

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of |) | DOCKET NOS. UT-031459 and |
| |) | UT-031626 (consolidated) |
| COMCAST PHONE OF |) | |
| WASHINGTON, LLC |) | ORDER NO. 03: |
| |) | |
| |) | INITIAL ORDER ON CROSS- |
| |) | MOTIONS FOR SUMMARY |
| |) | DETERMINATION |

Synopsis: *This Initial Order would have the Commission conclude: (1) that WAC 480-120-439, which requires “Class A companies” to file service quality reports, applies to all local exchange companies (i.e., ILECs and CLECs) that have 2 percent or more of the access lines within the State of Washington, including Comcast Phone of Washington, LLC d/b/a Comcast Digital Phone; (2) that the company should not be granted an exemption from the rule on the present record; and (3) that the penalty assessed against Comcast for its failure to file the reports required under WAC 480-120-439 should be fully mitigated, subject to the condition that Comcast demonstrate in a subsequent filing, to be made within thirty days after a final Commission order in these proceedings, acceptable alternative means by which the company can satisfy the rule.*

SUMMARY

1 **PROCEEDINGS:** Docket No. UT-031459 concerns a Penalty Assessment against Comcast Phone of Washington, LLC d/b/a Comcast Digital Phone (“Comcast”). Finding Comcast’s failure to file a service quality report under WAC 480-120-439 an apparent violation of the Commission’s rules, the Commission assessed a penalty against Comcast in the amount of \$1,000, pursuant to RCW 80.04.405, on September 12, 2003. Comcast filed its “Application for Mitigation of Penalties or for Stay Pending Resolution of Petition for Interpretive and Policy Statement or Declaratory Order” on September 30, 2003. Commission Staff filed its Response on October 20, 2003.

2 Docket No. UT-031626 concerns Comcast's "Petition for an Interpretive and Policy Statement or a Declaratory Ruling That WAC 480-120-439 Does Not Apply to Comcast Phone of Washington, LLC, or an Order Granting Exemptions from Reporting Regulations," filed on October 2, 2003. The Petition raises issues concerning the interpretation and application of parts of chapter 480-120 WAC, including WAC 480-120-439.

3 The Commission entered its "Order Consolidating Proceedings and Denying Petition for an Interpretive and Policy Statement or a Declaratory Ruling" on October 24, 2003. By its Order, the Commission determined that the issues in these dockets should be resolved in an adjudicatory proceeding. The Commission appointed Administrative Law Judge Dennis J. Moss to preside. Pursuant to process determined at a prehearing conference on November 17, 2003, the parties filed cross-motions for summary determination on December 5, 2003, and responses on December 23, 2003.¹

4 **PARTY REPRESENTATIVES:** Judith A. Endejan, Graham & Dunn PC, Seattle, Washington, represents Comcast. Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, represents Time Warner Telecom of Washington LLC ("TWTC"). Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T Communications of the Pacific Northwest and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T"). Michel L. Singer Nelson, MCI Senior Regulatory Attorney, Denver, Colorado, represents MCI. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents WebTEC. Adam Sherr and Lisa A. Anderl, Qwest, Seattle, Washington, represent Qwest Corporation. Simon ffitch, Assistant Attorney General, Seattle,

¹ Comcast, AT&T, Qwest, Commission Staff, and Public Counsel filed motions for summary determination. Comcast, AT&T, MCI, Commission Staff, and Public Counsel filed responses. Qwest filed a letter stating it elected not to file a response, having addressed "each legal issue relevant to this case" in its motion.

Washington, represents the Public Counsel Section of the Washington Office of Attorney General. Shannon E. Smith, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").²

5 **PROPOSED DISPOSITION:** Subject to Commission review, this Order would determine the issues as follows:

1) WAC 480-120-439 applies to all local exchange companies (*i.e.*, ILECs and CLECs) that have 2 percent or more of the access lines within the State of Washington. Comcast has 2 percent or more of the access lines in Washington and is required to file service quality reports under WAC 480-120-439.

2) The Commission should not enter an order granting Comcast an exemption from WAC 480-120-439 on the present record. However, the Commission may grant authority for Comcast to use an alternative measurement or reporting format for any of the reports required and, if necessary, a partial exemption, in subsequent proceedings on a record that demonstrates how Comcast can better satisfy the rule's purpose by alternative means.

3) The penalty assessment should be fully mitigated, conditioned on Comcast demonstrating acceptable alternative means by which the company can satisfy the rule.

² In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

MEMORANDUM

I. Background and Procedural History

6 These proceedings raise issues about the interpretation and application of rules the Commission adopted in General Order No. R-507, which was entered in December 2002. The rule most centrally at issue, WAC 480-120-439, became effective on July 1, 2003, pursuant to that Order. WAC 480-120-439, reproduced in full as Appendix A to this Order, establishes record keeping and reporting requirements related to service quality standards set forth in various sections of chapter 480-120 WAC.

