IN THE SUPREME COURT OF FLORIDA

INTERNATIONAL TELECHARGE, INC., Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. **75,282**

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

The Public Service Commission is referred to in this brief as the "Commission." Appellant, Internal Telecharge Inc. is referred to as "ITI" or "appellant." References to the record on appeal are designated (R _____). References to the hearing transcript are designated (T_____).

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts as presented by Appellants does not contain all the relevant facts and details necessary for the Court's understanding of the Commission's decision in this case. Therefore, the Commission presents its own Statement of the Case and Facts for this Court's consideration.

This appeal arises from Commission Order No. **20489,** which was the culmination of an extensive investigation of a new group of telephone service providers called Alternative Operator Service Providers (AOS).[1] AOS providers are recent entrants into the telecommunications market. Prior to the divestiture of AT&T in **1982,**[2] all operator services were a part of the monopoly service provided by AT&T (now ATTA-C) and the Local Exchange Companies (LECs). Competition and technology in the telecommunications industry made it possible for AOS providers to market operator services previously controlled by ATT-C and LECs.

'The term "Alternative Operator Services" is defined by the Commission in Order No. **20489** as **". . .** the provision of operator services through operators other than those of the LEC and ATT-C." This term is used throughout the country to identify and distinguish these providers of operator service from the LEC and ATT-C operators. (R **1028).**

[2]United States v. American Telephone and Telegraph Co., **552** F. Supp. **131** (D.D.C. **1982).**

AOS companies typically provide operator services to payphone owners, hotels, hospitals, and other businesses that produce a large amount of telecommunications traffic at their business locations. AOS companies contract with these businesses, described as "call aggregators", to provide operator services for calls made from the businesses' telephones.[3]

In a typical AOS environment, when a caller, a hotel guest, payphone user, or hospital patient, dials only zero (referred to as **"0-"**), or zero plus the remaining digits of a call (referred to as **"0+"**), the call is intercepted and the caller is connected to an alternative operator. That operator records billing information, and forwards the call for completion. The call is charged to a credit card, third party, or to the caller's home telephone number on his local telephone bill through billing and collection agreements with the caller's local telephone company. The charge to the end user, the one who places the call and is responsible for payment, is usually higher than the price an interexchange company (IXC) would charge for the same call. (R 1025).

AOS companies share the revenues from the higher rates with the businesses they serve. AOS companies compete with each other by offering higher commissions to their business customers which

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[3]In the AOS proceedings, the Commission distinguished between the **"customers"** of the AOS provider, who are the business owners of the premises where the telephones are located and the "end users," or "consumers" who place the telephone calls and are responsible for payment. The consumers of alternative operator services are **not** the customers of the AOS providers.

are recouped through the prices they charge consumers for the calls they intercept. The higher the price, the higher the revenue stream they can offer the business customer (T 198, 705, 708-709, 1214).

In the years following the emergence of AOS companies, utility commissions throughout the country received numerous complaints from consumers regarding AOS companies.[4] In 1988, the National Association of Regulatory Utility Commissions (NARUC) initiated an investigation into the practices of AOS companies, as did the Federal Communications Commission.[5]

Florida, too, received an "inordinate number" of complaints from consumers who had been charged for telephone calls by AOS providers. Order No. 19095. In response to those complaints the Commission initiated its own investigation of the practices and activities of AOS providers in Docket No 871394-TP, In Re: Review of Requirements Appropriate For Alternative Operator Services and Public Telephones, and in April of 1988 it set for hearing the fundamental, "threshold question of whether the provision of alternative operator services is in the public interest". Order No. 19095.

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[4]See, for example, Re International Telecharse, Inc., 105 PUR 4th 160 (1989), and cases cited in footnote 11.

[5]See, NARUC, "Resolution Recommending Guidelines for Agencies Considering Regulating Alternative Operator Services," 32-1988 Aug. 8, 1988; and FCC, In the Matter of Telecommunications Research and Action Center v. Central Corporation, International Telecharae, Inc.. et. al., DA 89-237. Feb. 27, 1989.

In Order No. 19095, the Commission identified several problems which led it to investigate the AOS industry. Individuals using pay telephones, patients in hospitals, and hotel guests were often unaware that they were using alternative operator services until several months later when they received very high charges for the calls on their local telephone bills. (T 1184, 1190). Callers were unable to reach the local telephone operator to assist in emergencies, or to transport a long distance call, and they were prevented from using the interexchange carrier of their choice. (T 1216). The most numerous complaints concerned the rates that AOS providers were charging.[6]

The Commission also found some AOS companies were operating illegally or in violation of previous Commission orders. Some AOS providers did not have certificates as required by section 364.33, Florida Statutes, and others did not route all "0-" and "0+" intraLATA traffic to the local exchange company. (R 1026).

