BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of COMCAST PHONE OF WASHINGTON, LLC Application for Mitigation of Penalties or for Stay . . . . . . In the Matter of COMCAST PHONE OF WASHINGTON, LLC Petition for an Interpretive and Policy Statement or Declaratory Ruling	DOCKET NOS. UT-031459 and UT-031626 COMMISSION STAFF'S RESPONSE TO MOTIONS FOR SUMMARY DETERMINATION

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1 The Washington Utilities and Transportation Commission (Commission) Staff (Staff) responds to the motions for summary determination submitted by Comcast Phone of Washington, LLC (Comcast Phone) and AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services (AT&T). For the reasons set forth in this response, and in our Motion for Summary Determination[1] the Commission should deny summary determination to Comcast Phone and AT&T and grant the Staff's motion for summary determination.

I. ARGUMENT

A. The History of WAC 480-120-021 and 480-120-439 Does Not Support Comcast Phone's and AT&T's Argument That CLECs Necessarily Are Exempt From WAC 480-120-439.

2 Both Comcast Phone and AT&T argue that competitive local exchange companies (CLECs) are exempt from the reporting requirements of WAC 480-120-439 because that rule applies to Class A companies, which definition they contend excludes CLECs. Despite the plain language defining Class A companies as all local exchange companies serving more than two percent of the access lines in Washington, Comcast Phone and AT&T argue that the history of WAC 480-120 compels a different interpretation. They are wrong. Even if the history of the rules is relevant, it does not support their argument.

[1]The Commission Staff incorporates herein the arguments set forth in our Motion for Summary Determination.

1. The History of WAC 480-120-021 and WAC 480-120-439 Is Not Relevant.

3 At issue in this proceeding is whether CLECs are Class A companies; if so, then they must comply with the reporting requirements of WAC 480-120-439. As a preliminary matter, the rules of statutory construction apply to administrative rules as well as to statutes. *Cannon v. Department of Licensing*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone." *Id.*

4 For purposes of its rules, the Commission defines "Class A company" as: "a local exchange company with two percent or more of the access lines within the state of Washington." WAC 480-120-021. There is nothing ambiguous about the plain language of this provision. Likewise, there is nothing ambiguous about WAC 480-120-439, which says, "Class A companies must report monthly the information required in subsections (3), (4), and (6) through (10) of this section. . . ."

5 Even if Comcast Phone's and AT&T's arguments regarding the history of WAC 480-120-021 and 480-120-439 were tenable, which they are not, that does not mean the rules are ambiguous. An administrative rule is not ambiguous simply because different interpretations are conceivable. *Cannon*, 147 Wn.2d at 56. Therefore, there is no need for the Commission to construe these provisions by looking beyond their plain language to the history of the rules.

2. Even If WAC 480-120-021 and 480-120-439 Were Ambiguous, the History of the Rule and the Rulemaking Show That the Commission Intended to Include CLECs Within the Definition of Class A Company and Intended to Require Large CLECs to Comply With WAC 480-120-439.

6 Comcast Phone and AT&T begin their argument about the meaning of Class A company by ignoring the plain language of the definition and presuming that it applies only to ILECs. *See* Comcast Phone Motion, at 4-5; AT&T Motion, at 4. The companies then try to find support for their presumption in the history of the rule. As argued below, the history of the rules does not demonstrate that CLECs cannot be classified as Class A companies.

a. CLECs were required to file reports pursuant to the rule that preceded WAC 480-120-439.

7 The Commission enacted WAC 480-120-439 as part of its rulemaking covering the entire chapter of WAC 480-120. *See In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies*, Docket UT-990146. The rule that WAC 480-120-439 replaced also required local exchange companies to file service quality reports with the Commission. *Former* WAC 480-120-535. Like the current rule, the former rule required companies to file reports if the number of access lines they served exceeded a threshold number of access lines:

> Beginning June 1, 1993, each local exchange company shall submit the following reports as indicated:
>
> . . . .
>
> (3) Local exchange companies with over fifty thousand access lines

shall report monthly the information required by (a) through (d) of this subsection.

