoting BOC business interests than with designing reasonable presubscription procedures.

63. We are not persuaded by carrier claims that the maximum rate restrictions for interexchange carriers implement the Commission's Allocation Order. Various petitioners have correctly noted that the Allocation Order does not require interexchange carriers to adhere to particular rates to be included on the ballot. The LECs cannot lawfully impose requirements for inclusion in the ballot that have not been mandated.

64. Our conclusion regarding the legality of the LECs' proposed payphone tariffs, however, does not alter the fact that we harbor several concerns regarding the effect of pay telephone presubscription on end user customers. In fact, in a recent complaint proceeding regarding AOS providers, this Bureau imposed carrier identification requirements similar to those proposed in the LECs' payphone tariffs.[25] That Order mandates that carriers identify themselves to the end user via placards on the telephones and on line prior to assessment of charges. The Bureau further ordered carriers to provide customers with rate information upon request. Some of the other restrictions proposed by the carriers are likewise enforceable through means other than carrier-initiated tariff restrictions. For example, Sections 68.4 and 68.112 of the Commission's Rules, 47 C.F.R. §§ 68.4, 68.112, require that pay telephones be equipped to assist hearing-impaired end users.

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25 See TRAC v. Central Corp., Int'l Telecharge et al., File Nos. E-88-104 through E-88-108, DA 89-237, Memorandum Opinion and Order, adopted Feb. 24, 1989.

IV. CONCLUSION; ORDERING CLAUSES

65. The Common Carrier Bureau has reviewed the tariff transmittals, the supporting materials, and the pleadings, and we conclude that the tariffs referenced herein violate Section 201(b) of the Communications Act and therefore must be rejected. Excepted are the SWB and BellSouth tariffs, which will become effective as scheduled. In the event that any carrier desires to refile its tariff reflecting revisions necessary to comply with this Order, it may make such a filing on 10 days' notice. For purposes of any such refiling, the Bureau will consider reasonable any tariff provisions which are consistent with the provisions and procedures set forth in the Commission's Order regarding presubscription of business and residential telephones.[26]

66. Accordingly, IT IS ORDERED that the petitions opposing the Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 276; New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 947; New England Telephone Company Tariff F.C.C. No. 40, Transmittal No. 960; the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 251; the Pacific Bell Telephone Company Tariff F.C.C. No. 128, Transmittal No. 1391; and the Nevada Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 73 ARE GRANTED to the extent indicated herein, and the tariffs ARE REJECTED.

67. IT IS FURTHER ORDERED that the petitions opposing the BellSouth Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 204 ARE DENIED.

68. IT IS FURTHER ORDERED that the above-referenced companies whose tariff filings are rejected SHALL FILE tariff revisions not later than March 15, 1989, to become effective on one day's notice, in order to remove rejected material from their tariffs. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 89-189 is assigned.

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26 Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order).

69. IT IS FURTHER ORDERED that the above-referenced companies whose tariff filings are rejected may file tariff revisions reflecting provisions in compliance with this Order not later than March 15, 1989, to become effective on not less than 10 days' notice. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 89-190 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock

Gerald Brock
Chief, Common Carrier Bureau

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

DA 89-237

In the Matter of	)	
	)	
TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND CONSUMER ACTION	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
CENTRAL CORPORATION	)	File No. E-88-104
INTERNATIONAL TELECHARGE, INC.;	)	File No. E-88-105
NATIONAL TELEPHONE SERVICES, INC.;	)	File No. E-88-106
PAYLINE SYSTEMS, INC.; AND	)	File No. E-88-107
TELESPHERE NETWORK, INC.	)	File No. E-88-108
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted February 24, 1989; Released February 27, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us a formal complaint filed by Telecommunications Research and Action Center ("TRAC") and Consumer Action ("CA") (together "TRAC/CA"), two not-for-profit consumer advocacy groups, against the above-named providers of alternative operator services (AOS).[1]

