

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

In the Matter of the

Washington Independent
Telecommunications Association and Lewis
River Telephone Company, d/b/a TDS
Telecom Petition for Declaratory Ruling

DOCKET NO. UT-083056

**RESPONSE OF
THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION
AND LEWIS RIVER TELEPHONE COMPANY D/B/A TDS TELECOM
TO MOTION OF COMCAST PHONE OF WASHINGTON, LLC
FOR LEAVE TO REPLY TO WITA/TDS RESPONSE AND PROPOSED REPLY**

1. Pursuant to the Notice of Opportunity to File Reply to Comcast's Motion entered January 13, 2009, the Washington Independent Telecommunications Association ("WITA") and Lewis River Telephone Company, d/b/a TDS Telecom ("TDS") hereby file this Reply to the Comcast Motion. First, and foremost, WITA and TDS appreciate the opportunity to be able to file this Reply. At the outset, WITA and TDS note that an objection to Comcast's motion for leave to reply would most likely be futile. Therefore, rather than objecting to the motion for leave to reply, WITA and TDS will simply concentrate on responding to the substance of Comcast's Proposed Reply. For purposes of convenient reference throughout the remainder of this Reply, the Comcast filing will be referred to as the "Comcast Motion."

DISCUSSION

The Existence or Non-Existence of a "Right" that Comcast Asserts is the Key Issue in this Proceeding.

2. At Paragraph 3 of Comcast's Motion, Comcast asserts that what WITA and TDS argue is a "hopelessly circular argument that, if accepted, would clearly expand the Commission's jurisdiction to a judicative declaratory ruling proceedings well beyond what the legislature intended." That statement by Comcast is just not consistent with the statute itself. RCW 34.05.240(7) allows a necessary party to block the use of a declaratory ruling if and only if the declaratory order "would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding." The key question is whether there does or does not exist a right that would be substantially prejudiced.

3. At Paragraph 5 of the Comcast Motion, Comcast asserts "Comcast has the existing right to interconnect with other telecommunications carriers...." (Emphasis added.) That is the key

question. It is not certain that Comcast has an existing right. That, in fact, is the question before the Commission in this proceeding.

4. The circular argument is not what WITA and TDS present. The circular argument is Comcast's continual assertion that it has an existing right to interconnection. That is the core issue of the proceeding.

5. Comcast claims that the arguments presented by WITA and TDS are erroneous in that they are based upon a mistake of fact. That mistake of fact which is asserted by Comcast is whether Comcast claims the traffic that it wants to send to TDS is an information service or not.¹ At the time that WITA and TDS filed their initial response in this docket, WITA and TDS sincerely believed that Comcast was asserting that what it provided was an information service. The parties have since learned through discovery in Docket No. UT-083055 that Comcast attempts to draw a fine distinction through a deliberate corporate allocation of responsibilities, such that the affiliate known as "Comcast IP" provides what Comcast states is an information service, while Comcast Phone, through its limited offerings, is asserted by Comcast to be providing a telecommunications service. Again, this is a question that goes to the core of why this Petition for Declaration Ruling was filed. Not only is this seemingly deliberate confusion of functions on the part of Comcast an apparent effort to draw very fine distinctions to elude Washington Commission regulation for the Digital Voice service offered by Comcast IP, it has also been called into question by the Federal Communications Commission ("FCC").

6. On Sunday, January 18, 2009, the FCC issued a directive to Comcast to provide a rationale as to why the Digital Voice offering by Comcast (note the FCC did not try to distinguish between Comcast Phone and Comcast IP) was not a telecommunications service subject to Title II

¹ Comcast Motion at Paragraph 4.

regulation. A copy of the FCC's letter to Comcast is attached as Exhibit 1. Thus, not only are these issues at work before this Commission, they are also in play before the FCC.

7. Please note that Comcast is required to respond to the FCC by January 30, 2009. WITA and TDS suggest that the Commission direct Comcast to provide a copy of its response to the FCC in this docket on the same date that it is filed with the FCC. The information may be illuminating (or it may not) on the issues in this proceeding.

The FCC Has Not Made a Determination as to Comcast's Status.

8. Comcast asserts in Paragraph 4 of the Comcast Motion that: "The Federal Communications Commission ("FCC") has unambiguously concluded that the PSTN interconnection service that Comcast provides is a telecommunications service..." citing to the FCC's Time Warner decision.² That is flat not the case. In the Time Warner decision, the FCC recognized that each case would have to be evaluated on its own facts. There is nothing about the Time Warner case that preempts this Commission or conclusively applies a decision to the Comcast provision of service.³

9. As stated by the FCC in Time Warner in reviewing Time Warner's wholesale offering "We emphasize that the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications service to their customers, either on a wholesale or retail basis. We do not address or express any opinion on a state commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service."⁴ Thus, the FCC left

² Comcast Motion at Paragraph 4.

