Washington State Hotel & Motel Association

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

Member, American Hotel & Motel Association

March 27, 1991

Mr. Paul Curl
Secretary
Washington Utilities and
Transportation Commission
Chandler Plaza Building
1300 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 /
Reply Comments of Washington State
Hotel and Motel Association

Dear Mr. Curl:

Enclosed for filing and distribution are the original and nineteen copies of the Reply Comments of the Washington Hotel and Motel Association in the above entitled docket.

Individual copies have been directed under separate cover to Chairman Nelson and to Commissioners Casad and Pardini.

Very truly yours,

Rebecca L. Bogard/c

REBECCA L. BOGARD

Clifford A. Webster

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March 26, 1991

Mr. Paul Curl
Secretary
Washington Utilities and
Transportation Commission
Chandler Plaza Building
1300 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

Reply Comments of Washington State Hotel and Motel Association

Dear Mr. Curl:

These comments are submitted in response to various statements filed in the above docket. In some respects they are generic in nature, touching on the subject matter raised by commentors. To the extent they are directed to specific comments, they will be identified as such.

There are two elements that tend to pervade the comments filed by various persons in response to the Commission's proposed rulemaking. First, we are impressed, and somewhat distressed, with the apparent ease with which telecommunications jargon slips into the vocabulary, and in so doing manages to convey the appearance of legitimacy. With the exception of the local exchange companies (which probably know better), the term "aggregator" is scattered throughout many of the comments. We feel compelled once more to point out that there is no such term in Washington law - an absence having clear implications respecting the Commission's regulatory jurisdiction.

Secondly, with but one exception (Telesphere, Ltd.), there is no one seeking to have hotels and motels categorized as telecommunications companies. As we will point out hereafter, Telesphere's perspective is based on a simplistic and inappropriate interpretation of state law. Moreover, it is self-serving, and is not intended to protect any interest other than that of Telesphere itself. Telesphere's self-appointment as guardian of the public interest should be rejected.

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The Commission's Jurisdiction must be based on Washington not Federal Law

Several of the comments make reference to the Telephone Operator Consumer Services Improvement Act of 1990 ("Operator Services Act") under which the FCC is given certain powers. Included in the provisions of that act is the term "aggregator", and the FCC is given by Congress, specifically, some limited jurisdiction over the activities of those falling within that definition. This distinction should not be lost on the Commission. The legislature of this state has not enacted similar enabling legislation. This Commission must find its jurisdictional basis in the Washington Public Service Laws, not in amendments to the Federal Communications Act.

If we appear to be harping on this point, and perhaps we are, there is a reason. Of all the commentors in this docket, the only entities that are **not** traditional or long-standing jurisdictional telecommunications companies are hotels and motels. It is only the hotels and motels that would be swept into the regulatory basket by reason of a rule definition that finds no foundation in **state** law.

Unlike the proposed rule, even the Federal law does not go so far as to regulate hotels and motels as public utilities. Attachment A to the comments of the Northwest Payphone Association, reveals that the intent of the federal legislation is to provide clear regulatory guidance to the FCC **in the regulation of OSPs**[1]. While Congress saw fit to adopt specific legislation containing the term "aggregator", for the purpose of clarifying FCC regulation of OSPs, there is no similar provision relating to "aggregators" in the Washington Public Service Laws.

[1] This tends to illustrate further the confusion that can arise from careless blending of Federal and State legislation. Several of the interstate carriers use OSP rather than AOS. In this context, the blend is not significant, only slipshod. On the other hand, we submit that the distinction between "aggregator" and "customer" is a major and controlling distinction in terms of whether an entity is subject to even limited regulatory jurisdiction.

We reiterate that under Washington law, hotels and motels are identified simply as customers of purveyors of Alternative Operator Service (RCW 80.36.520). There is nothing in state law which would convert them to telecommunications companies simply because they place CPE in guest rooms, or enter into contracts with mainstream or AOS telecommunications companies. As the sponsors of the federal legislation further noted, telephone call handlers in transient facilities such as hotels, motels, and hospitals are able to assess call charges on guests' bills. In so doing, they are not subject to rate regulation, even under federal law.

Hotels and Motels are Not Public Utilities under Washington Law

We must take vigorous exception to the bland and gratuitous comments of Telesphere Limited, which would first define hotels and motels as aggregators, and then argue that they are "clearly" with the definition of telecommunications company. What has apparently eluded the notice of Telesphere is that Congress specifically adopted legislation defining "aggregators", something that the Washington legislature has not done. Hotels and motels, which may be aggregators under federal law, are still customers under Washington law.

Secondly, Telesphere apparently did not have an annotated version of the code, or it would have noted that the courts of this state have provided some refinements to the term "for hire" as it is used in the public service laws. In order to be categorized as a utility, a firm must offer its services to the **general** public. We discussed this subject at some length in our opening comments, and if their is any confusion on this subject, we urge the Commission to review them. In any event, hotels and motels are not in the business of providing utility service so as to make it jurisdictional. We also emphasize that hotels offer the **use** of CPE, which is exempt under RCW 80.36.370. Of course, it is clear that the Telesphere's principle motivation in asserting this position is self-serving. By the device of making hotels and motels public utilities, it seeks to relieve itself of contract obligations imposed by Commission rule. We will address that viewpoint separately.

Telesphere notes that direct Commission regulation over aggregators would be fully consonant with the federal regulatory scheme. It fails to note that the federal regulatory scheme,

supported by specific legislation, is not identical to the regulatory scheme in Washington. We do, however, agree with Telesphere that if they is any doubt as to the Commission's jurisdiction, **and we contend there should be major doubt**, the Commission should await a specific directive from the Legislature before it undertakes to regulate the incidental services of hotels to their guests.