On the basis of the testimony and record developed in a three-day hearing, the Commission issued Final Order No. 20489 on December 21, 1988. The Commission held that:

> The provision of alternative operator services as it currently exists is not in the public

[6]"Our staff made test calls using several AOS providers. One AOS provider billed $4.01 for an unanswered call. Local exchange companies do not charge for unanswered calls. For two intra-exchange calls (Miami to Miami and Hollywood to Hollywood), the same company billed $3.45 and $2.45, respectively. The local exchange rate for each call would have been $1.00." Order No. 19095.

> interest, however with implementation of the requirements set forth herein the provision of intrastate alternative operator services shall be allowed. (R **1044).**[7]

Under the terms of the order, AOS providers are required to meet certain conditions to be certified. They must:

> **1)** identify themselves at the beginning and end of each call, to insure that the end user did not believe that the LEC or ATT-C was handling the call;
>
> 2) ensure that their customers provide information about operator services and rates and charges to callers by card or sticker prominently placed near the telephone;
>
> 3) provide rate information to end users upon request;

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[7]The vote on the fundamental public interest question was **3-2,** Chairman Nichols and Commissioner Gunter dissenting. In a separate dissenting opinion, Chairman Nichols stated:

> "In my opinion, thus far, the AOS market has served simply as a vehicle for third parties to collect commissions, to the detriment of the public in general.
>
> AOS is not in the public interest because it results, in many cases, in captive customers being routed to interexchange carriers not of their choosing and being charged exorbitant rates without adequate knowledge of those charges. I consider this form of competition not to be to the benefit of customers actually making the call and, therefore, not in the public interest. . . .
>
> I cannot help but point out the irony of saying this service is in the public interest as it provides competition, when without quite comprehensive regulation this form of competition would certainly prove detrimental to **consumers."** Order No. **20489.** (R **1045-1046).**

4) file tariffs fully describing rates and charges to end users;

5) refrain from billing or charging for uncompleted calls, or billing for completed calls in increments greater than one minute, unless the provider could demonstrate an established relationship with the end user; and

6) provide consumer access to all locally available interexchange carriers.

The Commission further determined in its order that all "0-" and "0+" intraLATA calls must continue to be routed to the local exchange company pursuant to previous Commission orders.

Finally, the Commission ordered the AOS providers to implement a rate structure comparable to the ATT-C time-of-day rate for operator services:

> In determining what rates and charges should be charged by the AOS providers to end users we have attempted to protect the transient public, since they are the persons which most frequently encounter an AOS provider. We believe that the rates we are approving will sufficiently protect consumers against excessive pricing. . . . In a truly competitive environment a rate cap would be unnecessary, but AOS as it currently exists in the marketplace is not competitive.
>
> We believe a primary purpose of regulation should be to ensure that the public interest is well served . . . .
>
> [w]e find that AOS providers have failed to demonstrate why they should be permitted to charge rates above ATT-C's. If consumers were to benefit from the arrival of the competitive companies, they should have experienced price savings, not price increases. Order No. 20489 (R 1037-1038).

Appellant, ITI, and other AOS companies filed motions for reconsideration of the Commission's final order. ITI filed a motion for stay pending that reconsideration. (R 1060, 1145, 1280). The Commission granted a stay, but required that any company wishing to continue to charge rates above the limit proscribed in Order No. 20489 must post a bond or corporate undertaking with the understanding that any amounts collected above the proscribed limit would be subject to a refund upon issuance of the reconsideration order. (R 1350). ITI's corporate undertaking was approved, and it continued to charge rates higher than those approved by the Commission pending the outcome of reconsideration. (R 1383).

On November 29, 1989, the Commission issued Order No. 22243 reaffirming the substantive decisions of Order No. 20489. The Commission also ordered ITI to refund the amounts collected pursuant to the corporate undertaking "to the entity originally billed." ITI was directed to file a report on its refund process which detailed the amount of refunds made, identified any unrefundable amounts, and proposed a plan for how to treat those unrefundable amounts. This appeal followed.