³ In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934 as Amended to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Memorandum Opinion and Order, DA 07-709 (rel. March 1, 2007).

⁴ Time Warner at Paragraph 14.

it to the states to do individual review of a carrier's offering. The FCC concluded its analysis of this issue by stating "Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection in their own right for the purpose of transmitting traffic to or from another service provider." (Emphasis in original.)⁵ It is not at all clear that Comcast meets the requirements set forth by the FCC.

10. Comcast's blithe assertion in Paragraph 5 of the Comcast Motion that it is a telecommunications carrier as that term is used in Section 251 has not been established. That is, again, a core issue in this Petition. No facts have been established that demonstrate that Comcast has met the test of qualifying as a telecommunications carrier for purposes of seeking interconnection for the traffic generated by Comcast IP.

Time is Not an Issue for Comcast.

11. In Paragraph 6 of the Comcast Motion, Comcast asserts that it is not prejudiced by any delay in the way in which this proceeding may unfold. Since delay to Comcast's entry into a market does not seem to be an issue of substantial prejudice, there is no reason not to proceed with this Petition.

12. Comcast goes on to argue that even if the issue of substantial prejudice arising from the passage of time was an issue, which Comcast asserts that it is not, the cases cited by WITA and TDS are inappropriate. WITA and TDS will not repeat the manner in which it addressed this issue in the letter of January 6, 2009. Rather, those arguments are incorporated here. However, it is clear that the arguments presented by Comcast on this point are baseless. The rules of statutory construction support reference to common law decisions interpreting terms similar to those contained in RCW 34.05.240(7).

⁵ Time Warner at Paragraph 16.

Comcast's Repeated Assertion of a "Right" is Not Determinative.

13. What Comcast goes on to argue is that it "claims a tangible right to interconnection."⁶

However, is that really the case? Is Comcast, perhaps, asserting a right to interconnect illegally with Lewis River Telephone Company and other rural telcos? Is Comcast asserting a right to illegally impose costs on Lewis River Telephone Company and other rural telcos? Do not Lewis River Telephone Company and other rural telcos have a right to be free from such unwarranted burdens? This, as we have tried to emphasize, is the core issue in the Petition. Simply asserting a right (and repeating it over and over again), without establishing any basis for that right, cannot be the basis for avoiding an analysis under a filed petition for declaratory ruling. The very assertion of the right, without establishing it is that right in any concrete form, shows that this is the very reason to proceed with a petition for declaratory ruling. This is very reminiscent of the old adage: "If you have the law, pound the law; if you have the facts, pound the facts; if you have neither, then pound the table." Comcast is pounding the table.

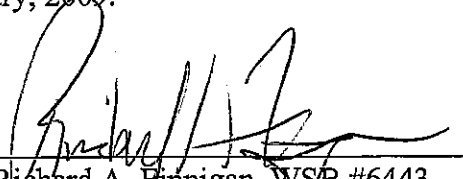
14. Finally, the arguments raised by Comcast in Paragraph 8 of the Comcast Motion concerning Docket No. UT-020667, have been addressed in the January 6, 2009, letter and are incorporated here. Suffice it to say that there is a substantial difference between a petition for declaratory ruling concerning the provisions of an existing interconnection agreement and the assertion by Comcast of theoretical rights to interconnect for the provision of what even Comcast must admit is the origination of what Comcast describes as information service traffic by Comcast IP for delivery to Lewis River Telephone Company, in total contravention to the requirements set forth by the FCC in 47 C.F.R. § 51.100 that interconnection may not be obtained for solely information service traffic.

⁶ Comcast Motion at Paragraph 6.

CONCLUSION

15. Based on the foregoing analysis, WITA and TDS respectfully request that the Commission deny the motion brought by Comcast to dismiss the Petition for Declaratory Ruling.

Respectfully submitted this 23rd day of January, 2009.



Richard A. Finnigan, WSB #6443
Attorney for the Washington Independent
Telecommunications Association and Lewis
River Telephone Company, d/b/a TDS
Telecom

EXHIBIT 1



Federal Communications Commission
Washington, D.C. 20554

January 18, 2009

VIA FACSIMILE
AND FIRST CLASS MAIL

Kathryn A. Zachem
Vice President, Regulatory Affairs
Comcast Corporation
2001 Pennsylvania Ave. NW, Suite 500
Washington, DC 20006
FAX: (202) 466-7718

Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52.

Dear Ms. Zachem:

The Commission has received your submission of September 19, 2008, detailing Comcast's broadband network management practices, Comcast's planned deployment of protocol-agnostic network management practices, and Comcast's plan for complying with the *Comcast Network Management Practices Order*, and your submission of January 5, 2009, certifying Comcast's fulfillment of the compliance plan.

