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January 6, 2009

VIA E-MAIL AND HAND DELIVERY

Mr. David Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

Re: Docket No. UT-083056 – Response to Comcast's Motion for Reply

Dear Mr. Danner:

The Washington Independent Telecommunications Association ("WITA") and Lewis River Telephone Company, d/b/a TDS Telecom ("TDS") hereby respectfully request that the Commission reject Comcast's Motion for Leave to File a Reply and its Reply (the "Motion"). In the alternative, WITA and TDS request the opportunity to fully respond to the Motion.

From a procedural standpoint, Comcast's counsel was fully aware that the undersigned would be out of the country on vacation beginning on January 7 and returning to the office on January 19, 2009. Due to commitments on the undersigned's time in the day prior to leaving on vacation, it is not physically possible to prepare a full reply to the Motion until I return. Comcast's counsel and the undersigned had several communications concerning Comcast during the intervening days since WITA and TDS filed their Response in this matter and at no time did counsel for Comcast provide any sort of "heads up" or give any indication that this filing was coming, even though Comcast's counsel was fully aware of my schedule.

Further, Comcast indicated at the Procedural Conference when the scheduling occurred that it would not be filing any new information and would rely on the information it had previously filed with the Commission. The

process was set up so that WITA and TDS would have the final reply to the arguments that have been raised.

Now, Comcast is raising an entirely new argument. Its argument tries to draw the finest of lines that what it calls as a Local Interconnection Service is a telecommunications service and that the traffic generated by the end users can somehow become both telecommunications traffic and information service traffic at the same time; i.e., the traffic is information service traffic for the purposes of state registration by Comcast IP at the Commission and telecommunications service traffic as it relates to the right to seek information. Note that Comcast's unregistered affiliate is providing what Comcast itself has described as an information service. This argument really goes at the heart of the issues that are pending before the Commission and in many ways demonstrates why the Commission needs to proceed with this Petition for Declaratory Ruling and take a hard look at what is being done.

Comcast asserts that it has a legal right to request interconnection and that the legal right would be harmed by going through the declaratory ruling process. Unfortunately for Comcast, the question is whether or not there is a legal right to request interconnection given the manner in which VoIP service is provisioned. Simply asserting a legal right does not establish that the right exists.

Comcast also misinterprets the arguments related to the issue of whether the passage of time constitutes substantial prejudice or not. Comcast argues that the two cases[1] cited by WITA and TDS do not address the term "substantial prejudice" as set out in RCW 34.05.240(7). It is a true statement that neither case directly addresses RCW 34.05.240(7), but the statement misses the point. There are no cases under RCW 34.05.240(7) that address the term "substantial prejudice." Thus, it is appropriate to examine how the court has viewed the term "substantial prejudice" as a more general concept. It is black letter law in statutory construction that where a term is not defined and is not a specialized term, the words are given their common law meaning, if any,[2] or, lacking a meaning at common law, then ordinary meaning.[3] Thus, it is entirely appropriate to look at what the term "substantial prejudice" has

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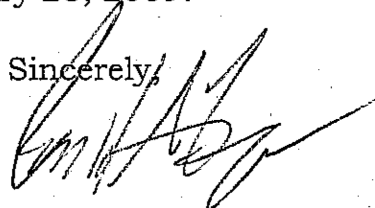
[1] Mutual of Enumclaw Ins. Co. v. USF Ins. Co, 164 Wn.2d 411, 191 P.3d 866 (2008) and State ex rel Peninsula Neighborhood Ass'n v. Dep't of Transportation, 142 Wn.2d 328, 12 P.3d 134 (2000).
[2] In re Brazier Forest Products, 106 Wn.2d 588, 595, 724 P.2d 970 (1986).
[3] In re Lehman, 93 Wn.2d 25, 27, 604 P.2d 948 (1980).

been determined to mean in other settings and apply the lessons of those cases to the matter before the Commission. Further, the time line for the declaratory order process can be established so that the issue is resolved without a significant passage of time.

Comcast also cites to In Re Petition of WITA for a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns, Docket No. UT-020667, and the Commission's Order Declining to Enter Declaratory Order (Aug. 19, 2002). There is a significant difference between this docket and the VNXX docket. In the VNXX docket, the Commission found that going through the declaratory order process would affect existing agreements and existing traffic. That is clearly not the case with Comcast. The issue is Comcast's ability to request interconnection, not an interpretation of an existing agreement. Although, in passing, given the tortuous route that was taken in order to resolve VNXX issues, everyone might have been better off had the declaratory order process been available.

Therefore, WITA and TDS request that the Commission deny Comcast's Motion. In the alternative, WITA and TDS request the opportunity to file a full response to the Motion on or before January 23, 2009.

Sincerely,



RICHARD A. FINNIGAN

RAF/km

cc: ALJ Rendahl (via e-mail and hand delivery)
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