Washington State Hotel & Motel Association

Member, American Hotel & Motel Association

December 11, 1990

Mr. Paul Curl
Secretary
Washington Utilities and
Transportation Commission
Chandler Plaza Building
1300 S. W. Evergreen Park Drive S.W.
Olympia, Washington 98504

Re: Docket No. UT-900726
Amendment of WAC 480-021, -106, -138, and -141
relating to Telecommunications Companies

Dear Mr. Curl:

These comments are respectfully submitted on behalf of the Washington State Hotel and Motel Association (Association), a state-wide organization representing the lodging industry.

Under the proposed amendment to WAC 480-120-141(9)(c) in the foregoing docket, the Commission would undertake to regulate hotels and motels as a public utility for the telephone services they provide to their guests. The Association opposes such regulation, believing that there are serious legal and practical implications that have yet to be given adequate consideration. We will undertake to address those matters briefly.

I. LEGAL CONSIDERATIONS

A. Jurisdiction

Under RCW 80.01.040, the Commission regulates "as provided in the public service laws, the rates, services, facilities, and

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practices of all persons engaging . . . in the business of supplying any utility service or commodity to the public for compensation." (Emphasis ours) The foregoing statute reveals three elements that must exist concurrently in order for the Commission to assert regulatory jurisdiction. Regulation of the lodging industry is supported by none of those elements.

1. Hotels and motels are not "in the business" of providing utility service

Purveyors of lodging do not fall within that statutory guideline. They are simply not in the business of providing utility services. They are in the business of providing lodging, in the course of which, as an essential element, certain amenities, many of which could be categorized as utility service are provided their guests. For example, hotels all provide water, electricity, heat and air conditioning, and the costs of providing those "utility" services are included in their rate structure. In addition, almost universally, hotels make a telephone available to their guests. Telephone service is unique only because its use by particular guests can be readily identified. On the other hand, electricity and water are not amenable to itemization. Even so, all of these "utility" services, including telephones, are merely incidental to the lodging business conducted in good faith.

2. Service is not provided to the general public

Hotels and motels are not engaged in providing utility type services to the public as that term is used in the statute. This

component has been addressed on at least two occasions by the courts in this state. It has been held that a corporation becomes a public corporation subject to regulation only when its business is dedicated to and devoted to the public[1]. The test is whether the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it than can be served by the utility. In 1986, the court reiterated the concept of customer selectivity as a dominant factor in determining public utility status.[2] Clearly, offering the service to particular selected class of individuals, such as hotel guests, does not satisfy the test.

No one is entitled to walk in off the street and use telephones in hotel rooms. That privilege is reserved to guests. Moreover, guests understand that when they use the telephone, the hotel will be compensated for that use. The Association does not dispute the right of the guest to know the charges and conditions apply to the use of the telephone. However, those conditions or charges inhere as part the hotel's managerial function.

This basic principle has been applied in analogous landlord-tenant relationships. When the only persons entitled to a utility type service are those who have entered into a landlord-tenant

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[1] Inland Empire Rural Electrification, Inc. v. Department of Public Service, 199 Wash. 527, 92 P.2d 258 (1939)

[2] West Valley Land Co. v. Nob Hill Water Association, 107 Wn.2d 359, 729 P.2d 42 (1986).

relationship, and the service is not open to the indefinite public, tenants constitute a defined, privileged, and limited group. Service under these circumstances has been held to be private in nature[3]. In this context, the relationship between landlord and tenant is only superficially different than the relationship between host and guest.

3. Regulation of hotels and motels is not contemplated by the public service laws

The third element of the statute relevant here is the provision that jurisdiction is governed by the public service laws. There is no hint from the public service laws that the lodging industry, or any part of it, is to be regulated as a public utility. Exactly the contrary is true. RCW 80.36.520 describes hotels, motels, etc. not as "aggregators" or as telecommunications companies, but as customers. Moreover, RCW 80.36.370 exempts from regulation any sale, lease, or use of customer premises equipment. The Commission has recognized that hotels and motels provide service to their guests through the use of CPE owned or operated by a subscriber, and has observed further that the subscribers include

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[3] Drexelbrook Associates v. Pennsylvania Public Utilities Commission, 206 Pa.Sup. 121, 216 A.2d 229 (1965). In that case the landlord was buying utility service at wholesale, and selling it retail to its tenants, which included 90 buildings, 1227 residential properties, and 9 stores. Even so, the nature of the business and the relationship between the parties was held to create private rather than public service.

hotels, hospitals, and universities[4]. Accordingly, the use to which the subscriber puts the CPE in making a connection with a long distance carrier does not bring subscriber under regulation.

B. Small Business Impact Statement

The proposed amendment of WAC 480-120-141(9)(c) lacks even a perfunctory Small Business Economic Impact Statement relating to regulation of the lodging industry. Not all members of the Association are large businesses. In fact, while no specific study has been made of Association membership, it is probable that most of them would qualify as small businesses. RCW 34.05.320(c) is unequivocal as to this precondition of rulemaking. Adding as many as 1400 hotel/motel operations, most of them small, to the growing list of regulated telecommunications companies, would likely cause major economic dislocation. The Commission must evaluate possible economic consequences before it undertakes to sweep hotels and motels into its regulatory basket.