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1 The defendants referred to herein are as follows: Central Corporation ("Central"); International Telecharge, Inc. ("ITI"); National Telephone Services, Inc. ("NTS"); Payline Systems, Inc. ("Payline"); and Telesphere Network, Inc. ("Telesphere"). In addition to defendants' answers, other pleadings filed in this matter include: a Motion to Respond in Consolidated Manner and Clarify Pleading Schedule, a Motion to File Late Pleading Schedule, a Motion to File Late Pleading, a Reply to Answers to Complaint and Petition to Revoke Authority to Operate, a Motion to File Corrected Copy, and a Corrected Copy of the Reply to Answers to Complaint and Petition to Revoke Authority to Operate filed

The complainants request that the Commission find the defendant AOS companies to be dominant carriers, revoke any operating authority under which the Defendants are operating, order them to cease and desist from offering service, and find that the rates and practices of the defendants are unjust and unreasonable in violation of Section 201(b) of the Act. For the reasons set forth below, the complaint is granted in part and denied in part.

II. BACKGROUND

2. This complaint grows out of the activities of a new segment of the partially deregulated telecommunications industry, the "alternative operator services", or "AOS" providers' industry.[2] Indeed, Commission policy encourages the entry of new competitors in interstate and international service markets. This open entry policy provides competitive prices and stimulates the introduction of innovative new service and consumer options. Generally, AOS companies lease long distance lines from interexchange carriers and combine that transport element with their own operator services. The AOS companies then enter into agreements with client companies, called "call aggregators", who typically are hotels, motels, hospitals, universities, airports, and other businesses and organizations that have telephones available to transient users. Under these agreements, the call aggregator's customers are automatically connected to the AOS provider when they make certain operator assisted long distance calls.[3] In the case of such agreements, the telephones on the call aggregator's premises are said to be "presubscribed" to the particular AOS company.

3. An AOS company's operator services are generally associated with "0+" calls, e.g., collect, third-party billed, and credit card calls

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by TRAC/CA; an Opposition to TRAC/CA's Motion to Reply in Consolidated Manner and Clarify Pleading Schedule, and a Motion to Dismiss filed by Telesphere. TRAC/CA's Motions were granted on September 13, 1988. Order, DA 88-1432. Finally, the State of Connecticut Office of Consumer Counsel filed a Petition to Intervene on August 31, 1988 for the purpose of monitoring the proceeding. We grant the motion.

2 As the AOS industry has grown, some participants have objected to the term "alternative" since it implies, they argue, that their companies are defined only in the context of being an alternative to AT&T. In response, they have urged the substitution of the acronym "OSP" (for "operator service provider") for AOS. While noting the concerns of those members of the industry who prefer the term "OSP" industry, the more prevalent AOS acronym will be used in this proceeding.

3 AOS providers may also provide operator services for other interexchange carriers under contract.

(including calls made with telephone company calling cards and major credit cards).[4] For the services they provide, each AOS company charges its own rates, which in addition to a return on investment are allegedly designed to recover the costs of leasing the underlying long-distance transport, plus their own costs of providing the operator assistance. Local exchange carriers ("LECs") generally bill customers and collect payments for AOS companies in accordance with contracts between the AOS provider and the LEC or, in some instances, under intrastate rate schedules. Calls billed to a telephone company calling card will often appear on the user's monthly telephone bill. Calls billed to a bank or consumer credit card (e.g. MasterCard, Visa, etc.) appear on that credit card bill rather than on a monthly telephone bill.

4. In the aftermath of the AT&T divestiture and the ongoing changes in regulation of the telecommunications industry, consumers have understandably experienced a certain amount of confusion as the traditional ways of obtaining and using telephone service have given way to the sudden appearance of new options and alternatives in an increasingly competitive environment. So too has the advent of AOS brought with it its share of confusion and complaints. The Commission has received a large number of informal complaints involving AOS carriers, many of which involve the defendant companies. In many cases, consumers claim they were not adequately informed by the call aggregator or the AOS provider that their call would be handled by an AOS company or what charges would be incurred. In other instances, consumers complain that they were unaware of the existence of numerous AOS companies as opposed to traditional service providers. Since each AOS company charges its own individual rates, even when the caller uses another telephone company's calling card, and because of the rate variations that may result from technical anomalies such as "call splashing",[5] some consumers have expressed surprise and confusion over their bills. Along with complaints about rate levels and improper billing, other informal complaints have arisen from the practice of "call blocking".[6] In short, call blocking

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4 While the complaints only address "0+" calls, the issues and remedies are equally applicable to "1+" calls, which include calls from coin operated telephones which are paid in cash, so-called "sent paid" telephone calls.

