

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

In the Matter of the Petition of	)	DOCKET UT-083056
	)	
WASHINGTON INDEPENDENT	)	
TELEPHONE ASSOCIATION and	)	ORDER 02
LEWIS RIVER TELEPHONE	)	
COMPANY, d/b/a TDS TELECOM	)	
	)	ORDER DISMISSING PETITION
For a Declaratory Ruling	)	
.....	)	

1 ***Synopsis.** This Order dismisses WITA’s and TDS’ petition for a declaratory order to determine whether TDS is required to negotiate terms of interconnection with Comcast for the provision of fixed VoIP service. The Commission need not enter such an order as the same issues will be addressed in the pending petition for arbitration of an interconnection agreement between Comcast and TDS. Because the primary issue in dispute is whether Comcast is a telecommunications carrier providing telecommunications service through its fixed VoIP service, the issue is more appropriately addressed in the arbitration.*

**I. INTRODUCTION**

2 **Nature of the Proceeding.** Docket UT-083056 involves a petition by the Washington Independent Telephone Association (WITA) and Lewis River Telephone Company, d/b/a TDS Telecom (TDS) (jointly “WITA/TDS” or “Petitioners”) for a declaratory ruling to determine whether TDS is required to negotiate terms of interconnection with Comcast Phone of Washington, LLC (“Comcast” or “Company”) for provision of fixed voice over Internet protocol (VoIP) service or, in the alternative, whether Comcast is acting as a telecommunications carrier offering telecommunications services.

3 **Appearances.** Richard Finnigan, Attorney, Olympia, Washington, represents WITA and TDS. Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, and Michael C. Sloan, Davis Wright Tremaine LLP, Washington, D.C., represent

Comcast. Gregory M. Romano, General Counsel – Northwest Region, Everett, Washington, represents Verizon Northwest Inc., MCI Communications Services Inc. d/b/a Verizon Business Services and Bell Atlantic Communications Inc. d/b/a Verizon Long Distance (collectively “Verizon”). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents the Washington Electronic Business and Telecommunications Coalition (WeBTEC). David L. Rice, Miller Nash LLP, Seattle, Washington, represents the Broadband Communications Association of Washington (BCAW).

- 4 **Procedural History.** On October 28, 2008, WITA and TDS jointly filed with the Commission a petition for declaratory order pursuant to RCW 34.05.240 and WAC 480-07-930. In general, they seek a declaratory ruling on the question of whether WITA’s members are obligated to interconnect with Comcast to provide fixed VoIP service, as the Federal Communications Commission (FCC) has not yet determined whether fixed VoIP is a telecommunications service subject to interconnection under Section 251 of the federal Telecommunications Act of 1996 (the Act),<sup>1</sup> or an information service.<sup>2</sup>

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<sup>1</sup> See 42 U.S.C. § 251.

<sup>2</sup> Although neither the FCC nor this Commission have formally defined “VoIP,” the FCC began using the term generally in its IP-Enabled Services Notice of Proposed Rulemaking (NPRM) proceeding (see *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, rel. March 10, 2004) to include any IP-enabled service offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony. In several proceedings following the IP-Enabled Services NPRM, the FCC provided further definition or clarity to specific types of VoIP service offerings that are required to meet certain regulatory obligations that apply generally to traditional telecommunications service offerings. For example, the FCC’s VoIP 911 Order (*E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, May 19, 2005, FCC 05-116), embraced a new term “interconnected VoIP” and proposed the following definition, which was adopted in 47 C.F.R. § 9.3:

*Interconnected VoIP service.* An interconnected Voice over Internet protocol (VoIP) service is a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user’s location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switch.