“Class A” companies, defined in WAC 480-120-021 as “a local exchange company with two percent or more of the access lines within the state of Washington,” must report monthly the information required in subsections (3), (4), and (6) through (10) of WAC 480-120-439. “Class B’ companies, defined in WAC 480-120-021 as “a local exchange company with less than two percent of the access lines within the State of Washington,” are not required to file reports, but must keep certain records related to service quality standards. According to WAC 480-120-021, the definitions it includes apply throughout the chapter “except where there is an alternative definition in a specific section, or where the context clearly requires otherwise.”

7 Comcast’s Director of Governmental and Regulatory Affairs in Washington, Ms. Rhonda Weaver, stated in a sworn declaration filed in these proceedings that as of the effective date of WAC 480-120-439, neither she “nor anyone else within the Company” understood the reporting requirements to apply to Comcast. Comcast continues to dispute Staff’s contention that Comcast is a Class A company under WAC 480-120-021 and, hence, subject to the reporting requirements of WAC 480-120-439.

- 8 Indeed, Comcast contends that it is neither a Class A nor a Class B company because those terms apply only to incumbent local exchange carriers (*i.e.*, “ILECs,” in the nomenclature that prevails in the wake of the federal Telecommunications Act of 1996). Comcast, by contrast, is a competitive local exchange carrier, or CLEC. Comcast’s arguments are considered in more detail below. It is sufficient to observe here that Comcast has not filed a report under WAC 480-120-439.³
- 9 The disagreement between Comcast and Staff concerning the applicability of WAC 480-120-439 to CLECs came into focus shortly after the rule’s effective date. On July 17, 2003, Commission Staff informed Ms. Weaver via e-mail that Staff believes Comcast is a Class A company and required to file monthly reports under WAC 480-120-439. It is significant, for reasons that will be discussed later, that Staff’s communication to Ms. Weaver did not cite the Class A definition in WAC 480-120-021, but rather referred Comcast to WAC 480-120-302, which establishes “Accounting requirements for companies not classified as competitive.” Staff’s e-mail states: “We would like to discuss these requirements with you at your earliest convenience.”
- 10 An e-mail exchange on July 18, 2003, between Ms. Weaver and Dr. Glenn Blackmon, the Commission’s Assistant Director for Telecommunications, shows that Comcast and Staff immediately began further discussions on this subject, and made preliminary plans to meet during the week of July 21, 2003. It is apparent from this exchange that Comcast, at least, had some question concerning whether it had reached the 2 percent threshold for Class A status, under any definition of the term. Ms. Weaver responded to Dr. Blackmon’s suggestion that the company rely on Department of Revenue data from December 2002, showing 3,412,593 access lines in Washington, by pointing out

³ The first reports required under WAC 480-120-439 were due by September 2, 2003, for the July 2003 period.

that WAC 480-120-302 refers companies to the Commission's Records Center for the pertinent data, not the Department of Revenue.⁴

- 11 An e-mail dated July 28, 2003, from Dr. Blackmon to Ms. Weaver shows that the parties met during the week of July 21, 2003. In his e-mail, Dr. Blackmon stated that it was his understanding that "the biggest question about whether Comcast must report under WAC 480-120-439 has to do with whether it is a "Class A company," a "Class B company," or neither." Dr. Blackmon's e-mail states that "[w]e discussed the definition of these two terms in WAC 480-120-302" and relates Dr. Blackmon's understanding of Comcast's argument "that since 480-120-302 applies only to non-competitive companies, a competitive company would be neither a Class A company nor a Class B company." Dr. Blackmon states further that he reread the rules after his meeting with Comcast and concluded the matter would be clarified by reference to the definitions in WAC 480-120-021. Finally, Dr. Blackmon stated "I look forward to hearing from you about how Comcast wants to proceed on this issue."
- 12 Dr. Blackmon's Declaration shows that after July 28, 2003, Staff and the Company proceeded by continuing to discuss, and to disagree about, the interpretation of WAC 480-120-439, the meaning of "Class A company" generally, and the calculation of the 2 percent threshold. These discussions continued through August and into September. According to Ms. Weaver, Comcast's interactions with Staff on this subject between July 17, 2003, and early September 2003, included at least 8 e-mails, 3 telephone conferences, and a face-to-face meeting. Ms. Weaver states in her Declaration:

⁴ It is worth noting Dr. Blackmon's Declaration, which states that Staff "after many hours of work . . . published the result [of its access line count using data from the Records Center] on October 30, 2003." "The result," Dr. Blackmon states, "was 4,090,455 access lines in the state." Comcast's total access lines, measured against that total, still exceed the 2 percent threshold.