(a) Installation appointments met . . .
(b) Held orders . . .
(c) Regrade orders held . . .
(d) Trouble reports. . . .

Former WAC 480-120-535. Therefore, like the current rule, the former rule did not exempt CLECs, but instead applied to all local exchange companies that exceeded a given number of access lines. Comcast Phone's argument that WAC 480-120-535 only could have applied to ILECs because there was no local competition in 1993 is unavailing.[2] All local exchange companies were required to comply with WAC 480-120-535 as soon as they began to provide local exchange service.

b. <u>The rulemaking record demonstrates that CLECs are not exempt from the reporting requirements.</u>

8 The rulemaking record does not support Comcast Phone's and AT&T's argument that CLECs are exempt from the definition of Class A company. In essence, Comcast Phone argues that the Commission slipped the definition of Class A company, and thereby the reporting requirement, into the rulemaking at the eleventh hour and

[2]Comcast Phone contends that local competition did not exist prior to 1994, so in no way could the rule have applied to CLECs. *See* Comcast Phone's Motion, at 5 n.6 (citing *Electric Lightwave v. WUTC*, 123 Wn.2d 530, 869 P.2d 1045 (1994)). This contention is without merit.

In 1985, the Legislature declared it the state policy to "promote diversity in supply of telecommunications services and products in telecommunications markets throughout the state." RCW 80.36.300(5). On November 13, 1992, the King County Superior Court reversed the decision by a divided Commission that preserved a monopoly for intraexchange service. *Electric Lightwave*, 123 Wn.2d at 536. Following the superior court decision, the Commission began authorizing local exchange competition. *WUTC v. US West Communications, Inc.*, Docket Nos. UT-941464 *et al.*, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part, at 8-9 (Oct. 31, 1995). Comcast Phone's contention that it was unlawful for CLECs to enter the market until 1994 is incorrect.

did not allow parties to file written comments regarding the proposed definition. Comcast's Motion, at 5-6. The facts belie this argument.

9 As noted above, the former WAC required local exchange companies serving more than 50,000 access lines in Washington to file certain service quality reports. *Former* WAC 480-120-535. Through the rulemaking, the Commission carried forward the reporting requirement for local exchange companies serving more than a threshold number of access lines. As explained below, the service quality reporting rule progressed through the rulemaking process with the understanding that CLECs would be required to comply with service quality standards and report on service quality measures.

10 Sprint Corporation (Sprint), which operates as a CLEC and ILEC in Washington, submitted comments regarding the service quality reporting requirements on February 4, 2000. In those comments, Sprint stated its belief that the reporting requirements would be "burdensome" and "costly to implement." *In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies*, Docket UT-990146, Comments of Sprint Corporation, at 15 (Feb. 4, 2000). Sprint also advocated that "competitive providers should be exempt from this section for the reasons previously enumerated." *Id.*

11 During the rulemaking, AT&T also took the position that CLECs should not have to meet the same service quality standards as ILECs. In joint comments dated February

4, 2000, AT&T and MCI WorldCom stated that the proposed service quality rules should not apply to CLECs. *See In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies*, Docket UT-990146, Comments of AT&T and MCI WorldCom, at 6 (Feb. 4, 2000).

12 WorldCom also submitted comments early in the rulemaking that directly discussed the reporting requirement. On June 7, 2000, with respect to *proposed* WAC 480-120-535, WorldCom told the Commission :

> As stated in its introduction, WCOM believes that service quality performance reports serve no purpose in a competitive market. Carriers will be held accountable by customers who can choose to stay or leave the company. A carrier with poor service quality will be unable to maintain a customer base when there are comparable services available to them through other carriers. By requiring service quality reports, carriers will be tasked with the administrative burden of tracking and reporting bureaucratic paper work whether it is needed or not. The WUTC can invoke this requirement on an as needed basis. If the commission has reasonable and documented reasons for requiring a carrier to provide held service order reports or trouble reports, they should request reports from the carriers; however, if no problem or quality issue exists, there is no reason to expend valuable resources (both for carriers and the WUTC) toward this effort.

