BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of,	)	No. UT-031459/UT-031626
	)	
COMCAST PHONE OF WASHINGTON, LLC	)	PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER ON CROSS MOTIONS FOR SUMMARY DETERMINATION AND REQUEST FOR ORAL ARGUMENT

I. INTRODUCTION

Comcast Phone of Washington, LLC ("Comcast Phone") hereby petitions the Washington Utilities and Transportation Commission ("Commission") for administrative review of the Initial Order on Cross Motions for Summary Determination served January 16, 2004, pursuant to WAC 480-07-825 (the "Initial Order"). Comcast Phone also requests oral argument on this petition pursuant to WAC 480-07-825(6).

II. NATURE OF CHALLENGE

Comcast Phone hereby challenges the following Conclusions of Law ("COL") in the Initial Order:

A. "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." (COL 2)

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B. "Comcast should not be granted an exemption from the requirements of WAC 480-120-439." (COL 3)

C. "Comcast should not be authorized to satisfy the requirements of WAC 480-120-439 via alternative measurements or recording formats absent a showing of specific alternative measurements or recording formats that will satisfy the rule." (COL 4)

III. BASES FOR CHALLENGE

A. CLECs Are Not Class A Companies as That Term is Used in WAC 480-120-439.

Comcast Phone challenges COL 2 that found Comcast Phone to be a Class A CLEC subject to the service quality reporting requirements of WAC 480-120-439. Paragraphs 17 through 30 of the Discussion in the Initial Order support this Conclusion of Law and must be set aside as well for the reasons set forth below.

1. Established legal principles support Comcast Phone's interpretation of WAC 480-120-439.

The Initial Order purports to rest COL 2 on "established legal principles,"[1] specifically "the plain meaning standard for statutory construction."[2]

The Initial Order contends that the definition of Class A company in WAC 480-120-021 does not distinguish between incumbent local exchange companies ("ILECs") and competitive local exchange companies ("CLECs"), applies generally to "all local exchange companies" ("LECs"), and that ILECs would have to be excluded from the definition if CLECs were excluded. This reasoning, leading to COL 2, is wrong for several reasons.

First, the Initial Order's interpretation ignores an equally important, fundamental rule of statutory construction that statutes and administrative rules are to be interpreted to "ascertain and give effect" to the Legislature's intent. *See, Children's Hosp. & Med. Ctr. v. Washington State Dep't of Health*, 95 Wn. App. 858, 975 P.2d 567, 571 (1999). The Initial Order's conclusion

[1] Initial Order, ¶ 17.

[2] *Id.*, ¶ 22.

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violates this rule. The Legislature's intent to not impose Class A reporting requirements on CLECs stems from several statutory sources. The first, RCW 80.04.530, the purported "source" of the Class A/B distinction[3] in the new administrative rules, was intended to streamline regulation for small ILECs (and not CLECs). The Initial Order disregards the extensive evidence and argument on that point.[4] The language and history of RCW 80.04.530 demonstrate that the term "local exchange company," in the context of drawing a Class A/B distinction, applies only to ILECs. Similarly, the term "local exchange company" in the Class A/B definitions in WAC 480-120-021 should be interpreted in context as applying only to ILECs.[5]

As noted above, the legislative history of RCW 80.04.530 demonstrates a legislative intent to streamline regulation for small Class B ILEC's. Accordingly, when reviewed against the statutory backdrop of RCW 80.04.530, the terms Class A and B should have been interpreted to apply only to ILECs. This conclusion is bolstered by statutes that clearly express legislative intent that CLECs also be subject to streamlined regulation. *See, i.e.,* RCW 80.36.320(2), 80.36.300(6). However, the Initial Order fails to recognize, let alone acknowledge, the inconsistency that its construction creates; namely, Class B companies receive streamlined regulation, as directed by the Legislature, but CLECs do not, despite the Legislature's direction to do so. The Initial Order (¶ 29) does nothing but render a broad conclusion that imposing the reporting requirement on CLECs is not "inconsistent" with "minimal regulation."