SUBSEQUENT LEGISLATION AFFECTING AOS PROVIDERS

Subsequent to the filing of this appeal, the Florida Legislature met in regular session and reenacted Chapter 364, Florida Statutes, pursuant to Florida's Regulatory Sunset Act, section 11.61, Florida Statutes. The Legislature extensively revised Chapter 364 and created new definitional and substantive sections of the law which deal specifically with the provision of AOS in Florida. Chapter 90-244, Laws of Florida. The new law takes effect October 1, 1990.

SUMMARY OF THE ARGUMENT

On the basis of a substantial record produced at a hearing in the proceedings below, the Commission determined that AOS providers were not in the public interest unless they adhered to certain conditions of service. One of the conditions that the Commission placed on AOS providers was a limit on the rates they could charge for their services. The evidence demonstrated that AOS were charging excessive rates to captive and unwitting telephone users. But for the existence of AOS companies, telephone users would pay lower prices for operator assisted calls at hotels, payphones, hospitals and other locations which aggregate a large amount of telephone traffic.

The Commission's choice of ATT-C rates was reasonable because those were the rates available to consumers before AOS entered the market, and ATT-C rates had previously been approved by the Commission. The Appellant and other AOS providers had the burden of showing the issuance of a certificate without the condition of a rate cap, or with a higher rate cap, was in the public interest. They did not meet this burden.

The establishment of a "fair rate of return" for for AOS providers is not an issue in this case. That principle applies to the regulation of public utilities in a monopoly market. It has no application to a competitive market.

The Commission's decision to require ITI to refund excessive charges to those who had paid the charges was not arbitrary at all and it was not punitive. The decision was made in conformance with

statutory requirements and the Commission's own refund rule. Evidence presented at the hearing which concerned a refund held to be an invalidly promulgated rule was not relevant to the specific refund the Commission ordered ITI to make.

The Commission did not violate the equal protection clause by imposing different conditions of service on AOS providers than it does on ATT-C. The record provides ample support for the Commission's determination that AOS providers are in fact different and require different regulatory treatment than ATT-C. The Commission has a legitimate state interest in protecting the public from excessive charges and other abuses in the provision of utility service, and it has not violated constitutional principles by doing so.

The Commission's decision to adhere to well established policy that **"0-"** and **"0+"** calls would be reserved to the LEC's pending review in its generic docket on the subject was a proper and reasonable exercise of its regulatory authority. ITI's position that the Commission should sanction an exception to its policy for AOS is unsupported in the record and inappropriate for a proceeding convened for the limited purpose of determining whether AOS, one small segment of the telecommunications industry, was in the public interest.

ARGUMENT

I. THE PSC'S FINDING THAT CERTIFICATION OF AOS PROVIDERS WOULD BE IN THE PUBLIC INTEREST ONLY IF A RATE CAP WERE IMPOSED IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND COMPLIES WITH THE ESSENTIAL REQUIREMENTS OF LAW

The PSC has authority to issue certificates to providers of competitive telephone service, if, and only if, the issuance of such certificates is in the public interest. Section 364.337, Florida Statutes. Moreover, the Commission may impose such modifications or conditions as it finds necessary to protect the public interest. Section 364.335(4), Florida Statutes. United Telephone Long Distance Inc. v. Nichols, 546 So.2d 717 (Fla. 1989). U.S. Sprint Communications Co. v. Marks, 509 So.2d 1107 (Fla. 1987). In this case, the Commission found it was in the public interest to issue certificates for alternative operator services (AOS) on the condition that the rates they could charge would not exceed a certain amount.

A. THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S CONCLUSION THAT A RATE CAP WAS IN THE PUBLIC INTEREST

There is ample evidence in the record to conclude that a rate cap was in the public interest to prevent ratepayers from being charged exorbitant rates by AOS providers. The rate cap is necessitated by the nature of the AOS market and the imposition of a rate cap was supported by AOS providers who were parties to this proceeding.

The Commission initiated its investigation into AOS providers primarily because of the inordinate number of complaints concerning excessive rates. Order No. **20489** (R **1025**). Testimony was introduced which explained the structure of the AOS market and described how an aberrant form of competition had driven up rates for operator services rather than holding them down (T **198, 705, 708-709, 1214**). In order to get call aggregators such as hotels, motels, and hospitals to become their customers, AOS providers contracted to provide substantial commissions for the right to provide service (T **198**). The cost of these commissions were passed on to the guests or patients in the form of higher rates for in-room telephone service.