5 Call splashing occurs when a caller requests a transfer from an AOS company operator to his preferred interexchange carrier. Since the call is handed off to the preferred carrier in the city where the AOS company's operations center and switch are located, the point from which the call will be billed will often be different from the caller's originating location, and the call may be billed at a rate different than the caller may have anticipated.

6 Call blocking refers to the process of screening the calls dialed from the presubscribed telephone for certain predetermined numbers, and preventing or "blocking" the completion of calls which would allow the

and splashing, coupled with the fact that many AOS companies charge rates higher than AT&T, have led to consumer dissatisfaction with some of the AOS providers and, in turn, to complaints such as the instant one.

III. CONTENTIONS

5. The complainants, relying principally on the Commission's orders in the Competitive Carrier proceeding[7] argue that the defendant AOS companies fit the Commission's definition of a firm with market power and therefore should be regulated as dominant carriers. As dominant carriers, complainants contend, the defendants are providing services without the requisite authorization pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214[8] and should be ordered immediately to cease and desist from providing such service. Complainants advance two arguments in support of their claim of market power. First, complainants cite what they perceive as the inability of market forces to constrain AOS rates and practices. They argue that because of a lack of factual information end-users are unable to

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caller to reach a long distance telephone company different from the AOS company.

7 Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization: Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) ("Notice"); First Report and Order, 85 FCC 2d 1 (1980) ("First Competitive Carrier Order"); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) ("Further Notice"); Second Report and Order, 91 FCC 2d 59 (1982) ("Second Competitive Carrier Report"), recon. denied, 93 FCC 2d 59 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) ("Fourth Competitive Carrier Order"); Fifth Report and Order, 98 FCC 2d 1191 (1984) ("Fifth Competitive Carrier Order"); Sixth Report and Order, 99 FCC 2d 1020, vacated and remanded sub nom., MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

8 Section 214 provides in pertinent part:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.

make market decisions as to which carrier to use in certain circumstances and thus the defendants are able to charge prices above those of their underlying carrier, e.g., AT&T, MCI and US Sprint, without losing market share in these circumstances. Second, the complainants allege that the ability of the AOS providers and their call aggregators to control the facilities where calls are routed (i.e., the PBX equipment on the call aggregators' premises) and engage in call blocking clearly establishes that the defendants possess market power. Citing the Commission's First Competitive Carrier Order, the complainants contend that the exercise of control by the defendents over these bottleneck facilities is prima facie evidence of their market power.[9]

6. As a separate but related matter, the complainants assert that the rates charged by defendants are exhorbitant and therefore unjust and unreasonable in violation of Section 201 of the Communications Act, 47 U.S.C. § 201.[10] Complainants contend, in effect, that the Commission established a standard in Competitive Carrier which provides that the underlying carriers' rates operate as a "just and reasonable" ceiling on the resellers' rates and that a reseller may not price its services above the underlying carrier.[11] Complainants argue that since the rates charged by the defendants are in excess of those charged by AT&T, they must be found to be unjust and unreasonable within the meaning of Section 201.

7. An adjunct of complainants' market power contention is the claim that call splashing and call blocking are unreasonable practices. They contend that because AOS providers typically fail to identify themselves or notify consumers that they will pay rates higher than AT&T's, the effect of these practices is to leave uninformed or captive consumers[12] with no

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9 First Competitive Carrier Order at 21.

10 Section 201(b) provides that:

> All charges, practices, classifications, and regulations for and in connection with such communications 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.