The term “fixed VoIP” came into play in the same proceeding when the FCC recognized that the mobility enabled by some VoIP customers’ ability to use service from any broadband connection meant that the providers of “portable” or “nomadic” VoIP services often have no reliable way to

- 5 On November 3, 2008, Comcast filed in Docket UT-083055 a petition for arbitration of an interconnection agreement with TDS under Section 252(b) of the Act,<sup>3</sup> identifying its right to interconnect with TDS as the sole issue in dispute.
- 6 On November 12, 2008, the Commission gave notice of receipt of the petition for declaratory order as required by RCW 34.05.240(3) and scheduled a prehearing conference for November 24, 2008.
- 7 On November 17, 2008, Comcast filed an answer to WITA/TDS's petition requesting the Commission dismiss the petition. Asserting it is a necessary party, Comcast argued that it would be substantially prejudiced by the entry of a declaratory order, and stated that it would not consent to determination of the issues through a declaratory order proceeding.
- 8 The Commission rescheduled the prehearing conference and held the conference on December 1, 2008, at the Commission's offices in Olympia, Washington, before Administrative Law Judge Ann E. Rendahl. In Order 01, a prehearing conference order, Judge Rendahl granted the petitions to intervene filed by Verizon, WeBTEC and BCAW.
- 9 On December 1, 2008, the Commission issued a notice giving the intervenors an opportunity to submit comments concerning the petition and the issues Comcast raised in its answer, and allowing the Petitioners an opportunity to respond to the comments. The Commission also provided notice that it would enter a decision on the petition by January 9, 2008, as required by RCW 34.05.240(5).
- 10 Verizon, Sprint Communications Company, L.P. (Sprint), BCAW and WeBTEC filed comments by December 12, 2008. The Petitioners filed responsive comments on December 29, 2008.
- 11 On January 5, 2009, Comcast filed a motion for leave to reply to the Petitioners' response and their proposed reply.

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discern from where their customers are accessing the VoIP service. "Fixed VoIP" refers to the opposite condition, meaning VoIP-based services that are "non-nomadic," such as those offered by cable TV providers.

<sup>3</sup>See 42 U.S.C. § 252(b).

- 12 Also on January 5, 2009, the Commission issued a notice extending until Friday, January 16, 2009, the date for entering a decision on the petition.
- 13 On January 6, 2009, the Petitioners filed a letter requesting the Commission either reject Comcast's motion or allow them the opportunity to respond.<sup>4</sup> On January 13, 2009, the Commission granted their request to file a reply, and extended the date for a decision on the merits until February 13, 2009.
- 14 On January 23, 2009, the Petitioners filed a response to Comcast's motion for leave to reply.
- 15 On February 11, 2009, Comcast submitted to the Commission supplemental authority supporting its position.
- 16 In notices issued on February 11 and February 27, respectively, the Commission extended the date for entering an order on the petition for declaratory ruling to February 27, and March 13, 2009, due to the appointment of a new Chairman and the Commission's workload.

## II. DISCUSSION AND DECISION

### A. Requirements for Petitions for Declaratory Ruling

- 17 Under RCW 34.05.240(1), any person may file a petition requesting that an agency enter a declaratory order "with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency." The Petitioners in this case, WITA/TDS, must show:
- (a) That uncertainty necessitating resolution exists;
  - (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
  - (c) That the uncertainty adversely affects the petitioner;

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<sup>4</sup> The Petitioners filed a letter on January 7 correcting an error in their January 6 letter.

- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.<sup>5</sup>

18 In addition to considering whether the petitioner has met these requirements, an agency must address a threshold question concerning the effect of a declaratory order on a necessary party.<sup>6</sup>

An agency may not enter a declaratory order that 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.<sup>7</sup>

19 The Commission's rule governing declaratory orders includes a similar prohibition on entering a declaratory ruling, and provides a standard for determining whether a party's rights would be substantially prejudiced:

The commission will not enter a declaratory order under RCW 34.05.240 if any person asserts in response to a petition for declaratory order filed pursuant to RCW 34.05.240 that their rights might be substantially prejudiced by entry of a declaratory order, supports such assertion by sworn affidavit demonstrating the potential for substantial prejudice, and does not consent in writing to the determination of the matter by a declaratory order proceeding under RCW 34.05.240.<sup>8</sup>

20 The Commission's rule also provides that "The commission will dismiss a petition for declaratory order when issues in the petition are at issue in a pending adjudication."<sup>9</sup>

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<sup>5</sup> RCW 34.05.240(1).