Considerable evidence was presented that higher rates had resulted from the advent of the AOS industry. Ms. Kathy Brown, an analyst with the Commission's Consumer Affairs Division, stated that during a 5-month period an inordinate number of complaints were received concerning AOS providers (T **1179-1180**). Of the complaints that had been closed out by the Division of Consumer Affairs, **99%** were found to be justified. She further testified that:

> The majority of consumers' complaints concerned billing. Consumers complained when they received a bill that the charges itemized were excessive and that they did not realize their calls were being routed through an AOS company until they received the bill. (T **1183**).

As pointed out in the Commission's order initiating this proceeding, AOS providers were charging as much as **$4.01** for an

unanswered call. In other cases, rates were twice or three times the rate otherwise available from the LEC or ATT-C. (R 61). Witnesses for the AOS providers admitted that rates charged by some AOS providers may have been excessive (T 32).

Clearly, it was not in the public interest to certificate AOS providers without employing some mechanism to ensure that the rates they charged would be reasonable. The record supported the imposition of a rate cap.

Mr. Alan Taylor, Chief of the Commission's Bureau of Service Evaluation, recommended a rate cap (T **1344, 1347).** He further recommended the cap be set at the AT&T rate:

> I guess where I come from in this is recognizing what the rate would be absent AOS. AT&T is generally available and because of that I think it's appropriate for it to be a benchmark (T **1349).**

The AOS providers themselves supported a rate cap as a means of preventing price gouging. The witness for ELCOTEL applaudedthe rate cap approach. He said the rate cap approach would "spur competitive entry and permit market forces to take hold" and "at the same time, avoid burdensome and time consuming tariff proceedings." (T **404-405).** National Telephone Service's witness likewise supported a rate cap (T **590).**

The evidence presented to the Commission supports the imposition of a rate cap as a condition of AOS certification. Indeed, ITI in their post-hearing brief acquiesced in the imposition of a rate cap. See Appendix at A-3. The Commission's choice of the comparable ATT-C rate is reasonable.

B. THE COMMISSION'S DECISION TO SET THE MAXIMUM RATE AOS PROVIDERS COULD CHARGE AT THE COMPARABLE ATT-C RATE WAS REASONABLE

Having concluded a rate cap was necessary, the Commission then had to select the level for the rate cap. The rates ATT-C charged for comparable service were selected because those rates were available to consumers before AOS entered the market. Furthermore, ATT-C has rates "which have been approved by this Commission, not merely registered in **tariffs." (R 1523, T 1297).**

As pointed out by the appellant, rates for ATT-C operator services were set by the Commission prior to divestiture. Appellant's brief at **12.** While the rate for operator services has remained the same, the rates for other comparable services, such as toll service, have changed and in each instance those rates have been reviewed and approved by the Commission or its staff. Order Nos. **19758, 16180,** and **12788.** Appendix at **A-14.** In Order Nos. **16180** and **19758,** the Commission established a rate band (a rate cap and rate floor) for **ATT-C's** toll services (MTS and WATS)**.** In Order No. **19758,** the Commission discussed in detail the establishment of the price floor and that it be equal to the switched access charges plus billing and collection. The Commission, at page **8** of that order, gave any affected party the right to petition the Commission, at <u>any</u> time, if that party believes ATT-C is engaged in predatory pricing (pricing below costs). No party, including any AOS provider has petitioned the Commission alleging ATT-C rates are below costs.

Likewise, in this proceeding, no AOS provider came forward with concrete evidence to show that current ATT-C rates do not cover costs. Appellants admit in their brief that there was no concrete evidence on which to conclude ATT-C rates did not cover costs. At best, the evidence only suggested "that LEC and ATT-C rates may not even cover their own costs."[8] Appellant's Brief at 16.

The ATT-C rates were also a reasonable choice for a rate cap because it is the rate which was otherwise available in the market. It was the rate the public would pay absent AOS providers being in the market (T 1349). If the effect of AOS entry into the market is higher rates, the public interest in granting them a certificate at all is questionable.

> If AOS companies capture their share of the market to the benefit of their customers (hotels/motels, etc), but at the expense of the end user, the public is certainly no better off and often may be worse off than when consumers had no choice of long distance carriers but ATT-C. Order No. 20489 at 9.

