BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RULEMAKING TO CONSIDER RULES ELIMINATING THE REQUIREMENT THAT TELECOMMUNICATIONS COMPANIES FILE PRICE LISTS, CHAPTERS 480-80; 480-120, AND 480-121 WAC.	DOCKET NO. UT-060676

COMMENTS OF PUBLIC COUNSEL

January 8, 2007

I. INTRODUCTION

The Public Counsel Section of the Washington Attorney General's Office (Public Counsel) respectfully submits these comments in response to the December 15, 2006 Notice of Opportunity to File Written Comments on the proposed rule revision to WAC 480-120-266(2) in the above captioned matter. Public Counsel appreciates the opportunity to address the December 12, 2006 proposed changes and urges the Commission to retain the language contained in the Supplemental (CR-102) provision dated October 16, 2006.

II. BACKGROUND

A. Substitute Senate Bill 6473 Eliminated "Price Lists" For Those Telecommunications Companies that Had Received Competitive Classification.

The "price list" legislation was introduced in the Washington State Senate on January 12, 2006.[1] On February 14, 2006, S.B. 6473 was amended and became S.S.B. 6473. After passage

[1] Senate Bill 6473, 59th Leg., Reg. Sess. (Wash. 2006).

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in both houses, Governor Gregoire signed the bill into law on March 30, 2006. The new law took effect on June 7, 2006.[2]

Principally, S.S.B. 6473 eliminated price lists for companies classified as competitive by the Washington Utilities and Transportation Commission (WUTC).[3] The phrase "price list" is a term of art; it has a specific, precise meaning in telecommunications law and regulation both in Washington and elsewhere. States may use slightly different definitions to describe price lists but the essence is the same. Price lists are substituted for tariffs when a company faces sufficient enough competition to justify relieving it of traditional legal requirements. In lieu of a tariff, a price list containing rates, terms and conditions for services is filed with the public utility commission.[4] Like Washington's prior price list statute, some states require a notice and waiting period before the rate, term or condition becomes effective.[5] Others, like Oregon, do not.

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[2] Laws of 2006, ch. 347.
[3] RCW 80.36.320 and .330 (as amended by Laws of 2006, Leg., Reg. Sess., ch. 347, §§ 4 and 5).
[4] *See e. g.*, OR. REV. STAT. § 759.054:

> **Price listing for product or service offered as part of local exchange telecommunications services**.
>
> (1) If the Public Utility Commission determines that a product or service offered by a telecommunications utility as part of local exchange telecommunications services can be demonstrated by the utility to be subject to competition, or that a product or service is not an essential product or service, the commission may authorize the utility to file a price list with the commission.
>
> (2) The price list shall contain the description, terms, conditions and prices of the service or product described in subsection (1) of this section. No other schedule for price listed services need be filed with the commission. The price list or any revision of the price list is not subject to the provisions of ORS 759.180 to 759.190 [tariff suspension statutes] and shall become effective immediately upon filing with the commission unless a later date is specified.

[5] Colorado has a 14-day notice requirement for price list changes. Section 723-2123(b)(III)(F)(vii), C.R.S.

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With regard to Washington, the Legislature first established the means by which telecommunications companies or their services could become competitively classified in 1985.[6] Once classified by the Commission, companies could file "price lists" with the WUTC instead of tariffs.[7] These newly established price lists were required to contain any changes to any rate, toll, rental, or charge ten days before taking effect. A company was also required to publish those changes to its customers.[8] The Commission had the authority to define the form of the company's notice.[9]

S.S.B. 6473 entirely eliminated price lists as established in the 1985 enacted competitive classification statutes.[10] Thus, competitively classified companies or services now no longer have to (1) file with the Commission any changes to any rate, toll, rental, or charge or (2) wait ten-days before the change could take effect.[11]

In addition to the changes to the competitive classification statutes, S.S.B. 6473 amended RCW 80.36.100.[12] RCW 80.36.100 requires, *inter alia*, that companies file with the Commission and keep open to public inspection tariffs showing rates, tolls, rentals, and charges of such companies. These tariffs are subject to a significant regulatory framework, including the suspension statute, RCW 80.36.110. The new subsection (5) added to RCW 80.36.100, spells out that the tariff statute does not apply to telecommunications companies classified as