II. OTHER CONSIDERATIONS

A. Alternative procedures are available

For years, the Association has participated in rate proceedings before the Commission as an affected customer. For years, guests have been charged for local and long distance use of hotel/motel telephone equipment. At no time, through many modifications of statutes relating to telecommunications, has it

[4] Finding of Fact No. 6, Docket No. U-89-2603-P, page 10, Final Order dated July 20, 1990.

been suggested that hotels and motels are anything other than customers. Now, by changing the statutory definition from "customer" to "aggregator[5]", which has no foundation in the public service laws, the Commission proposes to regulate the lodging industry as public utilities.

If the Commission has some reason to believe that hotels are subject to regulation, there is a statutory mechanism available in which evidence, not conjecture, forms the basis for decision, and all parties have an opportunity to explore all facets of the problem. That procedure is a classification hearing initiated under RCW 80.04.015 to determine if, and on what basis, any actions of the lodging industry are subject to its jurisdiction. The effort to assert jurisdiction by rulemaking is at best precipitous, particularly in light of dubious legislative authority.

B. Generic ratemaking is not a viable mechanism

Aside from jurisdictional infirmities, the attempt to establish "generic" rate caps for all hotels and motels has both practical and constitutional flaws. To place a cap on those rates could result in unconstitutional confiscation of property. The current proposal which would require hotels and motels to provide directory information services without charge is the equivalent of

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[5] The term "aggregator" is seemingly drawn from the "Telephone Operator Consumer Services Improvement Act of 1990", (PL _____), in which Congress undertook to use and define it. This suggests that the proposed rule far exceeds the scope of Chapter 80 RCW as presently written, which perceives hotels and motels to be "customers".

requiring them to provide use of their facilities without compensation, and hence, confiscatory.[6]

The proposed limitation on hotel and motel surcharges to twenty-five cents (.25) is wholly unrealistic. After deregulation of the telecommunications industry in the mid-1980's, the lodging industry has found it necessary to purchase sophisticated and expensive telecommunications equipment and services to meet the needs of the modern traveler. This is true for all properties, irrespective of size. The modern business traveler now demands systems that can transmit information from lap top computers, and that will operate facsimile machines. To be competitive today, hotels and motels can no longer afford to purchase merely plain old telephone service.

Each hotel, large or small, has different equipment in place, a different investment base, different capital structure, different capital costs, different revenue requirements, different cost structure, different management, and probably a dozen other differences. The rulemaking process does not permit the Commission to take meaningful evidence to support any rate, least of all a cap. In order to allow the industry to recapture its costs for equipment and labor related to providing room telephones, and the different sizes and locations of lodging properties, means that the

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[6] What an entrepreneur may do of his own volition and what is required to be done under government mandate are entirely different from a constitutional perspective.

Commission will be unable to establish any sort of standard charges for such service and will be required to engage in case-by-case ratemaking for each hotel and motel property. Generic ratemaking by rule is simply not contemplated by Title 80 RCW.

Even if telephone services of the lodging industry were subject to regulation, and each of those hotels and motels, hospitals and universities were to file an initial tariff, each is entitled to a determination of what rates are appropriate for its operation based on its particular characteristics. Each would be entitled to an adjudicative proceeding. The effect on the "utility", and the impact on the Commission would be nightmarish.

The lodging industry traditionally has charged only those guests who use the telephone equipment made available in a guest room for the use of that equipment. This "user pay" or "cost causer" concept to recapture the cost of providing telephones in guest rooms has been widely practiced in the industry and accepted by the lodging industry patrons for years. The rationale for this policy is simple: Those who use the telephone should bear the cost for providing the amenity in the room; those who do not use the telephone during their stay should not. The only other alternative method of recapturing costs would be to revise room rates for all guests, which would be unfair to those who do not use the telephone.

The extremely competitive nature of the lodging industry in all segments - luxury, mid-range, economy - has over the years

served effectively to control or eliminate excessive surcharges to guests by hotels and motels for the use of the guest room telephone equipment. Many hotels have terminated their association with alternative operator service companies in response to guest complaints. In addition, some hotel companies advertise free telephone service in markets where guests are particularly sensitive to telephone charges.

3. Conclusion

The lodging industry is highly competitive, and, as a result, responds quickly to the concerns of its clientele. Moreover, the Association fully supports the right of hotel and motel guests to be informed as to the price of telephone usage. But it is not prepared to concede that a better job could be done under a regulatory umbrella than by experienced hotel/motel managers responding to external competitive influences as well as the expressed concerns of their guests.

We urge that the Commission withdraw its proposed amendment to WAC 480-120-141(9)(c), unless and until regulation of the hotel/motel industry is supported by a clear legislative mandate.

Respectfully submitted,

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