<sup>6</sup> *See, In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc., for Declaratory Order Regarding Responsibilities of the Designated Toll Carrier, Docket No. UT-961012 (October 30, 1996).*

<sup>7</sup> RCW 34.05.240(7).

<sup>8</sup> WAC 480-07-930(3).

<sup>9</sup> WAC 480-07-930(1)(b).

**B. The WITA/TDS Petition**

- 21 The Petitioners request that we enter a declaratory order determining whether TDS is required to negotiate terms of interconnection with Comcast to provide fixed location VoIP services provided by Comcast or an affiliate, and whether Comcast is acting as a telecommunications carrier for purposes of its VoIP service. In the alternative, they seek a ruling as to whether Comcast's VoIP service subjects it to state regulation as a telecommunications company offering telecommunications within the state of Washington.
- 22 The Petitioners argue that the FCC has not yet provided clear guidance about whether retail VoIP service is a telecommunications service or an information service under the Act.<sup>10</sup> The distinction is significant because, WITA/TDS argue, if Comcast's VoIP service is an information service, then the Act's interconnection requirements would not apply. If, on the other hand, it is found to be a telecommunications service, then such requirements would apply. They assert that the substantial uncertainty as to the classification of Comcast's VoIP service creates significant problems for WITA's members, including TDS, who do not know whether they are obligated to negotiate terms of interconnection with Comcast or its affiliate. In support, the Petitioners point out that Section 251 of the Act provides that telecommunications carriers "must, at a minimum, 'interconnect ... with the facilities and equipment of other telecommunications carriers,'"<sup>11</sup> and that Comcast has made a bona fide request for interconnection.<sup>12</sup>
- 23 Finally, the Petitioners argue that the ambiguity concerning Comcast's interconnection rights results in an actual controversy. Therefore, a declaratory order would not be an advisory opinion. Further, they contend that Comcast would not be prejudiced by entry of an order finding it is not entitled to interconnect with the WITA companies.<sup>13</sup> Nor would Comcast be prejudiced by the slight delay in negotiations caused by this proceeding if the Commission rules in Comcast's favor.<sup>14</sup>

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<sup>10</sup> WITA/TDS Petition, ¶ 13.

<sup>11</sup> *Id.*, ¶ 19, quoting 47 U.S.C. § 251(a).

<sup>12</sup> *Id.*, ¶¶ 2, 6.

<sup>13</sup> *Id.*, ¶ 46.

<sup>14</sup> *Id.*

- 24 **Comcast Answer.** Comcast requests the Commission dismiss the petition, claiming that it is a necessary party whose rights would be substantially prejudiced by entry of a declaratory order and that it does not consent to determination of the issues through a declaratory order proceeding.<sup>15</sup>
- 25 Comcast supports its position with the Affidavit of Beth Choroser. In her affidavit, Ms. Choroser asserts that Comcast has negotiated, and the Commission has approved, Section 251 interconnection agreements between Comcast and seven other local exchange companies (LECs) in Washington.<sup>16</sup> Ms. Choroser further states that Comcast relies on its status as a telecommunications carrier to negotiate and arbitrate interconnection agreements with LECs. Without these rights, Comcast would be severely hampered in providing services in Washington.<sup>17</sup>
- 26 Comcast argues that the Petitioners' claim that the company would suffer no prejudice if the Commission were to determine it is not entitled to interconnect nullifies the limits on declaratory orders under the statute and the Commission's rule.<sup>18</sup> It points out that an order declaring that Comcast is not a telecommunications carrier would essentially revoke its registration with the Commission and nullify its existing interconnection agreements with other LECs.<sup>19</sup> The Company argues that the Commission has previously rejected such an argument, and declined to enter a declaratory ruling that would have affected a company's "exchange of traffic and interconnection agreements."<sup>20</sup> Comcast asserts that the relief requested by the Petitioners in this proceeding would have a far greater impact on Comcast, and might preclude Comcast from exchanging any traffic with WITA members and thus serving customers.<sup>21</sup>
- 27 Comcast also claims that the issues raised in the petition are the same as those at issue in its petition for arbitration in Docket UT-083055, and are more appropriately

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<sup>15</sup> Comcast Answer, ¶¶ 1, 4.