[6] Laws of 1985, ch. 450, §§ 4 and 5 (codified as RCW 80.36.320 and .330).
[7] *Id*., at § 4(2) and § 5(2). According to the competitive classification statutes, "Minimal regulation means that competitive telecommunications companies may file, instead of tariffs, price lists."
[8] *Id*. Laws of 1985, ch. 450, §§ 4 and 5.
[9] *Id*.
[10] Laws of 2006, ch. 347, § 3(2) and § 4(2) (Former RCW 80.36.320 and .330).
[11] *Id.*
[12] Law of 2006, ch. 347, § 1 (codified as RCW 80.36.100(5)).

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competitive under RCW 80.36.320 or to telecommunications services classified as competitive under RCW 80.36.330.[13] Thus, competitively classified companies will no longer use tariffs or price lists.

B. The Commission Instituted a Rulemaking to Implement S.S.B. 6473.

On May 5, 2006, the Commission issued a Pre-proposal Statement of Inquiry (CR-101) to implement S.S.B. 6437 through rulemaking. Initially, WAC 480-120-266(2) read as follows:

> A telecommunications company offering intrastate telecommunications services pursuant to competitive classification shall make available to any member of the public, in at least one location, during regular business hours, information concerning its current rates, terms and conditions for all of its intrastate telecommunications services. Such information shall be made available in an easy to understand format and in a timely manner. Following an inquiry or complaint from the public concerning rates, terms and conditions for such services, a carrier shall specify that such information is available and the manner in which the public may obtain the information.

This language remained in the Commission's Proposed Rulemaking (CR-102) issued on July 27, 2006. On October 16, 2006, the Commission issued a Supplemental (CR-102) for comment. In the Supplemental (CR-102), WAC 480-120-266(2) was amended as shown in this legislative style version:

> A telecommunications company offering intrastate telecommunications services pursuant to competitive classification shall make available to any member of the public~~, in at least one location, during regular business hours,~~ information concerning its ~~current rates, terms and conditions for all of its~~ intrastate telecommunications services in an easily accessible manner on an internet web site. Such information shall be made available in an easy to understand format and shall be timely updated ~~in a timely manner~~. Following an inquiry or complaint from the public concerning rates, terms and conditions for such services, a carrier shall specify that such information is available and the manner in which the public may obtain the information.

[13] *Id.*

The significant changes between the initial and supplemental provisions are (1) the requirement of a physical location for the provision of information was eliminated, (2) the information to be provided was expanded such that it was no longer restricted to current, rates, terms and conditions, and (3) a requirement was added that information be made available in an easy to understand manner on an internet web site.

The final version of WAC 480-120-266(2) was issued by the Commission on December 12, 2006. In legislative style, that language reads as follows:

> ~~A telecommunications company offering intrastate telecommunications services pursuant to competitive classification shall make available to any member of the public, in at least one location, during regular business hours, information concerning its current rates, terms and conditions for all of its intrastate telecommunications services in an easily accessible manner on an internet web site. Such information shall be made available in an easy to understand format and shall be timely updated in a timely manner.~~ Following an inquiry or complaint from the public concerning rates, terms and conditions for ~~such services~~ competitive telecommunications services, a carrier shall specify ~~that such information is available and the manner in which the public may obtain the information~~ where to obtain pertinent information, and how to contact the commission.

The final change to 480-120-266(2) was explained in a December 13, 2006 memorandum prepared by Commission Staff (Staff). Staff explained that the final change recognizes that the "new law specifically states at RCW 80.36.100(5) that competitive services cannot be subjected to tariff-like procedures."[14] In response to Public Counsel's suggestion that competitively classified companies be required to identify a list of services and initial rates when registering with the Commission pursuant to WAC 480-121-020, the Staff memorandum stated that "in light of the clear statutory intent that competitive services be subjected to minimal regulation and the

[14] Staff Memo at p. 2 (emphasis added).