Second, the Initial Order rests erroneously on another unsupported assertion that the new reporting rule merely carried forward the requirements of an old rule, WAC 480-120-535. However, the Initial Order expressly acknowledges that "there is no history of WAC 480-120-

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[3] Staff Motion for Summary Determination, p. 3.

[4] See, i.e. Reply Brief of Comcast Phone of Washington, LLC, pp. 3 & 4; Declaration of Rhonda Weaver in Support of Comcast Phone Reply, Attachment A.

[5] The very introductory language of WAC 480-120-021 requires the definitions to be read "in context," which requires an examination of past and present usage of the terms Class A and B.

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439, or its predecessor rule, ever having been applied to a CLEC."[6] That is because no one interpreted the predecessor rule as applying to CLECs. Like RCW 80.04.530, the use of the term "local exchange carrier" in WAC 480-120-535 when read in context applied only to ILECs because the rule took effect in 1993, prior to the emergence of CLECs in the market. Rather than address this fact, the Initial Order merely adopts Staff's analysis,[7] which incorrectly claimed that "CLECs meeting the threshold would be required to comply with the reporting requirements." That was never established as a matter of fact or law. If anything, the comments of Sprint and WorldCom during the rulemaking demonstrate that CLECs viewed the service quality reporting rules as new regulatory requirements, as opposed to a carry-forward of existing requirements.[8]

Third, the Initial Order fails to address Comcast Phone's legal argument that the Commission would commit legal error by interpreting WAC 480-120-439 as applying to CLECs. Where, as here, a regulatory body makes a departure from previous regulatory policy (to wit: requiring CLECs to file service quality reports when not previously required), it must explain why. *See The Fishing Company of Alaska v. U.S.*, 195 F. Supp.2d 1239, *aff'd* 333 F.3d 1045 (9th Cir. 2003); *INS v. Yueh-Shaoi Yang*, 519 U.S. 26, 32, 136 L. Ed.2d, 117 S. Ct. 350 (1996). In the Adoption Order,[9] the Commission never explained that it intended to apply a Class A/B distinction to CLECs for service quality reporting purposes. Accordingly, if the Commission adopts the interpretation of the new rule by the Initial Order it will commit a legal error by its unexplained departure from previous Commission policy.

Finally, with the exception of WAC 480-120-439, usage of the term "Class A LEC" is limited to situations involving an ILEC, which is also consistent with usage of the term at the

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[6] Initial Order, ¶ 39.

[7] Initial Order, ¶ 26.

[8] *See* Exhibit A to Qwest's Motion for Summary Determination.

[9] General Order No. R-507, (Dec. 12, 2002), Docket No. UT-990146.

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federal level, where the FCC has limited the Class A/B distinction to ILECs.[10] Comcast Phone did not argue that these are exceptions that swallow the rule, as the Initial Order maintains. Rather, Comcast Phone argues that the common usage of the term Class A throughout WAC Ch. 480-120 relates to ILECs and never specifically to CLECs. This pattern of usage leads to a construction as a whole, in context, of the term Class A LEC that means a Class A ILEC. *Hubbard v. Dept. of Labor & Industries*, 140 Wn.2d 35, 992 P.2d 1002 (2000 (each provision of a statute is to be read in relation to the other provisions and the statute is to be construed as a whole).

In sum, Comcast Phone respectfully submits that the Initial Order erred in its sole reliance on the "plain meaning" rule of construction to the exclusion of other, more compelling rules of construction.

Comcast Phone suggests the following replace COL 2:

> "In order to best effectuate the legislation intent in RCW 80.04.530, 80.36.300 and 80.36.320(2), WAC 480-120-439 does not apply to CLECs, because, in context, the definition of Class A LEC does not encompass CLECs."