<sup>16</sup> Choroser Affidavit, ¶ 3.

<sup>17</sup> *Id.*, ¶¶ 6, 7.

<sup>18</sup> Comcast Answer, ¶ 5.

<sup>19</sup> *Id.*, ¶ 6.

<sup>20</sup> *Id.*, ¶ 7, quoting *In re Petition of WITA for a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Docket UT-020667, Order Declining to Enter Declaratory Order, ¶¶ 13, 19 (Aug. 19, 2002) [*UT-020667 Decision*].

<sup>21</sup> *Id.*, ¶ 8.

addressed in that proceeding.<sup>22</sup> Further, the company argues the Commission should not conduct a proceeding on VoIP's regulatory status, as the issue is pending before the FCC and a Commission decision would affect virtually all competitively classified providers of local telecommunications.<sup>23</sup>

28 **Comments.** Verizon, Sprint, BCAW and WeBTEC all support the objections Comcast makes in its answer and request that we dismiss the petition.

29 Verizon, WeBTEC and BCAW assert that the Commission must reject the petition based on Comcast's arguments in its answer.<sup>24</sup> Verizon concurs with Comcast that the Petitioners' interpretation of substantial prejudice, i.e., if a necessary party loses on the merits there is no substantial prejudice, is a tortured reading of the statute.<sup>25</sup> Verizon and BCAW also argue that the Petitioners' reasoning is contrary to several Commission decisions in which the Commission made a simple inquiry into whether the necessary party consented to having the matter heard through a declaratory order proceeding, and whether the necessary party might be prejudiced, not whether there is actual prejudice.<sup>26</sup> Verizon and BCAW concur with Comcast that the Commission should dismiss the proceeding as the same issues are raised in the pending arbitration proceeding.<sup>27</sup>

30 In addition, Sprint argues that the Petitioners' issues are similar to those already decided in a recent arbitration between Sprint and the Whidbey Telephone Company, and that the Commission should not decide the issue differently here. In that proceeding, the Commission found that Sprint, which offers a fixed location VoIP service to end users, was a telecommunications carrier entitled to interconnection

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<sup>22</sup> *Id.*, ¶¶ 11-14.

<sup>23</sup> *Id.*, ¶¶ 15-20.

<sup>24</sup> Verizon Comments at 1-2; WeBTEC Comments, ¶¶ 3-7; BCAW Comments at 1-3.

<sup>25</sup> Verizon Comments at 2.

<sup>26</sup> *Id.* at 3-4, citing *UT-020667 Decision; In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. for Declaratory Order Regarding Responsibilities of the Designated Toll Carrier*, Docket UT-961012 (Oct. 30, 1996) [*UT-961012 Decision*]; *In the Matter of the Petition of the Partnership for the Equitable Rates for Commercial Customers for a Declaratory Order*, Docket UG-940326, Notice of Petition for Declaratory Order (Mar. 9, 1994); see also BCAW Comments at 2-3.