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specific prohibition under RCW 80.36.100(5) against treating such services like tariffs, thus the second part of Public Counsel's recommendation to require initial rates is not adopted."[15]

Staff's analysis mirrored that of the Joint CLECs dated August 23, 2006 (CLECs). The CLECs took the position that any requirement that competitively classified companies post rates, terms, or conditions for the public is "fundamentally inconsistent with the legislation eliminating price lists."[16] In particular, the CLECs argue that the new RCW 80.36.100(5) "expressly provides that the obligation in subsections (1) and (3) to "keep open to public inspection at such points that the commission may designate, schedules showing the rates" and "rules or regulations" for services "does not apply to telecommunications companies classified as competitive."[17] The CLECs went even further and alleged that proposed WAC 480-120-266(2), as it then existed (and presumably the CR-102 supplemental version as well) would "virtually" reinstate the price list requirement.[18]

III. ARGUMENT

A. Commission Staff and the Joint CLEC's Statutory Interpretation of S.S.B. 6437 Ignores the Plain Meaning of the Relevant Statutes and Should be Rejected.

Where the meaning of a statutory provision is plain on its face, one must give effect to that plain meaning as an expression of legislative intent.[19] The plain meaning may be

[15] *Id*. at 5 (emphasis added).
[16] CLECs, at p. 2. The CLECs do admit, however, that the Commission's rules would result in their no longer being required to submit this information to the Commission. Joint CLECs, at p. 2.
[17] *Id*.
[18] *Id.*
[19] *City of Olympia v. Drebick*, 156 Wn.2d. 289, 296 (2006).

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determined by an "examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found."[20]

1. RCW 80.36.100(5) unambiguously reflects a legislative intent to solely eliminate "price lists" as previously defined by RCW 80.36.320 and .330.

The unintended consequences of eliminating price list requirements within the then existing statutory scheme explains exactly what was intended by the adoption of RCW 80.36.100(5). Consequently there is no need to resort to conjecture about what "looks like" a tariff or a price list and what does not. The legislature simply added subsection (5) to RCW 80.36.100 as part of its effort to eliminate price lists.

Commission Staff and the Joint CLECs assert that RCW 80.36.100(5) prohibits the application of "tariff-like procedures" or "virtual" price lists to competitively classified companies or services.[21] This reading is contrary to the plain meaning of the applicable statutes. There is no such thing as a "tariff-like procedure" or "virtual" price lists. Statutorily, there are tariffs and there were price lists. The interplay between these two regulatory requirements constitutes black letter telecommunications law, and is reflected in the Colorado and Oregon examples provided.

The addition of RCW 80.36.100(5) makes perfect sense in the tariff/price list dichotomy found in the statutes at issue. Therefore, our analysis begins with the statutory and regulatory relationship between tariffs and price lists in the statutes themselves. Prior to S.S.B. 6473, RCW 80.36.100 subjected <u>all telecommunications companies</u> doing business in Washington to the

[20] *Id.*, quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d. 1, 9-10 (2002).
[21] Staff Memo at p. 2; CLECs, at p. 2.

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tariff requirements found in that statute. This is clear from the first sentence in RCW 80.36.100 which reads, "Every telecommunications company shall file with the commission," etc. In other words, absent the competitive classification statutes, competitively classified companies would have been subject to tariff requirements.

The tariff requirement changed with RCW 80.36.320 and .330, which established the modern framework for competitively classifying companies. Once competitively classified, a company could utilize price lists instead of tariffs and avoid the obligations associated with RCW 80.36.100. The relevant portions of the 1985 law creating competitive classification and price lists, which remained unchanged until S.S.B. 6437, reveals that competitive classification temporarily removed but did not eliminate a company's underlying statutory obligation to file tariffs. Rather, RCW 80.36.100 lay dormant until a company's competitive classification was withdrawn, revoked or the opportunity to file price lists was eliminated. Price lists were the exception, tariffs were the rule.

Thus, eliminating the price list provisions in RCW 80.36.320 and .330 without any change to RCW 80.36.100 meant that the obligation to file tariffs would return. Even though the intent of the legislation was to eliminate price lists, the effect of amending only.320 and .330 would have been to unintentionally substitute tariff requirements by default. That was clearly not what anyone had in mind.