I told Staff that Comcast Phone would request a declaratory ruling from the Commission on the applicability of WAC 480-120-439, or, in the alternative, request a waiver, because Comcast Phone cannot currently comply with all of that rule's reporting requirements. Comcast Phone was working on this filing when we received a Penalty Assessment on September 15, 2003. At no time during my communications with Staff did Staff ever indicate it would seek a penalty for Comcast Phone's "noncompliance" with WAC 480-120-439.

- 13 Dr. Blackmon states that he "repeatedly and consistently advised the company that it should either comply with the rule or make a formal filing to confirm its belief that the company was not required to report." According to Dr. Blackmon, by the time he recommended a penalty assessment to the Commissioners, Comcast "had missed several informal commitments to petition to the WUTC for a clarification." Dr. Blackmon asserts that the company's failure to file a petition after he informed Ms. Weaver in August that "the dispute should be resolved by the WUTC" means that the company "was not acting in good faith to resolve the issue when the WUTC issued the penalty assessment" on September 12, 2003.
- 14 Comcast, having received the Commission's penalty assessment notice on September 15, 2003, filed its "Application for Mitigation of Penalties or for Stay Pending Resolution of Petition for Interpretive and Policy Statement or Declaratory Order" on September 30, 2003. On October 2, 2003, Comcast filed its "Petition for an Interpretive and Policy Statement or a Declaratory Ruling That WAC 480-120-439 Does Not Apply to Comcast Phone of Washington, LLC, or an Order Granting Exemptions from Reporting Regulations."
- 15 The Commission entered its "Order Consolidating Proceedings and Denying Petition for an Interpretive and Policy Statement or a Declaratory Ruling" on October 24, 2003. The Commission conducted a prehearing conference on

November 17, 2003. Comcast agreed not to contest that it does, in fact, operate 2 percent or more of the access lines in Washington. There being no material facts in dispute, the parties agreed to proceed on the basis of cross-motions for summary determination. The parties filed cross-motions for summary determination on December 5, 2003, and responses on December 23, 2003.⁵

II. Discussion and Decisions

A. Introduction

16 Comcast asserts that WAC 480-120-439 does not apply to CLECs, such as itself, as a matter of law. In addition, Comcast argues that WAC 480-120-439 should not be construed to apply to CLECs as a matter of policy.

17 Before turning to the company's legal arguments, we observe generally that Comcast's policy arguments are somewhat misplaced.⁶ Such arguments could have been made, and to some extent were made, in the rulemaking proceedings in Docket No. UT-990146, which concluded after considerable public process in December 2002 with General Order No. R-507. Policy arguments from participants such as Comcast contribute to the Commission's rulemaking process and help shape the rules that the Commission adopts. Once adopted, however, the Commission's rules are statements of law. Commission rules, like statutes, must be construed in accordance with established legal principles; the Commission cannot simply ignore those principles in favor of policy outcomes. Thus, we will not consider policy arguments in any detail in section II.B., below, where we resolve as a matter of law the parties' dispute concerning whether WAC 480-120-439 applies by its terms to Comcast.

⁵ See, *supra*, fn. 1.

⁶ AT&T and MCI make arguments similar to those advanced by Comcast. This Order, when referring to Comcast's arguments, also takes into account the arguments by AT&T and MCI. In like vein, when referring to Staff's arguments, this Order also takes into account the similar arguments made by Qwest and Public Counsel.

18 Comcast's policy arguments, however, will be considered in connection with its request for alternative relief in the form of a full or partial exemption under WAC 480-120-015, which provides, in pertinent part:

(1) The commission may grant an exemption from the provisions of any rule in this chapter, if consistent with the public interest, the purposes underlying regulation, and applicable statutes.

We discuss the exemption question, and the somewhat related question of alternative reporting under WAC 480-120-439(2), below in section II.C.

19 Finally, in section II.D., we consider and decide whether the penalty assessed against Comcast on September 12, 2003, should be mitigated.

B. Interpretation of WAC 480-120-439

20 WAC 480-120-439 provides in pertinent part:

Service quality performance reports. (1) **Class A companies.** Class A companies must report monthly the information required in subsections (3), (4), and (6) through (10) of this section. 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) **Class B companies.** Class B companies need not report to the commission as required by subsection (1) of this section. 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 [various provisions of chapter 480-120 WAC].

The terms “Class A company” and “Class B company” are defined in WAC 480-120-021 as follows:

“Class A company” means a local exchange company with two percent or more of the access lines within the state of Washington.

“Class B company” means a local exchange company with less than two percent of the access lines within the state of Washington.

21 These definitions, along with all others in WAC 480-120-021, are subject to the rule’s opening proviso that “[t]he definitions in this section apply throughout the chapter except where there is an alternative definition in a specific section, or where the context clearly requires otherwise.”