<sup>27</sup> Verizon Comments, at 4-5; BCAW Comments at 3-4.

under Section 251.<sup>28</sup> Finally, Sprint contends it would be a necessary party in this proceeding if the Commission's actions here would affect prior decisions, and objects in writing to a decision in this proceeding, as it would substantially prejudice its rights.<sup>29</sup>

31 WeBTEC asserts that the broad declarations sought by the Petitioners would affect much of the telecommunications industry, as all LECs would be affected and are necessary parties to the proceeding.<sup>30</sup>

32 **Petitioners' Response.** In their response, WITA/TDS argue that Comcast does not meet the four elements of the limitation on declaratory rulings in RCW 34.05.240(7). Specifically, they claim that it is not clear whether Comcast has rights to interconnect under Section 251, and that to satisfy the requirements of the statute, Comcast must have rights, not merely assert them.<sup>31</sup> They argue that to interpret the statute differently would render it meaningless.

33 The Petitioners also point out that Comcast must prove it would be substantially prejudiced by the relief proposed in the Petition.<sup>32</sup> They argue that Comcast has not demonstrated specific facts that would constitute substantial prejudice and assert that mere delay is not sufficient to demonstrate substantial prejudice.<sup>33</sup> They also contend there is no substantial prejudice in going through a proceeding to determine if the asserted right to interconnect exists.<sup>34</sup>

34 **Comcast's Motion for Leave to File Reply and Reply.** In its motion, Comcast argues that the Petitioners mischaracterize facts and law in their responsive

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<sup>28</sup> Sprint Comments, ¶¶ 4-6, citing *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Company L.P. with Whidbey Telephone Company Pursuant to 47 U.S.C. Section 252(b)*, Docket UT-073031, Order 04, Order Determining Threshold Issues (Jan. 24, 2008), upheld in Order 05, Final Order Denying Petition for Interlocutory Review and Closing Docket (May 9, 2008).

<sup>29</sup> *Id.*, ¶ 8.

<sup>30</sup> WeBTEC Comments, ¶ 8.

<sup>31</sup> WITA/TDS Response, ¶¶ 8-15.

<sup>32</sup> RCW 34.05.240(7).

<sup>33</sup> WITA/TDS Response, ¶¶ 19-21, citing *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash.2d 411, 191 P.3d 866 (2008); *State ex rel. Peninsula Neighborhood Ass'n v. Department of Transportation*, 142 Wash.2d 328, 12 P.3d 134 (2000).

<sup>34</sup> *Id.*, ¶ 17.

comments, and requests the opportunity to file a reply. Under the Commission's procedural rules, parties may not file a reply to an answer without showing cause and obtaining Commission approval. Motions for permission to file replies are deemed denied unless the Commission grants the motion within five business days. Nevertheless, on the sixth business day after receiving the motion, the Commission provided the Petitioners an opportunity to respond.

- 35 In its reply, Comcast rebuts the Petitioners' argument that it has no rights that would be affected by a declaratory ruling, stating that their argument is based on "a false factual premise."<sup>35</sup> Comcast claims the traffic to be sent TDS is telecommunications traffic and not information service traffic. While Comcast acknowledges that it "has taken the position that interconnected VoIP service is an information service," it asserts that "Comcast does not provide such service."<sup>36</sup> Comcast also asserts that the FCC has "unambiguously concluded that the [public switched telecommunications network] interconnection service that Comcast provides is a telecommunications service."<sup>37</sup> Comcast argues that it is, therefore, a telecommunications provider, and that the Commission has repeatedly recognized its rights as such a provider in approving Section 251 agreements between Comcast and seven LECs in Washington.<sup>38</sup>
- 36 Comcast further objects to the Petitioners' claim that it will not suffer substantial prejudice. Comcast claims a tangible right to interconnection that would be directly and adversely affected if the requested ruling were granted: The Company, its VoIP affiliate and hundreds of thousands of customers would be harmed.<sup>39</sup> Comcast does not assert delay as a part of its claim of substantial prejudice. Comcast disputes the relevance of the cases WITA/TDS rely on to support their argument that Comcast has not demonstrated substantial prejudice, noting that neither case involves the

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<sup>35</sup> Comcast Motion and Reply, ¶ 3.

<sup>36</sup> *Id.*, ¶ 4.

<sup>37</sup> *Id.*, citing *Time Warner 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*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) [*Time Warner Order*].