B. The Initial Order Failed to Address Whether CLECs Should Be Exempt From WAC 480-120-439

Comcast Phone challenges COL 3 & 4 and Paragraph 31 through 35 of the Discussion because these conclusions constitute a summary denial of a total exemption from the service quality reporting requirements of WAC 480-120-439, if the Commission finds this rule to apply to Comcast Phone. The Initial Order states no reason for denying a total exemption, which was the alternate relief sought by Comcast Phone.[11]

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[10] See Comcast Phone Motion for Summary Determination, pp. and Comcast Phone Reply, p.1.

[11] 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 Exemption from Reporting Regulations, pp. 2, 7-8; Comcast Phone Motion for Summary Determination, p. 9.

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The Initial Order[12] acknowledged that public policy should be considered in connection with a request for full or partial exemption under WAC 480-120-115. Rather than consider any of the public policy arguments in favor of the grant of a full exemption, the Initial Order sidestepped this question, concluding that the only exemption Comcast Phone might obtain would be by the allowance of an alternative reporting mechanism in the future. While Comcast Phone appreciates the opportunity to seek an alternative reporting mechanism,[13] should it be necessary, Comcast Phone urges the Commission to grant it a full exemption from WAC 480-120-439. The Commission is fully authorized to waive this requirement under RCW 80.36.320(2) which states "The Commission may also waive other regulatory requirements under this title for competitive telecommunications companies when it determines that competition will serve the same purpose as public interest regulation". WAC 480-120-015 also allows the Commission to "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."

Granting a full waiver to WAC 480-120-439 to Comcast Phone, which is a competitive telecommunications company, would be in the public interest consistent with the regulatory policy established by the Legislature favoring streamlined regulation for CLECs[14] and small ILECs.[15] It would be bad public policy, and contrary to the public interest, to streamline regulation for one but not the other. Furthermore, imposing burdensome regulation upon

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[12] Initial Order ¶ 18.

[13] The reason there is no record support for a specific proposal regarding an alternative reporting mechanism is because Comcast Phone and Staff were engaged in settlement discussions on this point as of the due date for the filing of Motions for Summary Determination, but no agreement was reached. The confidentiality provisions of the exchanges between Comcast Phone and Staff precluded any record discussion of the specific alternative reporting mechanisms Comcast Phone proposed.

[14] RCW 80.36.300(6); 80.36.320(2).

[15] RCW 80.04.530

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competitive providers who succeed clearly runs contrary to the pro-competitive goals of both state and federal legislation.[16]

Ostensibly, the regulatory policy served by WAC 480-120-439 is the promotion of high-quality service by large providers with a captive customer base who must publicly report on their performance. That same policy is served by competition as it relates to Comcast Phone, which certainly is in no position to abuse captive customers with poor quality service because it has no captive customers. A customer can choose another provider if Comcast Phone's services do not meet a customer's expectations about service quality. Further, even if a CLEC serves more than 2% of the state's total access lines, that certainly does not mean that would enable it to keep customers captive to its services and that it would deny consumers competitive options.

If the Commission truly intends to be pro-active in promoting competition then it will relieve CLECs like Comcast Phone of unnecessary regulatory requirements such as service quality reporting.

Thus, Comcast Phone suggests the following replace COL 3 and 4:

> "Comcast Phone should be granted an exemption from the requirements of WAC 480-120-439 because competition will serve the same purpose as this regulation and it is in the public interest to waive its requirements."

IV. CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Comcast Phone requests the Commission to reject the Initial Order as discussed above and to enter a Final Order that relieves Comcast Phone from the requirements of WAC 480-120-439. Because this case raises an issue of first impression about a new rule involving critical public policy considerations, Comcast Phone requests oral argument, which is necessary to assist the Commission in making its decision.

[16] See, i.e. RCW 80.36.300 et. seq.; Telecommunications Act of 1996, 47 U.S.C. § 151 et. seq.

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