Setting a rate cap at ATT-C rates involves no delegation of Commission ratemaking authority. The Commission maintains ultimate control over the rate cap and over ATT-C rates. The ATT-C rates currently in effect have been approved by the Commission. Any further changes to ATT-C rates must be within the bands previously

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[8]The Appellant's argument regarding Southern Bell experiencing a loss of nearly $16 million on operator services is misleading. As the Southern Bell witness explained, Southern Bell is not allowed to charge for the first three directory assistance calls. (T 1077). It is not because the charges for the individual services do not cover costs.

approved by the Commission, and even rate changes within those bands are subject to Commission staff review. Moreover, AOS providers, or other affected persons can petition for, or the Commission on its own initiative can initiate, a proceeding to change the rate cap for AOS providers, and the rate cap can be changed (provided it is in the public interest to do so) whether or not the ATT-C rates change.

C. THE BURDEN WAS ON THE AOS PROVIDERS TO SHOW THAT THE ISSUANCE OF A CERTIFICATE WITHOUT A RATE CAP, OR AT A HIGHER RATE CAP, WAS IN THE PUBLIC INTEREST

The AOS providers have no absolute right to a certificate under Chapter 364. Applicants for certificates to provide telephone service must prove that the issuance of the certificate is in the public interest.

The appellant's argument on the rate cap issue boils down to this: AOS providers are entitled to certificates without the condition of a rate cap, or they are entitled to a certificate with a higher rate cap. The appellants had the burden of proving either alternative would meet the public interest test, and they failed to carry that burden.

A certificate is a license or permit to provide telephone service and the burden rests with the applicant seeking the license or permit to show their entitlement.

> We view it as fundamental that an applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency.

Department of Transportation v. J.W.C. Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981). The evidence in this case clearly did not support the issuance of certificates to AOS providers without a rate cap. The public had been harmed by having to pay excessive rates for telephone service at hotels, motels, or other premises served by AOS providers. Without a rate cap, excessive rates would continue.[9]

The appellants likewise did not meet their burden of proving issuance of a certificate with a higher rate cap would be in the public interest. The Commission was unconvinced that the general information presented by AOS providers demonstrated that their costs equalled or exceeded the ATT-C rates. Moreover, there was ample evidence to conclude that if AOS costs were in excess of ATT-C rates, it was because of the commissions (or kickbacks) paid to the hotel, hospital, or other call aggregator. AOS providers were paying commissions averaging 15% and some were as high as 20%. (T 198). The Commission did not believe it was in the public interest to condone these kickbacks through increasing the rate cap. It was not in the public interest to approve telephone rates which

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[9]One alternative to a rate cap was full rate base regulation of each AOS provider. That alternative would have been antithetical to one of the legislative purposes of opening telephone service to competition. Competition is supposed to lessen the need for regulatory oversight, not increase it. Moreover, if the introduction of AOS providers has the result of increasing rates to the public for services already available, whether it is in the public interest to certificate AOS providers at all certainly becomes doubtful. Indeed, two commissioners voted against issuing certificates to AOS providers under any circumstances.

subsidized the hotel industry.[10] (T 336, 337, 351, 365, 366, 374, 707-710). As Commissioner Beard stated:

> My job isn't to protect the hotel. My job is to protect the end user, ratepayer. You may not have a contractual relationship with that individual, but I'm going to do my best to make sure they get fair and equitable treatment. (T 187).

D. APPELLANT'S ARGUMENT REGARDING DENIAL OF A FAIR RATE OF RETURN IS INAPPOSITE TO THE PROVISION OF COMPETITIVE TELEPHONE SERVICE

The legal principle that rates for telephone service cannot be set so low as to deny the provider of the service a fair rate of return on investment is inapplicable to this case. That principle applies to regulated monopolies. This case involves provision of telephone service in a competitive market.

In a monopoly market, the public utility has both the right and the obligation to serve all customers within its territory who are reasonably entitled to service. Sections 364.03(3) and 367.111(1), Florida Statutes. The public utility must make the necessary investment to meet its obligation to serve, and it can be compelled to do so. Sections 364.15, 366.05(8) and 367.121(1)(d), Florida Statutes. The quid pro quo for assuming this obligation is that the public utility must have an opportunity to earn a fair rate of return (or profit) on investment. Gulf Power v. Bevis, 289

[10]The Commission did not preclude an AOS customer, such as a hotel, from imposing a surcharge on long distance calls. However, it had to be collected by a separate charge on the end user's hotel bill. Order No. 20489 at 10. Thus, the argument that commissions are needed to help defray the cost of equipment to provide telephone service is hollow.