<sup>38</sup> *Id.*, ¶ 5, citing Choroser Affidavit, ¶ 3.

<sup>39</sup> *Id.*, ¶ 6, citing Choroser Affidavit, ¶¶ 6-7.

declaratory ruling statute, RCW 34.05.240(7).<sup>40</sup> However, Comcast argues that it meets the standard for substantial prejudice set forth in *Mutual of Enumclaw* – whether a party has demonstrated “an identifiable and material detrimental effect on its ability to defend its interests.”<sup>41</sup>

37 In closing, Comcast asserts that the Petitioners fail to mention or address the Commission’s prior interpretation of RCW 34.05.240(7) in dismissing WITA’s petition for a declaratory ruling on virtual NXX (VNXX) issues. Comcast argues that, similar to the VNXX decision, a declaratory order in this proceeding would affect its ability to interconnect and exchange traffic, not just with TDS and other WITA companies, but the seven existing agreements it has with carriers in Washington. Comcast claims that the Petitioners do not refute this uncontested evidence of substantial prejudice.<sup>42</sup>

38 **Petitioners’ Response.** The Petitioners do not object to Comcast’s motion, but respond to Comcast’s reply. They defend their interpretation of RCW 34.05.240(7), asserting that a right must exist in order for it to be substantially prejudiced.<sup>43</sup> Further, they claim that, regardless whether Comcast claims it has a right to interconnection, the issue in this proceeding is whether in fact Comcast has that right. The Petitioners contend that Comcast’s assertion of a right is what makes the argument circular.<sup>44</sup>

39 As to Comcast’s claim of mistake of fact, WITA/TDS state that they sincerely believed at the time of their initial response that the traffic Comcast intended to send to TDS was information service traffic. After receiving discovery responses, they acknowledge Comcast’s claim to the contrary, but assert that Comcast “attempts to draw a fine distinction through a deliberate corporate allocation of responsibilities” as to whether Comcast or its affiliate provides information service.<sup>45</sup>

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<sup>40</sup> *Id.*, ¶ 7, citing *Mutual of Enumclaw*, 164 Wash.2d 411, and *Peninsula Neighborhood Ass’n*, 142 Wash.2d 328.

<sup>41</sup> *Id.*, ¶ 7, quoting *Mutual of Enumclaw*, 164 Wash.2d at 430.

<sup>42</sup> *Id.*, ¶¶ 8-9.

<sup>43</sup> WITA/TDS Response to Comcast Reply, ¶ 2.

<sup>44</sup> *Id.*, ¶ 4.

<sup>45</sup> *Id.*, ¶ 5.

- 40 They argue further that the FCC has *not* determined the status of Comcast’s fixed VoIP service, noting that the FCC in its *Time Warner* decision deferred to state commissions the decision whether a particular carrier offers a telecommunications service.<sup>46</sup> They also note that the FCC has recently questioned whether Comcast’s Digital Voice service is an information or telecommunications service.<sup>47</sup>
- 41 Finally, the Petitioners return to their argument that Comcast does not have a right to interconnection that would be substantially prejudiced. They assert that Comcast’s claim of a right is the core issue of the petition for declaratory ruling and that the Company’s assertion of the right shows the need to proceed with their request for such a ruling.<sup>48</sup>

### C. Decision

- 42 We must determine whether to decide the petition for declaratory ruling on its merits, based on the parties’ pleadings, or dismiss the petition based on threshold requirements in statute and rule. Consistent with WAC 480-07-930(1)(b), we decline to enter a declaratory order in this matter, as the same issues are pending in the arbitration proceeding between Comcast and TDS in Docket UT-083055.<sup>49</sup> The arbitration proceeding will provide the appropriate forum to evaluate the Petitioners’ factual and legal arguments regarding whether Comcast is a telecommunications carrier, with all attendant rights and responsibilities of a telecommunications carrier, and whether the company’s fixed VoIP service is, or is not, a telecommunications service subject to the Commission’s jurisdiction.
- 43 Although we agree that Comcast is a necessary party to the proceeding, we need not reach the parties’ hotly debated question whether Comcast has a right or rights that would be substantially prejudiced by a declaratory ruling in this case, as we decline to enter a declaratory ruling on other grounds.