11 Complaint at para. 15.

12 The Complainants maintain that any suggestion that the informed consumer can find another telephone is not feasible. The Complainants state that it is virtually impossible for many consumers (hospitalized patients, college students in a dorm where all telephones are presubscribed to the AOS service, etc.) to gain access to a non-presubscribed telephone.

practical alternative but to pay the higher rates. The Complainants argue that such practices are contrary to the public interest and provide adequate grounds to revoke the operating authority of the defendants.

8. The arguments advanced by the various defendants in response to the complainants' allegations are for the most part identical in their essentials. Therefore we will summarize the arguments as if they were part of the same pleading. Insofar as individual defendants set forth unique arguments, they are treated individually. The central thrust of the defendants' collective response is that:

1. they are not dominant carriers, since none of them possess market power over any bottleneck facility;[13]

2. no case has been made that their rates are unjust or unreasonable;[14] and

3. they either do not engage in the practices that are alleged to be unlawful, or in those limited instances in which they do, such practices are not unjust or unreasonable.[15]

Moreover, the companies affirmatively assert that their presence in the marketplace is pro-competitive and that they now provide or are developing and will soon provide innovative services that AT&T does not provide, such as the use of bank credit cards, multilingual operators, voice messaging and voice mail.[16]

Complaint at para. 22.

13 See, e.g., ITT Answer at 16-17, Appendix A at pp. 20-21; Payline Answer at 13; Telesphere Answer at 14; NTS Answer at 16.

14 See, e.g., Central Answer at 5; Telesphere Answer at 5-6; ITT Answer at 7, 19; Payline Answer at 15.

15 NTS Answer at 11-12; Payline Answer at 17-19; ITT Answer at 20-21; Central Answer at 4-5.

16 Central makes the additional claim that it is a carrier described in Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b), and as such, is not subject to the Commission's Section 208 complaint procedures. No support is provided for their claim that they are a 2(b)(2) carrier and we find it to be without merit.

IV. DISCUSSION

9. As an initial matter, we note that the defendant companies are resellers as defined in Competitive Carrier [17] and as such, are classified as non-dominant carriers under our current regulatory scheme. Our decision to classify resellers as non-dominant was based on our finding that given the low barrier of entry into the resale industry, resale carriers faced more actual and potential competition than any other part of the telecommunications industry.[18] The policies adopted in Competitive Carrier are intended to enable resellers and other non-dominant carriers to respond to the demands of a competitive marketplace without unnecessary regulatory constraints. We deny the complaint to the extent that it requests that we depart from the conclusions and policies established in Competitive Carrier. The instant complaint, insofar as it seeks the reclassification of certain types of resellers, is a request for modification of the Commission's rules as developed in the Competitive Carrier Orders. We cannot, of course, modify our rules in the context of this complaint proceeding. In any event, consistent with the policies set forth in Competitive Carrier, we are satisfied that our complaint process and the remedial actions set forth herein fully redress the complainants' grievances.

10. We turn next to the issue of alleged unjust and unreasonable rates. The complainants have relied solely on the assertion that the defendants' rates are in excess of rates charged by AT&T, the assumed underlying carrier.[19] Complainants have cited no Commission authority to support their implicit proposition that a carrier's rates can be found "unjust and unreasonable" solely on the basis that they exceed the rates of some other carrier. The quantity and quality of services vary among carriers as do their underlying cost structures, all of which could support significant differences in rate levels. Based on the record, we find no facts or arguments which would be legally sufficient to sustain a finding that the defendants' rates

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17 The Second Competitive Order defines resellers as those carriers which do not own any transmission facilities but obtain basic communications services from underlying carriers for resale purposes. 91 FCC 2d at 70.