The obvious answer, therefore, was to amend RCW 80.36.100. The new RCW 80.36.100(5) makes it perfectly clear that competitively classified companies will not default to tariff requirements after price lists were eliminated. Indeed, the addition of subsection (5) states simply, "This section does not apply to telecommunications companies classified as competitive

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under RCW 80.36.320 or to telecommunications services classified as competitive under RCW 80.36.330."[22] Reading anything more into the new subsection (5) ignores the statutory relationship between it and the competitive classification statutes, resulting in an abrogation of legislative intent.[23]

2. The interpretation urged by Commission Staff and the Joint CLECs broadens the reach of S.S.B. 6437 beyond the plain language of the statute and ignores the statutory definition of a price list.

By defining a price list to mean something that is "tariff-like" Staff and the Joint CLECs read far too much into the statutory changes. The Joint CLECs recognize that the Commission is not requiring, through this rulemaking, that competitively classified companies file anything with the Commission. Certainly, everyone would agree that there is no requirement that the companies publish any changes in rates, tolls, etc. ten days in advance. Nonetheless, the argument is that anything that looks like a price list or a tariff should not be required by the Commission's rules. In other words, the Commission allegedly lacks jurisdiction over anything within the penumbra of price list or tariffs.

A plain reading of the recent statutory changes eviscerates these assertions for the reasons discussed above. In addition, changes made by S.S.B. 6437 – the same legislation eliminating price lists – says that the requirements found in RCW 80.36.330(2) are "minimum requirements."[24] The upshot of this is that the Commission may require <u>more</u> than that which is spelled out in the competitive classification statute, presumably including requirements that

[22] RCW 80.36.100(5).
[23] Public Counsel's analysis is bolstered by the Final Report for S.S.B. 6437, which says: "A service not classified as 'competitive' must be described in a tariff."
[24] Laws of 2006, Leg., Reg. Sess., ch. 347, § 4(2) (codified as RCW 80.36.330(2)).

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companies publicly make available current prices, terms and services in a specific format or venue.

Moreover, RCW 80.36.320(3) allows the commission to reclassify any competitive telecommunications company if in the public interest to do so.[25] Assume, for example, that a competitively classified company's service offerings are so difficult to determine that it is no longer in the public interest for that company to be competitively classified. In that case the Commission could rescind classification. Certainly, it would be anomalous if the Commission lacked authority to require a company to post its service offerings but has the authority to withdraw classification on those same grounds. The plain language of .320 and .330, therefore, cannot be read consistently with the analysis proposed by Staff and the Joint CLECs and so it must be rejected.

3. Even if RCW 80.36.100(5) is ambiguous, which it is not, legislative history reveals that the intent was to eliminate price lists solely as they existed in statute.

Where the language of a statute is clear on its face the application of statutory construction principles is unnecessary.[26] If statutory language is susceptible to more than one reasonable interpretation, it is considered ambiguous.[27] To assist in discerning legislative intent where there is ambiguity about meaning, one resorts to principles of statutory construction,

[25] *See also*, RCW 80.36.30(7) (same).
[26] *Kinnan v. Jordan*, 131 Wn. App. 738 (2006).
[27] *Cockle v. Dept. of Labor & Indus.*,142 Wn.2d 801, 808 (2001).

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legislative history, and relevant case law.[28] The goal is to adopt the interpretation most consistent with the Legislature's intent.[29]

In the instant case, Public Counsel asserts that the meaning of S.S.B. 6437 is as we have described it and therefore, without ambiguity. However, even if the Commission considered the statute ambiguous, Public Counsel's interpretation would still prevail because it is most consistent with the Legislature's intent as reflected in the legislative history.

In adopting S.S.B. 6437, the Legislature recognized price lists and tariffs as separate legal constructs despite the fact that they may have "looked like" each other in a superficial way. The Final Report for S.S.B. 6437 reflects this view.