See In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies, Docket UT-990146, WorldCom's Comments on Technical Rules, at 4 (June 7, 2000).

13 During the rulemaking, on January 23, 2001, the Commission requested comments on a draft set of rules that included the reporting requirement for local

exchange companies serving more than 50,000 access lines. *See In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies*, Docket UT-990146, Notice of Opportunity to File Written Comments; Notice of Workshop (January 23, 2001). In response to this notice, WorldCom once again directly commented on the service quality reporting requirement set forth in that draft rule:

> In regards to service quality reporting for CLECs, WCOM believes that CLEC's [sic] should not be held to the same reporting standards as the ILEC for the same reasons stated above [competitive reasons; CLECs are dependent on ILECs for facilities]. The imposition of such a requirement would impede competition, not enhance it.

In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies, Docket UT-990146, Comments of WorldCom – Technical Rules, at 1 (Feb. 14, 2001).

14 On August 24, 2001, the Commission put out for comment a discussion draft of WAC 480-120.[3] The Commission gave interested parties until November 5, 2001, to file comments on the draft and scheduled a workshop for October 18-19, 2001, for discussion of the proposed rules. *See In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies*, Docket UT-990146, Notice of Opportunity to Comment on Draft Rules, Notice of Workshop, Notice of

[3] A copy of relevant pages from *proposed* WAC 480-120-021 and 480-120-535 are attached for ease of reference. The entire discussion draft is available from the Commission's website (www.wutc.wa.gov) or from the Commission's Records Center.

Interactive SBEIS Questionnaire (Aug. 24, 2001). The discussion draft accompanying the notice defined "Class A company" as a "local exchange company with two percent or more of the access lines within the state of Washington."

15 The August 24, 2001, draft also included the proposed service quality reporting rule. The proposed rule, while it bore the same number as the prior rule, contained essentially the same requirements as the final rule. The proposed rule provided, in relevant part:

> **480-120-535 Service quality performance reports.**
>
> (1) *Local exchange companies with two percent or more of the access lines in the state of Washington must report monthly* the information required in subsections (3), (4), and (6) through (10). Companies must report within thirty days after the end of the month in which the activity reported on takes place (e.g., a report concerning missed appointments in December must be reported by January 30).
>
> (2) *Companies that are exempted from financial reporting requirements by RCW 80.04.530 need not report to the commission as required by subsection (1).* However, these companies must retain, for at least three years from the date they are created, all records that would be relevant, in the event of a complaint or investigation, to a determination of the company's compliance with the service quality standards established by WAC 480-120-X08, WAC 480-120-XXX, WAC 480-120-XXY, WAC 480- 120-X16, WAC 480-120-510, WAC 480-120-515, and WAC 480-120-525.

Proposed WAC 480-120-535 (Aug. 24, 2001) (emphasis added).[4] This rule plainly shows that the Commission intended the reporting requirements to apply to companies

[4] Like the current rule, the proposed rule required local exchange companies serving more than two percent of the access lines in Washington to file reports regarding missed appointments; installation or activation of basic service; summary trouble reports, switching problems; interoffice, intercompany and interexchange trunk blocking; repairs; and business answering and repair answering system. *Compare proposed* WAC 480-120-535 (Aug. 24, 2001) *with* WAC 480-120-439.

serving two percent or more of the access lines in Washington. The exemption for smaller companies was phrased in terms of whether they were required to file reports under RCW 80.04.530, which exempts from certain reporting requirements those local exchange companies that serve less than two percent of the access lines in Washington. The proposed rule adopted the access line threshold for reporting requirements set forth in state law.[5]

16 The service quality reporting rule as proposed in August of 2001 would apply to all local exchange companies serving more than two percent of the access lines in Washington. That is the same threshold that is contained in the current rule.