18 First Competitive Carrier Order at 29.

19 We note that complainants have not placed any specific information into the record regarding the identification of underlying carriers, but have assumed in most cases that it is AT&T.

are unjust and unreasonable within the contemplation of Section 201 of the Act.[20]

11. Finally, we address the complainants' allegations of unjust and unreasonable practices on the part of the defendants in their provision of AOS services. Part of the rationale underlying the Commission's decision in Competitive Carrier to relieve resellers and other non-dominant carriers from unnecessary and counterproductive regulatory constraints was the recognition that competitive forces in the marketplace would ensure compliance with the Communications Act.[21] The Commission found that, in general, carriers with little or no market power were incapable of charging rates or engaging in practices which contravene the "just and reasonable" requirements of the Act.[22] In relieving non-dominant carriers from tariff filing requirements, the Commission acknowledged that Title II of the Act serves as a primary means to ensure that consumers are provided access to necessary information and to ensure that the Act's objective of just and reasonable rates and practices were met.[23] The Commission emphasized, however, that in the event marketplace forces prove to be inadequate, remedial actions as may be necessary to protect the public may be taken.[24]

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20 Contrary to complainants' contention, the Commission did not establish a standard in the Second Competitive Carrier Order which requires that resellers price their services at a level no higher than the underlying carrier's rates. Rather, the Commission noted that the underlying carrier's rates, which are constrained by Sections 201-205 of the Act, would effectively discipline a reseller's rates because, if "a reseller were to set its price above the rates of the underlying carrier or competing carriers, its customers would be expected to migrate to these other services." Second Competitive Carrier Order at 69. We find that the basis of the "AOS problem" is not their rates per se, but the practices involving lack of notice and blocking that restrict a customer's ability to "migrate to these other services [of competing carriers]", as we contemplated in the Competitive Carrier proceeding. It is these restrictive practices that we proscribe in this Order.

21 First Competitive Carrier Order at 20.

22 Id.

23 Second Competitive Carrier Order at 70-71. Section 203(a) of the Act requires common carriers, with limited exceptions, "to file and keep open for public inspection" schedules showing all charges for interstate and foreign wire or radio communications.

24 Id. at 70.

12. Therefore, in addressing complainants' allegations regarding the defendants' practices, we place particular importance on those statements in the record which describe the nature and level of consumer information that the respective defendant companies have provided to their caller/customers. We are also aware of the volume of informal complaints the Bureau has received that confirm the existence of many of the problems that are at issue here.[25] We are particularly concerned with the current practices of some of the defendant AOS companies regarding consumer disclosure, call blocking and call splashing. These practices distort and impede the operation of a fully competitive operator services industry. After consideration of the arguments and evidence advanced by the parties to this proceeding, we are persuaded that the practice of call blocking, coupled with a failure to provide adequate consumer information, is unjust and unreasonable in violation of Section 201(b) of the Act. We recognize that some of the defendant AOS companies deny engaging in such practices[26] and find the record unclear with respect to specific practices of each company. Nevertheless, we will require that to the extent that the defendant AOS companies engage in the practices we find unreasonable herein, they must adopt certain revised procedures with respect to consumer notice and call blocking. Moreover, compliance by any other operator service providers with the requirements set forth below will constitute an absolute defense to complaints based on the allegations addressed in this Order.

13. In order to carry out the policies of the Commission's Competitive Carrier decisions and to eliminate the unreasonable practices identified above, we order three specific forms of relief. First, the defendant AOS companies must provide consumer information to their customers in the form of tent cards, phone stickers, or some other form of printed documentation that can be placed on, or in close proximity to, all presubscribed phones. These materials shall set forth the company's identity (name, address and a customer service number for receipt of further information) as well as information to the effect the company's rates will be quoted on customer request. Contracts with call aggregators must contain provisions requiring aggregators to display these materials on, or in close proximity to, all presubscribed telephones. In addition, the defendants must amend existing contracts with call aggregators to reflect this requirement. The defendants will bear primary responsibility for the implementation of the above-specified form of notice, and must make reasonable efforts to assure such implementation within sixty (60) days of the effective date of this Order.

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25 The Bureau's Informal Complaints and Public Inquiries Branch has received approximately two thousand complaints and inquiries regarding AOS rates and practices since January 1988.