So.2d 401 (Fla. **1974).** The regulatory body has the responsibility to review utility investment and operating expenses to ensure that rates are fair, just and reasonable but still allow the public utility an opportunity to earn a fair return.

In the competitive telephone market, there is no regulatory compact. Entrants into the competitive telephone market, such as AOS providers, enter the market as they choose. They can pick which customers to serve and they can exit the market at anytime. Unlike a regulated monopoly provider, such as a local exchange company, they have no obligation to serve. Because they are not and cannot be compelled to make any investments, they are not guaranteed the opportunity to earn a fair rate of return. It is their choice to get into the market and if they cannot make a profit - they can exit the market.

The Appellant's argument and the case law cited on pages 21 to 27 of their brief are irrelevant. None of these cases relate to telephone service provided in a competitive arena as is the case here. Moreover, to apply the concept of "fair rate of return" to this case would require the Commission to fully examine all the investments and expenses incurred by <u>each</u> AOS provider, determine if they were prudent, and then set a rate for each AOS provider. This is totally antithetical to the notion that allowing competition in telephone service would eliminate the need for such regulatory oversight. Appellant's argument is based on a premise that has no applicability to the case at bar.

E. THE FLORIDA LEGISLATURE HAS MANDATED THAT PROVIDERS OF AOS BE SUBJECT TO A RATE CAP

The Commission's decision in this case has been ratified by the Legislature's enactment of Chapter **90-244,** Laws of Florida which takes effect in October of this year. The Legislature created section **364.3376,** Florida Statutes, which imposes virtually the same conditions on AOS providers as are contained in Order No. **20489.** Most importantly, the Legislature mandated the Commission "establish maximum rates and charges for all providers of such services within the state."

The intent and effect of the new section dealing with operator services and operator service providers is to affirm, codify, and strengthen the actions taken by the Commission:

> Staff recommends that the Commission's authority to regulate the intrastate activities of alternative operator service providers be specifically recognized in the statute. In addition, certain of the Commission's rules circumscribing the activities of alternative operator services should be included in the statute for emphasis and to aid enforcement. A Review of Chapter **364,** Florida Statutes, by the Senate Economic, Professional and Utility Regulation Commitee Staff. Appendix at A-9.

11. THE COMMISSION'S DECISION TO REQUIRE ITI TO REFUND AMOUNTS COLLECTED IN EXCESS OF THE MAXIMUM RATES AUTHORIZED TO THE END USERS WHO PAID THE EXCESS AMOUNTS IS CONSISTENT WITH SECTIONS **364.05 (4),** AND RULE **25-4.114,** FLORIDA ADMINISTRATIVE CODE.

For the time period which ran from the date of Final Order No. **20489** to the issuance of Reconsideration Order No. **22243,** the Commission permitted ITI to charge rates higher than the maximum

authorized rates. ITI was required to file a corporate undertaking to protect the revenues which were collected in excess of the authorized maximum.

When the Commission issued its reconsideration order and determined that it would not alter the maximum charge it had originally authorized, the Commission required ITI to refund the revenues it collected in excess of those maximum rates. The Commission ordered ITI to recalculate each call billed at the excessive rate and credit or refund the excess to the end user. In conformance with Rule 25-4.114, Florida Administrative Code, the Commission's refund rule for telephone companies, the Commission directed ITI to file a report with Commission staff on its refund process that detailed the amount of refunds made, identified any unrefundable amounts, and proposed a plan for how to treat the unrefundable amounts. Order No. 22243, (R 1523). ITI's refund plan is currently under review by Commission staff.

The Commission's decision to require ITI to refund excess charges to end users was a proper exercise of its discretion as authorized by Sections 364.05(4) and 364.055, Florida Statutes, and was implemented in accordance with Rule 25-4.114, Florida Administrative Code.

The Commission is not simply authorized, but is commanded by statute to order refunds of all rates and charges it has determined to be unjust or unreasonable. Section 364.05, provides that when the Commission increases rates pending the outcome of a hearing:

> The commission shall, by order, require such telephone company to keep accurate account in

> detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such telephone company to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the telephone company shall be refunded or disposed of by the telephone company as the commission may direct; however, no such funds shall accrue to the benefit of the telephone company.