22 Comcast argues that because neither the definition of Class A company nor the language in WAC 480-120-439 expressly refers to competitive local exchange carriers, or CLECs, a CLEC such as Comcast cannot be considered a Class A company for purposes of WAC 480-120-439 or, presumably, for any purpose under chapter 480-120 WAC. This argument fails under the plain meaning standard for statutory construction. The definition in WAC 480-120-021, by its plain terms, includes all local exchange companies (LECs), whether in the subset of incumbent (ILEC), or competitive (CLEC) local exchange company. The definitions of Class A company and Class B company in WAC 480-120-021 do not expressly refer to either ILECs or CLECs. Were we to accept Comcast’s argument that the absence of a specific reference to CLECs means they are not

included in the definitions, we would have to accept the equally unlikely proposition that the definitions do not include ILECs. This would make the rule provisions utterly meaningless, a result not permitted under the rules of statutory construction.

23 Comcast makes three arguments based on the principle that rules, including definitions, must be read in context. Comcast's first line in this series begins by focusing on the prefatory language in WAC 480-120-021 that says the definitions stated in the section apply unless "there is an alternative definition in a specific section or where the context clearly requires otherwise." Comcast then makes the sweeping generalization that "[t]he use of the term Class A company in context throughout WAC ch. 480-120 makes clear that the term applies only to ILECs." *Comcast Motion at 4*. Comcast then cites examples of several individual rules in chapter 480-120 WAC that apply the Class A versus Class B distinction to ILECs either expressly,⁷ or via context.⁸

24 In complete contradiction of what Comcast argues, the fact that there are instances where the terms and context of individual rules in chapter 480-120 WAC clearly limit the applicability of the Class A/Class B distinction to ILECs demonstrates that the basic definitions of those terms in WAC 480-120-021 encompass more than just ILECs. Yet, Comcast turns logic on its head and argues that because there are exceptions to what otherwise appears to be the plain meaning of the terms (*i.e.*, that the terms include all LECs) we should find that the exceptions swallow the rule. We reject Comcast's argument that we

⁷ Comcast refers to WAC 480-120-302, which establishes accounting requirements for companies not classified as competitive (*i.e.*, ILECs, not CLECs). Since the rule applies only to ILECs, the definition of Class A company is limited in its application in this context to ILECs. The corresponding rule for CLECs, WAC 480-120-301, does not establish different requirements for Class A versus Class B companies.

⁸ Comcast refers to WAC 480-120-071(4), which applies to Class A companies that have a service extension tariff in effect. Since only ILECs have such tariffs, the definition of Class A company is limited in its application in this context to ILECs.

should infer from the fact that some rules limit the application of the Class A/Class B distinction to ILECs that the definitions themselves are so limited.

25 Comcast's second line of argument is that we should consider not only the context of the rules themselves to determine their meaning and application, but also the context of the rulemaking process. We will not venture very far down this path because it simply is not necessary for us to consider the equivalent of legislative history to construe the language at issue. However, we will briefly discuss this line of argument, the essence of which is that "nothing in the rulemaking put CLECs on notice that the Commission intended CLECs to be subject to service quality reporting rules." *Comcast Motion at 5.*

26 We start by noting Staff's observation that WAC 480-120-439 replaced former WAC 480-120-535. As Staff says:

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.

*Staff Response at 3.*⁹ Staff's argument goes on to relate in detail the revisions and renumbering that appeared in various drafts during the lengthy rulemaking process that eventually led to adoption of WAC 480-120-439. Staff also quotes from and discusses comments that various participants (*e.g.*, AT&T, Sprint, WorldCom) in the rulemaking docket filed addressing directly, and arguing against requiring, service quality reporting by CLECs. *Staff Response at 5-10.* As Staff sums the matter up:

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.

...

[T]he 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.

Id. at 10.

⁹ The acronyms ILEC and CLEC were not in widespread use, if they had been coined at all, prior to the federal Telecommunications Act of 1996.

27 Comcast's third line of argument is that we must consider as "context" the Washington Legislature's determinations that "CLECs be subject to minimal regulation (RCW 80.36.320(2)), and that the Commission permit flexible regulation of competitive telecommunications companies." *Comcast Motion at 7.* This, again, is a line of argument more appropriately made in a rulemaking proceeding, rather than in an adjudication in which we are required to determine the applicability of a currently effective rule.

28 In any event, WAC 480-120-439 does not establish requirements that are arguably unlawful under the cited statute, or inconsistent with the Legislature's policy determinations. RCW 80.36.320(2) provides in pertinent part:

Minimal regulation means that competitively classified companies may file, instead of tariffs, prices lists. 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

The Commission expressly reserved its discretion to be flexible in applying these reporting requirements by promulgating WAC 480-120-439(12), which allows for alternative measurement or reporting formats in appropriate circumstances. In addition, WAC 480-120-015 allows the Commission to grant an exemption from the provisions of any rule in chapter 480-120 "if consistent with the public interest, the purposes underlying regulation, and applicable statutes."