Contract Enforcement

We also take exception to the recommendation of MCI (page 6 of its comments) which would make each "traffic aggregator" as it uses the term, responsible for compliance with the rules. This, of course, begs the basic jurisdictional question. A precondition of rulemaking is a finding that hotels and motels are in fact jurisdictional public utilities.

The Commission clearly has jurisdiction over contracts entered into between regulated utilities and their customers. However, its jurisdiction does **not** extend contracts, express or implied, between utility customers (in this instance, hotels) and their customers (in this instance, guests). It is a commonplace of regulatory law that the Commission (1) may not do indirectly what it cannot do directly, and (2) may not delegate regulation to utilities. Applying those basic principles to this rulemaking, the Commission may not regulate the rates, services, and practices of non-jurisdictional entities (hotels) through its power to regulate the contracts of utilities. A simple analogy will illustrate the point. The Commission has jurisdiction over contracts between Puget Power and Seattle City Light because it regulates Puget Power. However, its supervisory authority over the contract does not give it jurisdiction over City Light. In short, it cannot, by reason of its authority over contracts, assert indirect ratemaking authority over the non-jurisdictional entity.

Insofar as contracts are concerned, the expectation that a utility will enforce proper contract provisions governing the direct relationship with its customers is neither inappropriate nor impossible. Contrary to the general viewpoint of several of the long distance carriers, such a expectation does not make them "policemen." It merely makes them responsible contractors.

Many AOS companies (as well as more established long distance carriers) have bloomed like poppies over the Flanders field in which the remains of Ma Bell lie, not entirely at rest. At least some of these are typified, for example, by an operation consisting of a manager and 17 operators located in Houston, Texas, with no actual presence in the State of Washington. For such companies, assuring compliance with contract posting provisions might understandably be difficult. However, hotels and motels are not convertible from customers to utilities because enforcement of contract terms presents difficulty to some long distance carriers.

As MCI noted, most hotels and motels try to accommodate their customers as much as possible. Hotels and motels are expected to comply with contract requirements, and failure to do so may well be grounds for termination of the contract. Both parties have an obligation to comply. For a regulatory body to place the burden of compliance on a regulated utility is neither unconscionable nor unduly burdensome.

Additional Ratemaking Considerations

Especially salient are the comments of US West Communications and the Northwest Payphone Association relating to establishment rates in a rulemaking proceeding, and rate capping. We have previously addressed the problem of ratemaking by rule, but would now address briefly a further flaw with the rate cap proposal. Any rate cap carries with it an implication of comparative ratemaking and collective ratemaking. Neither is appropriate for any number of reasons. The Commission is undoubtedly no stranger to rate comparisons. The rates of small regulated water companies are continually being compared with adjacent water district rates. Rates of electric utilities are continually being compared with those of adjacent PUDs. The rates of Puget Power are compared with those of The Washington Water Power Company. These comparisons are of no value because the cost bases and revenue requirements are dissimilar. Rate comparisons are improper unless all the operating characteristics are shown to be comparable.

US West is unquestionably the dominant carrier in this state - but it is not the ratemaking carrier. This is a role that it quite properly protests - it is a role that should not be thrust upon it. As others point out, persons to whom the rate cap is purportedly applicable are not privy to the information upon which the US West rates are based.

If hotels and motels are declared to be utilities for ratemaking purposes, each entity[2] is entitled to rates which fairly compensate it for the services rendered, including a fair rate of return on its particular investment. A rate cap is entitled to no presumption of propriety without substantial evidence. In this instance, there is not a trace of evidence to show that the proposed rate cap is fair, just, or reasonable.

Conclusion

Long before the Bell System was dismantled, hotels and motels were offering room telephone services to their guests as an incident to occupancy. Frequently, these services were without charge, but many hotels, particularly those with sophisticated equipment, imposed a fee for telephone usage. Obviously, the equipment has changed over the years. Many hotels still offer plain old telephone service, but, on the other hand, many have converted to sophisticated equipment, responding to the fact that many guests are laptoppers with modems and portable telefax copiers. Irrespective of the nature of the equipment, the fact remains that any such services, POTS or sophisticated, were not then, nor are they now, offered to the general public.

As we have pointed out previously, persons are not entitled to walk in off the street and use a guest telephone. Hotels do not promote the use of guest telephones. One will see no advertising saying that our guest phone services are superior to those our our hotel competitors. That is because we are not now, and never have been, telephone companies in the business of providing telephone service.

Equipment, POTS or sophisticated is simply there for use if the guest desires. If there is a charge for its use, it is not now and never has been a secret. Hotels continue to offer telephonic customer premises equipment for the use of their guests as an incident of lodging. This does not make them telecommunications companies under Washington law, the gratuitous comments of Telesphere, Ltd. to the contrary notwithstanding.

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[2] Collective ratemaking is not proper. While motor carrier class and commodity rates are made on a collective basis, there is specific statutory requirement in Chapter 81.80 RCW that all rates be applied uniformly. In addition, the Commission has before it all operating statistics (revenue and cost) for a representative group of carriers. No such procedure is contemplated in Title 80.

In its comments, Fone America quite correctly observes that the incidental phone service provided by hotels and motels would leave them outside the definition of telecommunications companies. Hotels and motels are governed by a myriad of laws, **including** the Consumer Protection Laws. We submit, however, that they are not subject to the Public Service Laws.

Respectfully submitted,

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