26 See, e.g., Central Answer at 5; ITI Answer at 5.

14. Second, we note that at least one of the defendants did not specify the degree to which it engages in "call branding".[27] We find, however, that even the best examples of call branding practiced by the defendants[28] convey insufficient information as to the company's identity, rates, practices, and range of services. This gap in consumer information thwarts effective consumer choice and creates the opportunity for any AOS company to charge excessive rates. For this reason, we find it an unlawful practice for operator services providers not to identify the company before a call is connected, including a sufficient delay period to permit a caller to hang up and/or advise the operator to transfer the call to the customer's preferred carrier. We order this procedure to be implemented by the defendants immediately with the effective date of this Order.

15. While the defendant companies, with one exception,[29] deny that they block calls, it is clear from the information available to us that call blocking in fact occurs.[30] Frequently, contracts between an AOS provider and its customer provide or permit call blocking by the customer. We find that call blocking of telephones presubscribed to the defendant AOS providers or other carriers is an unlawful practice. Accordingly, we order the defendants to discontinue this practice immediately. The defendants must amend their contracts with call aggregators to prohibit call blocking by the call aggregator within thirty days of the effective date of this Order.[31]

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27 See Central Answer at 5. Branding is the process or procedure used by a carrier, in this case the AOS provider, to identify itself to every person who uses its service.

28 See e.g., Payline Answer at 22; Telesphere Answer at 18.

29 See, NTS Answer at 20.

30 See, e.g., Telesphere's Answer at 14, where Telesphere states that Telesphere "does not control the handling of calls by call aggregators" and NTS' Answer at 16, where NTS states that "it does not block calls that reach its network" and that it "does not request or require call aggregators that are its customers to block calls made to other carriers and divert them to NTS."

31 We note that some companies claim to use call blocking to prevent fraudulent use of the network. Companies who wish to argue that such blocking should be permitted are free to seek a waiver of the "no blocking" requirement accompanied by the requisite showing that such a waiver is warranted. Absent the grant of such a waiver, companies may not engage in blocking.

16. Call splashing, the process of indirectly routing a call when a caller requests that the call be handled by a different carrier, often results in charges that are different than expected because the call has not been properly rated. Since the transferred call is often billed from a point other than its originating location, the consumer will often receive a bill which appears to be incorrect, either as to the rate charged for the call, or the location called from, or both.[32] While the actual levels of call splashing may vary among the five defendants, we are concerned that its effects be minimized. One possible method of addressing this problem is identified by Payline in its answer to the complaint. According to Payline, it attempts to absorb any charges itself which result from call splashing.[33] Even Payline admits, however, that it has not been able to successfully address this problem in many instances.[34]

17. The problem of call splashing reflects the technological characteristics of the network for which a solution can best be found through the cooperation of service providers including the Bell Operating Companies and AT&T on an industry-wide basis. Because we are concerned that this practice may have an adverse economic impact on consumers, we are requiring the defendant AOS companies to bring this matter before the Carrier Liaison Committee of the Exchange Carrier Standards Association. We understand that both hardware and software problems may need to be addressed in any ultimate resolution of this matter and we require the defendants to provide a progress report within sixty days. The defendants are required to eliminate immediately any call splashing that is within their technical capability to accomplish with their current networks.[35] The Bureau's Enforcement Division will closely monitor progress towards a resolution of this networking problem.[36]

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32 See, NTS Answer at 18.

33 Payline Answer at 17-19.

34 Payline Answer at 19.

35 We note that NTS filed with the Commission a petition seeking a Commission declaration that AT&T be required to establish through rates for transferred calls and a division of charges as a solution to call splashing. See "Petition for Order to Require AT&T to Establish a Through Rate and Reasonable Division of Charges," File No. ENF-89-02, filed November 15, 1988. We are in no way prejudging our review of the positions set forth in that proceeding.

36 Many of the problems associated with call splashing may be eliminated when call blocking ceases, since customers will be able to dial their carrier of choice directly.