17 On February 14, 2002, the Commission put out a pre-proposal draft of WAC 480-120. This draft rule preceded the Commission's decision to issue a CR 102 for the rule. This rule maintained the earlier definition of Class A company. WAC 480-120-535 was renumbered WAC 480-120-439. The revised draft streamlined the language of the rule and replaced the phrase, "Local exchange companies with two percent or more of the access lines in the state of Washington must report monthly . . ." with "Class A companies must report monthly . . ." While the words changed, their meaning remained the same.

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[5] RCW 80.04.530 was enacted in 1995, well after state policy contemplated local service competition. RCW 80.04.010 defines "local exchange company" as "a telecommunications company providing local exchange telecommunications service."

18 Therefore, the requirement that large local exchange companies file reports regarding their compliance with service quality measures was a component of the rulemaking from the beginning. The Commission continued using the number of access lines as threshold for the reporting requirements. The Commission simply changed the threshold, it did not change its requirement that CLECs meeting the threshold would be required to comply with the reporting requirements.

19 Contrary to Comcast Phone's argument, the Commission included the definition of Class A company much earlier than February 14, 2002. The Commission also provided interested parties with over two months within which to file comments, as well as a workshop during which interested parties could raise and discuss any concerns they might have had. *See* Comcast Phone's Motion, at 5-6.

20 Comcast Phone contends that, "when one reads WAC 480-120-439 in the context of the rulemaking process and WAC 480-120, it becomes clear that the new rule was not intended to apply to a CLEC." *Id.* at 6. To the contrary, the comments and various drafts of the rule plainly demonstrate that the Commission would continue to require all local exchange companies serving the threshold number of access line to file the service quality reports.

B. Washington Statutes and Public Policy Support the Commission's Requirement That All Large LECs Must Comply With WAC 480-120-439.

21 Comcast Phone and AT&T contend that the Commission should not require CLECs to comply with WAC 480-120-439 because the Legislature has provided that competitively classified companies should be subject to minimal regulation. *See* Comcast Phone's Motion, at 7; AT&T's Motion, at 1-2 (citing RCW 80.36.320(2)). The statute the companies cite does not support their argument.

22 Minimal regulation does not mean that competitive companies are not regulated. "Minimal regulation means that competitive telecommunications companies may file, instead of tariffs, price lists." RCW 80.36.320(2). Minimal regulation means only that competitive companies are not subject to the same pervasive economic regulation as ILECs. In addition to flexible pricing, the Commission "*may* also waive other regulatory requirements under this title for competitive telecommunications companies when it determines that competition will serve the same purposes as public interest regulation." *Id.* (emphasis added). It is fully within the Commission's discretion to require large CLECs to file reports pursuant to WAC 480-120-439.

23 The Commission considered the competing arguments regarding service quality reporting and ultimately decided that requiring large CLECs to file reports pursuant to WAC 480-120-439 is consistent with the public interest. The Commission decided that service quality reporting requirements serve the public interest because, while CLECs

initially are exempt from some substantive service quality standards, that exemption is subject to review. Where a company provides substandard service, the Commission has the authority to enforce its standards. Comcast Phone's and AT&T's argument that customers are adequately protected because they can simply switch to another carrier if the CLEC provides substandard service is not consistent with the public interest determination the Commission made when it adopted the service quality performance and reporting rules. The Commission decided that customers should not be required to switch from company to company just to receive the minimum level of service quality. Customers should be able to rely upon quality service from whatever provided they choose. The Commission should reject their argument.