> Tariffs and Price Lists. A service not classified as "competitive" must be described in a tariff, which is a detailed document, filed with the Commission, describing the rates, terms, and conditions of service. All tariffs are subject to review by the Commission when filed, and they may be suspended before they take effect.
>
> A service classified as "competitive" is described in a "price list." **While price lists look like tariffs and are also filed with the Commission, they are not reviewed or approved by the Commission. They automatically take effect ten days after notice to the Commission and customers.**[30]

Again, the Legislature understood that despite the fact that they "looked like" each other, price lists and tariffs are different and contain different legal obligations.[31] The Final Bill Report for S.S.B. 6473 says that what makes something a price list is that it: (1) is filed with the Commission but not reviewed or approved by the Commission and (2) automatically takes effect

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[28] *Id.*
[29] *Stewart Carpet Serv., Inc. v. Contractors Bonding & Ins. Co.*, 105 Wn.2d 353, 358 (1986).
[30] 2006 Final Legislative Report, 59th Leg. at http://www. leg. wa. gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/Senate/6473-S. SBR. pdf.(last visited Jan. 5, 2007) (emphasis added).
[31] *See also*, 1985 Final Legislative Report, 49th, Sess., at 251: "Telecommunications companies or the Commission may begin proceedings to classify competitive telecommunications companies or services…Competitive companies may file price lists instead of tariffs. The Commission may waive other regulatory requirements."

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ten days after notice to the Commission and customers. There should be no doubt then that legislative intent was to eliminate price lists as they had been defined in RCW 80.36.320 and .330. The intent was not to remove the Commission's jurisdiction over anything that looked superficially like a tariff or a price list for competitively classified companies or services.

Reading more into the repeal of price lists than the legislative history can support, impermissibly negates legislative intent. Rather, Public Counsel's careful assessment of the legislative history supports a narrow change to the status quo and should be adopted.

B. Given that the Commission Possesses the Authority to Enact WAC 480-120-266(2), There are Good Policy Reasons for Adopting Such a Rule.

Much has been said about the growing competitive landscape with regards to telecommunications services. A prerequisite to effective competition in any market (regardless of whether it is telecommunications services or not) is accurate information. Without transparency of information, consumers have no real choice and an effective market will not develop.

When discussing the availability of information, Public Counsel draws a distinction between that which is useful versus the cacophony of noise overwhelming consumers in this area. The goal, always, is to have an accessible "easy to understand format" like that originally proposed in WAC 480-120-266(2).

It is well known that many people already cannot understand their phone bill. Failing to require publicly available information necessary to understanding one's phone bill further increases the burden on customers. The effort to wade through all of the carriers' information to find what is relevant becomes even more taxing.

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Public Counsel believes that it is insufficient to rely on the market to ensure clear pricing information. There is little dispute that competition in the wireless phone industry exceeds that of wireline carriers. Yet even with a greater degree of competition, consumers remain unclear about the rates, terms and conditions of their contracts with wireless providers. Without this kind of information, real choice in which a consumer obtains the best services for the best price is illusory.

Given the existence of relative competition in the industry, one wonders why the wireless companies don't do better. The fact is that the lack of sufficient information means that very often consumers purchase plans that are more or less than they need. Over-sized plans mean lost money for consumers when minutes are not used. Smaller-scale plans mean that consumers might exceed free minutes and have to pay a stiff price for paid minutes. Similarly, consumers may purchase plans for larger or smaller geographic areas than what they need with the same result. Finally, cheaper or more advantageous plans could escape everyone but the most aggressive purchaser. Thus, a case could be made that wireless carriers don't offer clearer information because without this information consumers spend more.

So confusing are the wireless choices, people can now bypass wireless provider websites entirely and go through "LetsTalk," a privately held company that serves as an independent resource for wireless products and services.[32] Consumer Reports has identified it as a "relatively simple" way to compare wireless plans.[33] An obvious drawback is that the service, while free, is only available on the Internet. Even so, no similar service exists for wireline

[32] *See*, www.letstalk.com/ (last visited Jan. 5, 2007).
[33] Consumer Reports, *Best Cell Service*, January 2007.

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telecommunications at this time. Perhaps that will change if competition in the wireline industry develops.

Because competition has been ineffective in delivering clear and useful information to consumers, Public Counsel is compelled to comment on the changes to the proposed rule. Given the failure of competition to provide such information, WAC 480-120-266(2) contained in Supplemental (CR-102), provides a much needed floor below which no competitively classified telecommunications provider can go. It should be adopted.

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