V. CONCLUSION

18. In sum, we find in this order that the practices identified in the paragraphs above, namely, paragraphs 12, 13, 14 and 15 constitute unreasonable practices in violation of Section 201(b) of the Communications Act. To remedy these problems, we identify two mechanisms which will assure that consumers are properly protected -- the identification of the primary carrier and related information on or in the vicinity of the telephone and a specific identification of the company by the service provider on line prior to connecting a call. Further, we order the defendants to give rate information on request to consumers and declare the call blocking practices identified in the complaint to be unlawful. Finally, we have put a mechanism in place for dealing with the industry-wide technical problem of call splashing. Implementation of the remedies identified herein by any other carrier, including AT&T, constitute a defense against similar complaints.

19. These remedies, taken collectively, should assure that sufficient information and options will be made available to consumers in order to facilitate informed decisionmaking. The consumer should be the key determinant of which companies in the operator services industry thrive and which companies do not succeed. If the consumer concludes that some or all of these companies provide services that they want, the industry will expand and be financially sound. The steps taken in this Order will permit those consumer choices to be made soundly and rationally.

20. Accordingly, IT IS ORDERED, pursuant to the provisions of Sections 4(i), 4(j), 201(b), and 208 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b) and 208, and pursuant to authority delegated in Section 0.291 of the Commission Rules, 47 C.F.R. § 0.291, that the "Complaint and Petition to Revoke Authority to Operate," filed by Telecommunications Research and Action Center and Consumer Action on July 26, 1988, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

21. IT IS FURTHER ORDERED, that the "Petition to Intervene" filed on behalf of the State of Connecticut Office of Consumer Action IS GRANTED.

22. IT IS FURTHER ORDERED that the policies and procedures set forth and adopted herein shall become effective thirty (30) days from the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Easy Access Dialing Carrier Selection Form

Southwestern Bell Telephone

CHFDM052DSA 89PUB

Your telephone number:

014-623-0004 004

CAR-RT SORT **
PUBLIC COIN
1000 APPLEGATE WAY
ST LOUIS MO 63121

Please choose a long-distance company to provide your "0+" long-distance service for the telephone number listed above by checking one company you want from the list of companies at right.

Sign this form and return no later than: 01/23/89

The long-distance company you select will begin serving you: 04/26/89

CUSTOMER NOTE:

Easy Access Dialing is available only for the telephone number or numbers shown below. Your selected long-distance company will provide "0+" long distance service for these numbers only.

314-621-0115 ( )( )( )

Please check one selection only.

AT&T LONG DISTANCE SERVICE
288
( ) 1-800 KEEP ATT
(1-800-533-7288)

MCI "0+" SERVICE
222
( ) FOR PAY PHONE INFORMATION CALL
1-800-444-9095

US SPRINT PUBLICFON SERVICE
333
( ) 1-800-347-2500
BOX 15981 SHAWNEE MSN KS 66215

TEL-SHARE U.S. INC.
330
( ) -TRAVEL CALL-
1-800-288-9190

DIAL U.S.
339
( ) A HEDGES COMPANY
1-800-798-0115

ITT COMMUNICATIONS SERVICES
488
( ) 1-800-526-3000

AMERICAN LONG DISTANCE EXCHANGE
540
( ) SUPER COMMISSION PLAN
1-800-669-2647

TELESPHERE
555
( ) OAKBROOK TERRACE, ILL 60181
1-800-346-6329

NATIONAL TELEPHONE SERVICES
658
( ) 1-800-365-0078

ITI
805
( ) 0+ REVENUE SHARING
1-800-888-2285

TELECONNECT COMPANY
835
( ) CEDAR RAPIDS, IOWA
1-800-728-7000

EXHIBIT D

"If all telephone information on this form is not correct as shown, please contact your local Southwestern Bell Telephone Co. Business Office to arrange for Easy Access Dialing. This ballot may not be processed if received after the date your area converts to Easy Access Dialing.

Southwestern Bell Telephone will make every effort to ensure that your telephone service is connected to the long-distance company you choose. In the event your service is inadvertently connected to a different company, Southwestern Bell Telephone will assume liability only to the extent of connecting you to your chosen company at the earliest opportunity after you notify us.

Signature _____ Date _____

Return to: Southwestern Bell Telephone, Easy Access Dialing
PO BOX 4573, Houston Texas. 77210

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