In response to this mandate, the Commission has established effective procedures for implementing refunds in Rule **25-4.114,** Florida Statutes, including a method under subsection ***(7)*** of the rule which proscribes an ongoing reporting process to identify any problems with implementation. For ITI's refund, the Commission followed the law and its own rule to the letter. It even established an ongoing process to identify and resolve implementation problems. Such actions are not arbitrary, and they do not constitute a "hidden" or unauthorized penalty as ITI suggests. (Appellants' brief at 36).

It is important to distinguish between the two refunds which were ordered in this case. One was the industry-wide refund contemplated in Order No. 19095 that was held by the First District Court of Appeal to be an invalidly promulgated rule. The other was the ITI refund at issue in this case. ITI blurs the distinction between them. ITI argues that because the Commission determined that the industry-wide refund would be difficult to implement by

means of a direct refund to the end users, its decision to implement ITI's individual refund that way was improper. The two refunds contemplated by the Commission were different in scope and effect. Based on that difference, the Commission's determination that different methods should be used to implement them was appropriate.

The ITI refund involved only one company, not the entire AOS industry. Fewer customers and fewer local exchange company billing arrangements were involved. The ITI refund applied to revenues collected over a shorter period of time and it only covered revenue which had already been deemed excessive by a valid final order of the Commission. It did not cover amounts presumptively valid under existing tariffs filed with the Commission. The Commission included in the refund order a practical means by which ITI and the Commission could resolve difficulties in the implementation of the refund. Furthermore, the industry-wide refund was never implemented, and arguments about its proper implementation are irrelevant. ITI is not entitled to expect that the refund process will be easy, and where ITI can affirmatively demonstrate that a direct refund is impossible, the method exists for ITI to propose an alternative. The Commission's action was a reasonable exercise of discretion to correct the problem of excess charges made to end-users.

III. THE COMMISSION DID NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES OR FLORIDA CONSTITUTION BY IMPOSING DIFFERENT REQUIREMENTS ON ALTERNATIVE OPERATOR SERVICE PROVIDERS THAN IT IMPOSES ON ATT-C.

ITI's contention that the Commission's actions in this case violated the Constitutional principle of equal protection is untenable in light of the record and the law. The argument is, as Justice Holmes described it in Buck v. Bell, 274 U.S. 200, 208 (1927), "the usual last resort of constitutional arguments" in the field of economic regulation.

As the U. S. Supreme Court explained in Clements v. Fashing, 457 U.S. 957, 963 (1982), the equal protection test applied to state regulatory action in the economic arena is the "rational basis" test. Any regulation reasonably related to a legitimate state interest will be upheld:

> The Equal Protection Clause allows States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Using traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them. . . .

The record provides ample support for the Commission's ultimate determination that AOS providers are substantially different and require different regulatory treatment than ATT-C and the local exchange companies. For instance, AOS customers are not the end users who make and pay for the calls. They are the

business owners of the telephones from which the calls are made. No substantive, ongoing relationship exists between the AOS provider and the end user. The end user does not know, and AOS companies do not inform him, that his call is not being handled by a familiar local exchange or long distance operator. The AOS business is based upon the amount of income to be made from increased charges for telephone use in the AOS' customer's establishment. AOS companies share this income with their business customers and both benefit by higher prices charged to consumers. (T **198, 296, 337, 709, 1183, 1185-87, 1197, 1216, 1346).**

Furthermore, as the Commission explained in its Order on Reconsideration, it treated AOS differently from the mandated operator services of the LECs and ATT-C because ATT-C and LECs have rates approved by the Commission, not merely registered in tariffs as AOS and other IXCs do. LECs and ATT-C must provide operator services in all of their territory, and must plan and engineer accordingly, while AOS providers do not have that obligation.

> An AOS provider or a minor IXC may concentrate on the most profitable areas of the state and may exit the market at will. The LECs and ATT-C cannot pick and choose their markets, but must plan and engineer to provide operator services for all of their respective areas. We find this "carrier of last resort" status to be a significant factor which distinguishes the traditional operator service providers from AOS providers.

The services provided by AOS companies are not identical to the services provided by the LEC's and ATT-C.

> [W]e found and still believe, that AOS companies **are** different from the LECs and ATT-C, and any variation in our standards or

> restrictions is not inappropriate or unlawful discrimination, but is required to protect consumers and to make the provision of AOS in the public interest. Order No. **22243**. (R **1523**).