29 Comcast's arguments about the meaning of Class A company and Class B company in WAC 480-120-021 and WAC 480-120-439 are simply unavailing. The plain language of these provisions unambiguously establishes that all local exchange companies are within the definitions and subject to the reporting or records retention requirements without regard to their status as ILEC or CLEC.

Even accepting for purposes of argument that we should consider the legislative history of these rules, we still find no support for Comcast's arguments. WAC 480-120-439 merely carries forward in different language the Commission's longstanding requirement that larger local exchange companies furnish monthly service quality reports and that smaller local exchange companies retain certain records related to service quality and satisfy more limited reporting requirements. Finally, the reporting requirements are neither unlawful, nor inconsistent with the Legislature's directives concerning "minimal regulation" of competitive telecommunications companies.

30 We conclude, as a matter of law, that CLECs such as Comcast that have more than 2 percent of the access lines within the state of Washington are Class A companies within the meaning of WAC 480-120-439.

C. Exemption

31 Comcast argues that it should be granted an exemption under WAC 480-120-015 because the company "cannot comply with the reporting requirements of WAC 480-120-439 without undue hardship." *Comcast Motion at 9*. Alternatively, Comcast argues that if WAC 480-120-439 does apply, "a partial waiver should be granted and the Company should be allowed to satisfy the new rule by alternative means." *Id. at 2*. Later, having described in some detail certain practical barriers to meeting the specific reporting requirements included in WAC 480-120-439, the Company says:

Comcast Phone requests that the Commission allow it to devise alternative measurements and reports to satisfy all reporting requirements of WAC 480-120-439. Because Comcast Phone cannot currently provide the measurements required by Sections (3), (4), (9), (6) – (10) of WAC 480-120-439, the Commission should approve a permanent "alternative measurement" which allows Comcast

Phone a reasonable opportunity to comply with the new rule without extreme disruption to its business.

Under WAC 480-120-439(12), when a company cannot reasonably provide the measurements or reports as required, the Commission may approve an alternative measurement or reporting format. The rules recognize that allowances should be made if a company cannot reasonably comply with the rules requirements. WAC 480-120-015; WAC 480-120-439(12).

Id. at 10. Comcast suggests certain general guidelines for alternative reporting, but does not provide a detailed proposal for the Commission's consideration.

32 Staff also supports an alternative reporting mechanism for Comcast and “believes most of the problems Comcast Phone has identified could be addressed through [such a] mechanism.” *Staff Motion at 16.* Staff argues, however, that Comcast has not provided enough information in the context of this contested proceeding upon which the Commission can determine and approve an alternative reporting mechanism. Staff argues that the Commission should not grant “an exemption from all reporting,” but should consider “any alternative proposal Comcast may present.” *Staff Response at 13-14.*

33 The record in this proceeding strongly supports the idea that the Commission should authorize Comcast to satisfy the reporting requirements under WAC 480-120-439 by alternative means that reflect the company's network architecture and operations. The record is inadequate, however, to establish exactly what alternative reporting methods should be approved.

34 Under these circumstances, on the present record, it would not be appropriate to grant Comcast a full or partial exemption from the requirements of WAC 480-120-439. However, denial of this alternative form of relief here should be

without prejudice to Comcast seeking and the Commission granting such an exemption to the extent necessary to permit Comcast to satisfy the underlying purpose of this reporting requirement by alternative means proposed in a subsequent proceeding. It may be, however, that no exemption is required given WAC 480-120-439(12), which provides:

If consistent with the purposes of this section, the commission may, by order, approve for a company an alternative measurement or reporting format for any of the reports required by this section, based on evidence that:

(a) The company cannot reasonably provide the measurement or reports as required;

(b) The alternative measurement or reporting format will provide a reasonably accurate measurement of the company's performance relative to the substantive performance standard; and

(c) The ability of the commission and other parties to enforce compliance with substantive performance standard will not be significantly impaired by the use of the alternative measurement or reporting format.

35 Given the difficulties Comcast would encounter in providing meaningful data under the precise requirements of WAC 480-120-439, and Staff's acknowledgement that alternative reporting mechanisms appear to be appropriate for this company, the Commission should encourage Comcast and Staff to work together to develop a proposal for alternative measurement and reporting to be brought forward for Commission consideration in a subsequent proceeding. If the parties cannot agree to an alternative reporting mechanism, the Commission can resolve any differences in such a subsequent proceeding.