24 Comcast Phone and AT&T contend that any parity of regulation is inconsistent with the public interest. *See* Comcast Phone's Motion, at 7-8; AT&T's Motion, at 2-3. The Commission expressly rejected this notion in adopting WAC 480-120:

> Companies have requested that we modify the requirement for completion of *all* orders for access lines within one hundred and eighty days to be for completion of orders of up to five access lines. We have chosen to differentiate between the one-month and calendar-quarter standards, which concern only orders up to five access lines, and the one-hundred-and-eighty-day standard for *all* access line orders. The public interest will be served by having a minimum standard upon which applicants and customers can rely. We decline to make the requested change. *Indeed, we have gone further and altered the proposed rule that did not apply this one-hundred-and-eighty-day standard to competitive local exchange carries and adopted a rule that applies the same minimum standard to those companies. In doing so, we satisfy the request of incumbent carriers that requested the standard apply to all local exchange companies*. We do not apply

> the one-month and calendar-quarter standards to competitive companies because their need to coordinate with incumbents limits their ability to meet the shorter deadlines in some instances.

In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telecommunications Companies, Docket UT-990146, General Order No. R-507, Order Amending, Adopting and Repealing Rules Permanently, ¶ 53 (Dec. 16, 2002) (second emphasis added) (discussing applicability of WAC 480-120-105 to CLECs). The Commission should not agree with the companies that the public interest is better served by exempting CLECs from the reporting requirements. *See also* Commission Staff's Motion, ¶¶ 20-22.

C. The Commission Should Not Grant Comcast Phone an Exemption from WAC 480-120-439.

25 Comcast Phone concedes that it can comply with two of the six reporting requirements set forth in WAC 480-120-439. Comcast Phone's Motion, at 9. Comcast Phone's reason for not filing these reports is that it would be expensive to do so. *Id.* Comcast Phone states that it cannot comply with the other reporting requirements because those reports must be compiled on a central office basis, and Comcast Phone does not use a central office in its network. *Id.* This problem can and should be resolved through alternative reporting requirements, not an exemption from all reporting. *See* Commission Staff's Motion, ¶¶ 35-36. Rather than grant Comcast Phone the "permanent exemption" it requests, the Commission may wish to consider any

alternative proposal Comcast may present. *See* Comcast Phone's Motion, at 9-10. However, Comcast Phone has yet to propose an alternative reporting mechanism. Therefore, the Commission should deny Comcast Phone's request for exemption from the rule.

D. The Commission Should Not Mitigate the Penalty.

26 In arguing that the Commission should mitigate the penalty, Comcast Phone reiterates its contention that WAC 480-120-439 does not apply to CLECs. As stated above, it plainly does. Given the plain language of WAC 480-120-439, the unambiguous definition of "Class A company," and the fact that the former rule required large local exchange companies to file service quality reports, Comcast Phone's argument that it should not be penalized because it contested the rule in good faith is without merit. A company cannot define itself out of compliance with the Commission's rules.

27 As Staff stated in its Motion for Summary Determination, the Commission is not precluded from imposing the penalty on Comcast Phone because of the criteria set forth in MCIMetro *Access Transmission Services, Inc. v. US West Communications, Inc.*, Docket No. UT-971063, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, In Part, and Affirming, In Part (Feb. 10, 1999). Staff's Motion,

¶¶ 23-26. The Commission also offered Comcast Phone technical assistance. *See id.*, ¶¶ 27-34. The Commission Staff will not repeat those arguments in this response.[6]

II. CONCLUSION

28 For the reasons stated above, the Commission should deny summary determination to Comcast Phone and AT&T. The Commission should grant Commission Staff's motion for summary determination.

Dated: December 23, 2003.

Respectfully submitted,

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[6] Again, Comcast Phone contends that Staff has data readily available to it to determine whether Comcast Phone serves more than two percent of the access lines in Washington but has "refused to provide it." This is not true. First, the Commission is not required to compile this information for companies, but refers companies to the Records Center so they can generate their own calculation of the number of access lines. WAC 480-120-302(c) (1). Second, the Commission provided Comcast Phone with sufficient information to determine that it met the threshold number of access lines to trigger the reporting requirement, but Comcast Phone instead challenged the plain language of the rule. Amended Declaration of Glenn Blackmon, ¶¶ 7-11. Finally, Comcast Phone concedes that it serves more than two percent of the access lines in Washington so it is unclear why Comcast Phone complains about Staff's alleged refusal to assist the company with that determination.