AOS companies are also distinguishable from other telecommunications companies by the business methods and tactics they employ. The well-documented abuses of excessive charges, unlawful interception of calls to local exchange companies, and the prevention of telephone users from reaching their telecommunications carrier of choice are in the record. The Commission determined that the only way to protect the public from these tactics was to impose additional, well-defined conditions of service on the perpetrators of the abuses.

> It is the lack of an ongoing relationship between the AOS provider and an end user that compels us to place additional restrictions upon the AOS companies in order to ensure that the public is not abused by unfair, unjust and unreasonable rate practices. Order No. **20489**, (R **1031**).

As the record supports the Commission's determination that AOS companies are different, it also shows that the restrictions the Commission imposed on AOS were reasonably designed to correct the specific abuses the Commission had identified.

Any legislative or administrative measure that does not interfere with fundamental rights or employ inherently suspect classifications passes constitutional muster, if the measure is reasonably related to the promotion of a legitimate state interest. Exxon Corporation v. Eagerton, **462 U.S. 176 (1983)**; City of Cleburne v. Cleburne Living Center, **473** U.S. **432 (1985)**; Alamo

Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority, 825 F.2d 367 (Fla. 11th Cir. 1987); Melton v. Gunter, 773 F.2d 1548 (Fla. 11th Cir. 1985); W.E. Jackson v. Marine Exploration Company, Inc., 583 F.2d 1336 (Fla. 5th Cir. 1978).

The State of Florida, and the Florida Public Service Commission as its agent in the field of public utility regulation, clearly has a legitimate state interest in the prevention of excessive charges and other abuses perpetrated by persons and corporations engaged in performing service of a public nature. Florida Power Corporation v. Pinellas Utility Board, 40 So.2d 350 (Fla. 1949).

In State V. Yocum, 186 So. 448, 451 (Fla. 1939), where the Supreme Court determined that the City of Miami Beach's ordinance regulating taxicabs was a reasonable exercise of the city's police power, the Court said:

> When a business is essentially public in character and assumes proportions which may injuriously affect or menace the welfare, health, safety, public interest or which may be commonly classified under the police power, then the business must be regulated in behalf of the public welfare.

A regulatory act does not need to be all inclusive to fulfill the equal protection requirement, Shevin v. Bocaccio. Inc., 379 So.2d 105 (Fla. 1979), and it is Appellant's burden to show that there existed "no conceivable factual predicate which would rationally support the classification under attack." Hull v Board of Commissioners of Halifax Hospital Medical Center, 453 So.2d 519,

524 (Fla. 5th DCA 1984) quoting Florida High School Activities Ass'n V. Thomas, 434 So.2d 306, 308 (Fla. 1983).

The decision made to impose additional conditions of service on AOS was grounded in reasonableness, protective of the public interest, and supported by the facts and the law.

IV. THE COMMISSION'S DECISION TO ADHERE TO ITS ESTABLISHED POLICY THAT "0-" AND "0+" INTRALATA TRAFFIC WOULD BE RESERVED TO THE LOCAL EXCHANGE COMPANIES WAS A PROPER EXERCISE OF ITS REGULATORY AUTHORITY.

The question of routing of "0-" and "0+" intraLATA traffic became an important issue in this case, because AOS companies routed that traffic to their own operators in violation of prior Commission orders. Order No. 19095, (R 64). The Commission determined that the record in the AOS docket supported its established and well-documented position that "0-" and "0+" intraLATA traffic was reserved to the LECs. The Commission deferred any decision to alter its former decisions in this area to Docket No. 880812-TP, In re: Investigation into Equal Access Exchange Areas, Toll Monopoly Areas, 1+ Restriction to the Local Exchange Companies (LECs) and Elimination of the Access Discount, the generic docket established for the purpose of reviewing those policies on an industry-wide basis. Order No. 20489, (R 1033). The Commission's decision on this issue was a reasonable and constitutionally sound exercise of its regulatory authority.

ITI and the AOS presented no satisfactory evidence to demonstrate why the Commission should make an exception to its established orders for them. That position is unsupported in the

record and inappropriate for a proceeding convened for the limited purpose of determining whether AOS, one small segment of the telecommunications industry, was in the public interest.

CONCLUSION

The Commission's decision imposing conditions of service on AOS providers was necessary to protect the public interest. The conditions imposed were based on competent substantial evidence, are constitutionally sound, and otherwise comply with the essential requirements of law. The Court should affirm the Commission's orders.

Respectfully submitted,

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Dated: July 16, 1990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail this 16th day of July, **1990**, to:

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