D. Penalty Mitigation

36 Comcast argues that the Commission should fully mitigate the \$1,000 penalty it assessed against the company on September 12, 2003, for failing to file a service quality performance report for July 2003. Comcast states that at the time the penalty was assessed, the company was trying, in good faith, to resolve its dispute with Staff over the applicability of WAC 480-120-439, and was preparing to file a petition with the Commission for a declaration that the rule does not apply to CLEC's or to seek a waiver, if it does apply. Comcast argues that the Commission's imposition of a penalty while the company continues to dispute compliance issues in good faith is contrary to criteria the Commission previously has stated for penalty assessment and "contravenes the spirit and intent of the Washington State Administrative Procedure Act as revised by the Regulatory Reform Act of 1995." *Comcast Motion at 13-14.*¹⁰

37 Staff opposes any mitigation. Staff argues that "WAC 480-12-439 unequivocally requires Comcast Phone to file service quality reports," and states that the company "should have known its conduct was in violation of the rule because the Commission had informed the company that it was required to report."

38 Although we conclude above that WAC 480-120-439 requires a CLEC with more than 2 percent of the access lines in Washington to file service quality reports, this is not to say that any arguments to the contrary are frivolous. It is apparent from the pleadings and supporting documents that Comcast has disputed the applicability of this rule in good faith. Although the company's arguments do not prevail, they are not facially untenable.

¹⁰ Comcast cites *MCI Metro Access Transmission Services, Inc. v. U S 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 (February 10, 1999); and 1995 Wash. Laws 403 § 1(f).

- 39 There is no history of WAC 480-120-439, or its predecessor rule, ever having been applied to a CLEC. In that sense, at least, this case presents a question of first impression. The evidence shows that both the company and the Commission Staff first viewed the central issue of whether WAC 480-120-439 applies to CLECs in an atmosphere of uncertainty. When the matter first was discussed between Comcast and Staff, for example, Staff referred the company to a definition of Class A company that is included in a rule (*i.e.*, WAC 480-120-302) that, by its terms, applies only to “companies not classified as competitive.” This appears to have reinforced Comcast’s view that the terms Class A and Class B, as used in the rules, do not apply to CLECs. Although Staff’s perspective on this issue may have been clarified by Dr. Blackmon’s e-mail to Comcast on July 28, 2003, as previously discussed, Comcast had independent grounds upon which it contested the applicability of WAC 480-120-439, and apparently indicated to Staff its intention to seek a formal determination from the Commission rather than simply acceding to Staff’s view.
- 40 It appears from Ms. Weaver’s and Dr. Blackmon’s Declarations that, while communications between the company and Staff continued during August and into September, there was a lack of effective communication concerning exactly how and when this matter should be queued up for Commission determination. Ms. Weaver states that Comcast was actively preparing to file a petition at the time the penalty was assessed. Dr. Blackmon states that he had lost faith in Comcast’s intention to file because “Comcast missed several informal commitments” to make such a filing.
- 41 Whatever else may be true, the Commission’s decision to assess a penalty against Comcast did serve to bring this matter into sharp focus and queue it up for Commission determination. Were we to consider only this process objective, its attainment might justify mitigation of the penalty assessment. However, as determined here, the penalty assessed in this matter serves the additional

objective of promoting Comcast's compliance with a Commission rule that, by its failure to file service quality reports, it continues to violate today.

42 We recognize that Comcast had the right to dispute in good faith the applicability of WAC 480-120-439, but that dispute is here resolved against the company. Our principal goal at this juncture is compliance on a prospective basis. Considering all of the circumstances attendant to this matter we conclude that our goal will be best accomplished by ordering full mitigation of the penalty assessed against Comcast, conditioned on the company filing a petition seeking approval of an alternative measurement or reporting format under WAC 480-120-439(12) within 30 days after the date of a final Commission order in these proceedings. We expect Comcast and Staff to work cooperatively together to develop an alternative that will satisfy the underlying purposes of the service quality reporting rules taking into account the company's network architecture and operations. To the extent there are specific issues Comcast and Staff cannot resolve, those can be identified in a subsequent proceeding and the Commission will resolve them on the basis of such record as is required for their determination.

FINDINGS OF FACT

43 There are no disputed facts material to the Commission's determination of the issues in this proceeding. The Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the Commission's ultimate decisions are incorporated by this reference.

44 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electric companies.

- 45 (2) Comcast is a “public service company” and a “telecommunications company” as those terms are defined in RCW 80.04.010, and as those terms otherwise may be used in Title 80 RCW. Comcast is engaged in Washington State in the business of supplying utility services and commodities to the public for compensation.
- 46 (3) Comcast has more than 2 percent of the access lines within the state of Washington and, thus, is a Class A company as defined in WAC 480-120-021.
- 47 (4) Comcast, as a Class A company within the meaning of that term as used in WAC 480-120-439, is subject to the reporting requirements for such companies as stated in WAC 480-120-439.
- 48 (5) Comcast has not carried its burden of proof to show facts that would justify granting the company an exemption from the reporting requirements of WAC 480-120-439.
- 49 (6) Comcast has not carried its burden of proof to show facts that would establish a basis for alternative measurements or reporting formats that would be consistent with the requirements of WAC 480-120-439.
- 50 (7) Comcast’s failed to file reports required by WAC 480-120-439 by September 2, 2003.