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<sup>46</sup> *Id.*, ¶¶ 8-9, citing *Time Warner Order*, ¶ 14.

<sup>47</sup> *Id.*, ¶ 6.

<sup>48</sup> *Id.*, ¶¶ 13-14.

<sup>49</sup> Arbitrations are not “adjudicative proceedings under the Washington Administrative Procedure Act.” WAC 480-07-630(2). However, we find our rule governing declaratory rulings – WAC 480-07-930(1)(b) – allows us to use discretion in dismissing petitions for declaratory rulings to avoid duplicative proceedings.

44 We also find that Comcast's motion for leave to file a reply should be granted, as it addresses new issues of fact and law that had not been previously addressed in pleadings. Though we did not do so within five days of the motion, given that the Petitioners do not object to the motion and that we authorized and considered their response, we grant Comcast's motion and consider Comcast's reply and the Petitioners' response to Comcast's reply.

### III. FINDINGS OF FACT

45 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

46 (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, and practices of public service companies, including telecommunications companies.

47 (2) Washington Independent Telephone Association (WITA) is an organization whose members provide telecommunication services to customers in the State of Washington.

48 (3) Lewis River Telephone Company, d/b/a TDS Telecom (TDS) is a rural telephone company as defined in Section 153(37) of the Act, and is a "public service company" and a "telecommunications company," as those terms are defined in RCW 80.04.010, and as those terms otherwise are used in Title 80 RCW. TDS is engaged in Washington state in the business of supplying telecommunications service to the general public for compensation.

49 (4) Comcast Phone of Washington, LLC (Comcast), is registered with the Commission and classified as a competitive telecommunications carrier.

- 50 (5) WITA and TDS filed a petition for declaratory ruling with the Commission on  
October 28, 2008, concerning TDS' obligations to negotiate an  
interconnection agreement with Comcast.
- 51 (6) Comcast filed a petition for arbitration of an interconnection agreement with  
TDS in Docket UT-083055 on November 3, 2008.
- 52 (7) Comcast expressly refuses to consent to a Commission determination by a  
declaratory order of the issues pending in this proceeding.

#### IV. CONCLUSIONS OF LAW

- 53 Having discussed above all matters material to this decision, and having stated  
detailed findings, conclusions, and the reasons therefore, the Commission now makes  
the following summary conclusions of law, incorporating by reference pertinent  
portions of the preceding detailed conclusions:
- 54 (1) The Commission has jurisdiction over the parties to and subject matter of this  
proceeding under RCW 80.36.
- 55 (2) The Commission may not enter a declaratory order that would substantially  
prejudice the rights of a necessary party who does not consent in writing to the  
determination of the matter by a declaratory order. *RCW 34.05.240(7)*.
- 56 (3) The Commission may dismiss a petition for declaratory ruling if the issues in  
the petition are at issue in a pending adjudication. *WAC 480-07-930(1)(b)*.
- 57 (4) Comcast is a necessary party under RCW 34.05.240(7).
- 58 (5) The issues WITA and TDS raise for decision in their petition for declaratory  
ruling are similar to those at issue in the pending arbitration proceeding in  
Docket UT-083055.
- 59 (6) The Commission should decline to enter a declaratory order in this proceeding.

**V. ORDER**

**THE COMMISSION ORDERS:**

- 60 (1) The petition for declaratory ruling filed by the Washington Independent Telephone Association and Lewis River Telephone Company, d/b/a TDS Telecom is dismissed.
- 61 (2) Comcast Phone of Washington, LLC's Motion for Leave to Reply to WITA/TDS Response is granted.

DATED at Olympia, Washington, and effective March 12, 2009.

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a Petition for Reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a Petition for Rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**