We seek clarification with respect to an apparent discrepancy between Comcast's filing and its actual or advertised practices. Specifically, in Appendix B of your September 19 submission, Comcast notes that if a consumer uses 70% of his provisioned bandwidth for 15 minutes or more when his neighborhood Cable Modem Termination System (CMTS) node has been near capacity for a period of 15 minutes or more, that consumer loses priority when routing packets through congested portions of the network. See Letter from Kathryn A. Zachem, Vice President of Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, App. B at 8-10 (filed Sept. 25, 2008). If such a consumer then places a Voice over Internet Protocol (VoIP) call along a route experiencing actual congestion, Comcast states that consumer may find that his "VoIP call sounds choppy." *Id.* at 13. Critically, the Appendix draws no distinction between Comcast's VoIP offering and those offered by its competitors.

Comcast's website, however, suggests that such a distinction does in fact exist. The website claims that "Comcast Digital Voice is a separate facilities-based IP phone

service that is not affected by this [new network management] technique.” Comcast Help & Support, Frequently Asked Questions about Network Management, at <http://help.comcast.net/content/faq/Frequently-Asked-Questions-about-Network-Management> (last visited Jan. 12, 2009) (“*Frequently Asked Questions*”). It goes on to state, by contrast, that customers of other “VoIP providers that rely on delivering calls over the public Internet . . . may experience a degradation of their call quality at times of network congestion.” *Id.*

We request that Comcast explain why it omitted from its filings with the Commission the distinct effects that Comcast’s new network management technique has on Comcast’s VoIP offering versus those of its competitors. We also ask that you provide a detailed justification for Comcast’s disparate treatment of its own VoIP service as compared to that offered by other VoIP providers on its network. In particular, please explain how Comcast Digital Voice is “facilities-based,” how Comcast Digital Voice uses Comcast’s broadband facilities, and, in particular, whether (and if so, how) Comcast Digital Voice affects network congestion in a different manner than other VoIP services.

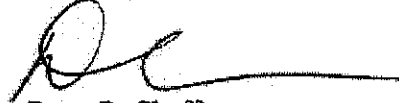
To the extent that Comcast maintains that its VoIP offering is a telephone service offering transmission facilities for VoIP calls distinct from Comcast’s broadband offering, then it would appear that the fee Comcast assesses its customers for VoIP service pays in part for the privileged transmission of information of the customer’s choosing across Comcast’s network. As we have stated before, the “heart of ‘telecommunications’ [under the Act] is transmission.” *Pulver.com Order*, 19 FCC Rcd 3307, 3312, para. 9 (2004) (holding that the Internet-based service at issue was not “telecommunications” because the provider “neither offers nor provides transmission to its members”); see 47 U.S.C. § 153(43) (defining “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”). And offering “telecommunications for a fee directly to the public” is the statutory definition of a telecommunications service. 47 U.S.C. § 153(46); cf. *Cable Modem Order*, 17 FCC Rcd 4798, 4823, para. 40 (2002) (classifying cable modem service as an information service only because the “telecommunications component is not . . . separable from the data-processing capabilities of the service” and because no cable modem service provider made a “stand-alone offering of transmission for a fee directly to the public”). Given that Comcast apparently is maintaining that its VoIP service is a “separate facilities-based” telephone service that is distinct from its broadband service and differs from the service offered by “VoIP providers that rely on delivering calls over the public Internet,” *Frequently Asked Questions*, it would appear that Comcast’s VoIP service is a telecommunications service subject to regulation under Title II of the Communications Act of 1934, as amended.

We thus request that Comcast explain any reason the Commission should not treat Comcast’s VoIP offering as a telecommunications service under Title II — a service subject, among other things, to the same intercarrier compensation obligations applicable to other facilities-based telecommunications carriers. See *IP-in-the-Middle Order*, 19 FCC Rcd 7457, 7466–67, para. 15 (2004) (holding that access charges apply to AT&T’s IP-in-the-middle telephony, given that “[e]nd users place calls using the same method” as

they would otherwise, that the service provides no "enhanced functionality," and that the service "imposes the same burdens on the local exchange as do circuit-switched interexchange calls"). We understand that Comcast's VoIP service is not yet complying with such intercarrier compensation obligations.

Please submit your response by the close of business on Friday, January 30, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "Dana R. Shaffer", with a long horizontal flourish extending to the right.

Dana R. Shaffer
Chief
Wireline Competition Bureau

A handwritten signature in black ink, appearing to read "Matthew Berry", with a stylized flourish at the end.

Matthew Berry
General Counsel
Federal Communications Commission