CONCLUSIONS OF LAW

- 51 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings. *Title 80 RCW.*

- 52 (2) WAC 480-120-439 applies to CLECs, such as Comcast, that have more than
2 percent of the access lines within the state of Washington. Such
companies are Class A companies as that term is used in WAC 480-120-
439.
- 53 (3) Comcast should not be granted an exemption from the requirements of
WAC 480-120-439.
- 54 (4) Comcast should not be authorized to satisfy the requirements of WAC
480-120-439 via alternative measurements or reporting formats absent a
showing of specific alternative measurements or reporting formats that
will satisfy the rule.
- 55 (5) The penalty assessed against Comcast on September 12, 2003, for its
failure to file the reports required under WAC 480-120-439 should be fully
mitigated, subject to the condition that Comcast demonstrate in a
subsequent filing acceptable alternative means by which the company can
satisfy the rule.
- 56 (6) The Commission should retain jurisdiction to effectuate the terms of this
Order. *Title 80 RCW.*

ORDER

THE COMMISSION ORDERS THAT:

- 57 (1) The requirements of WAC 480-120-439 for Class A companies apply to all
local exchange companies (*i.e.*, ILECs and CLECs) that have 2 percent or
more of the access lines within the State of Washington, including
Comcast.

- 58 (2) Comcast is required to satisfy the requirements stated in WAC 480-120-439 for Class A companies and its failure to do so is a violation of the Commission's rules.
- 59 (3) Comcast's request for an exemption from the requirements of WAC 480-120-439 is denied.
- 60 (4) Comcast's Petition for Mitigation is granted, subject to the condition that the company make a subsequent filing within 30 days after the Commission enters a final order in these proceedings showing acceptable alternative means by which the company can satisfy WAC 480-120-439. If Comcast fails to make a timely subsequent filing, the company's Petition for Mitigation is denied.
- 61 (5) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective this 16th day of January 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO PARTIES:

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a Final Order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-07-825 provides that any party to this proceeding has twenty (20) days after the service date of this Initial Order to file a *Petition for Administrative Review*. Any party may file an Answer to any Petition for review within ten (10) days after service of the Petition.

APPENDIX A

WAC 480-120-439 Service quality performance reports. (1) **Class A companies.** Class A companies must report monthly the information required in subsections (3), (4), and (6) through (10) of this section. 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) **Class B companies.** Class B companies need not report to the commission as required by subsection (1) of this section. 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 480-120-105 (Company performance standards for installation or activation of access lines), 480-120-112 (Company performance for orders for nonbasic services), 480-120-133 (Response time for calls to business office or repair center during regular business hours), 480-120-401 (Network performance standards), 480-120-411 (Network maintenance), and 480-120-440 (Repair standards for service interruptions and impairments, excluding major outages).

(3) **Missed appointment report.** The missed appointment report must state the number of appointments missed, the total number of appointments made, and the number of appointments excluded under (b), (c), or (d) of this subsection. The report must state installation and repair appointments separately.

(a) A LEC is deemed to have kept an appointment when the necessary work in advance of dispatch has been completed and the technician arrives within the

appointment period, even if the technician then determines the order cannot be completed until a later date. If the inability to install or repair during a kept appointment leads to establishment of another appointment, it is a new appointment for purposes of determining under this subsection whether it is kept or not.

(b) When a LEC notifies the customer at least twenty-four hours prior to the scheduled appointment that a new appointment is necessary and a new appointment is made, then the appointment that was canceled is not a missed appointment for purposes of this subsection. A company-initiated changed appointment date is not a change to the order date for purposes of determining compliance with WAC 480-120-105 (Company performance standards for installation or activation of access lines) and 480-120-112 (Company performance for orders for nonbasic services).

(c) A LEC does not miss an appointment for purposes of this subsection when the customer initiates a request for a new appointment.

(d) A LEC does not miss an appointment for purposes of this subsection when it is unable to meet its obligations due to force majeure, work stoppages directly affecting provision of service in the state of Washington, or other events beyond the LEC's control.

(4) **Installation or activation of basic service report.** The report must state the total number of orders taken, by central office, in each month for all orders of up to the initial five access lines as required by WAC 480-120-105 (Company performance standards for installation or activation of access lines). The report must include orders with due dates later than five days as requested by a customer. The installation or activation of basic service report must state, by central office, of the total orders taken for the month, the number of orders that the company was unable to complete within five business days after the order

date or by a later date as requested by the customer.

(a) A separate report must be filed each calendar quarter that states the total number of orders taken, by central office, in that quarter for all orders of up to the initial five access lines as required by WAC 480-120-105 (Company performance standards for installation or activation of access lines). The installation or activation of basic service ninety-day report must state, of the total orders taken for the quarter, the number of orders that the company was unable to complete within ninety days after the order date.

(b) A separate report must be filed each six months that states the total number of orders taken, by central office, in the last six months for all orders of up to the initial five access lines as required by WAC 480-120-105 (Company performance standards for installation or activation of access lines). The installation or activation of basic service one hundred eighty day report must state, of the total orders taken for six months, the number of orders that the company was unable to complete within one hundred eighty days.

Orders for which customer-provided special equipment is necessary; when a later installation or activation is permitted under WAC 480-120-071 (Extension of service); when a technician arrives at the customer's premises at the appointed time prepared to install service and the customer is not available to provide access; or when the commission has granted an exemption under WAC 480-120-015 (Exemptions from rules in chapter 480-120 WAC), from the requirement for installation or activation of a particular order, may be excluded from the total number of orders taken and from the total number of uncompleted orders for the month.

For calculation of the report of orders installed or activated within five business days in a month, orders that could not be installed or activated within five days in that month due to force majeure may be excluded from the total

number of orders taken and from the total number of uncompleted orders for the month if the company supplies documentation of the effect of force majeure upon the order.

(5) **Major outages report.** Notwithstanding subsections (1) and (2) of this section, any company experiencing a major outage that lasts more than forty-eight hours must provide a major outage report to the commission within ten business days of the major outage. The major outages report must include a description of each major outage and a statement that includes the time, the cause, the location and number of affected access lines, and the duration of the interruption or impairment. When applicable, the report must include a description of preventive actions to be taken to avoid future outages. This reporting requirement does not include company-initiated major outages that are in accordance with the contract provisions between the company and its customers or other planned interruptions that are part of the normal operational and maintenance requirements of the company.

The commission staff may request oral reports from companies concerning major outages at any time and companies must provide the requested information.

(6) **Summary trouble reports.** Each month companies must submit a report reflecting the standard established in WAC 480-120-438 (Trouble report standard). The report must include the number of reports by central office and the number of lines served by the central office. In addition, the report must include an explanation of causes for each central office that exceeds the service quality standard established in WAC 480-120-438 (Trouble report standard). The reports, including repeated reports, must be presented as a ratio per one hundred lines in service. The reports caused by customer-provided equipment, inside wiring, force majeure, or outages of service caused by persons or entities other than the local exchange company should not be included in this report.

(7) **Switching report.** Any company experiencing switching problems in excess of the standard established in WAC 480-120-401 (2)(a) (Switches -- Dial service), must report the problems to the commission. The report must identify the location of every switch that is performing below the standard.

(8) **Interoffice, intercompany and interexchange trunk blocking report.** Companies that experience trunk blocking in excess of the standard in WAC 480-120-401 (3) (Interoffice facilities) and (5) (Service to interexchange carriers) must report each trunk group that does not meet the performance standards. For each trunk group not meeting the performance standards, the report must include the peak percent blocking level experienced during the preceding month, the number of trunks in the trunk group, the busy hour when peak blockage occurs, and whether the problem concerns a standard in WAC 480-120-401 (3) or (5). The report must include an explanation of steps being taken to relieve blockage on any trunk groups that do not meet the standard for two consecutive months.

(9) **Repair report.**

(a) For service-interruption repairs subject to the requirements of WAC 480-120-440 (Repair standards for service interruptions and impairments, excluding major outages), companies must report the number of service interruptions reported each month, the number repaired within forty-eight hours, and the number repaired more than forty-eight hours after the initial report. In addition, a company must report the number of interruptions that are exempt from the repair interval standards as provided for in WAC 480-120-440.

(b) For service-impairment repairs subject to the requirements of WAC 480-120-440, companies must report the number of service impairments reported each month, the number repaired within seventy-two hours, and the number repaired more than seventy-two hours after the initial report. In addition, a

company must report the number of impairments that are exempt from the repair interval standard as provided for in WAC 480-120-440.

(10) **Business office and repair answering system reports.** When requested, companies must report compliance with the standard required in WAC 480-120-133 (Response time for calls to business office or repair center during regular business hours). If requested, companies must provide the same reports to the commission that company managers receive concerning average speed of answer, transfers to live representatives, station busies, and unanswered calls.

(11) The commission may choose to investigate matters to protect the public interest, and may request further information from companies that details geographic area and type of service, and such other information as the commission requests.

(12) If consistent with the purposes of this section, the commission may, by order, approve for a company an alternative measurement or reporting format for any of the reports required by this section, based on evidence that:

(a) The company cannot reasonably provide the measurement or reports as required;

(b) The alternative measurement or reporting format will provide a reasonably accurate measurement of the company's performance relative to the substantive performance standard; and

(c) The ability of the commission and other parties to enforce compliance with substantive performance standard will not be significantly impaired by the use of the alternative measurement or reporting format.

(13) Subsection (12) of this section does not preclude application for an exemption under WAC 480-120-015.