BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of the WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION For Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns	))))))	Docket No. UT-020667 JOINT CLEC STATEMENT OF FACT AND LAW

Pursuant to the Notice of Receipt of Petition for Declaratory Order; Opportunity to Submit Statement of Fact and Law (June 21, 2002), AT&T Communications of the Pacific Northwest, Inc., TCG Oregon, and TCG Seattle, Focal Communications Corporation of Washington, Fox Communications Corp., International Telecom, Inc., Pac West Telecom, Inc., Time Warner Telecom of Washington, LLC, WorldCom, Inc., and XO Washington, Inc. (collectively "Joint CLECs"), provide the following statement of fact and law upon the matters alleged in the Petition of the Washington Independent Telephone Association ("WITA") for Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns ("Petition"). The Joint CLECs submit that the Petition should be denied because it fails to make the requisite showing for a declaratory order, is in any case not an appropriate procedure for addressing the issues raised in the Petition, and even if it were an appropriate procedure, WITA is not entitled to the relief requested.

DISCUSSION

A. A Declaratory Order Proceeding Is Not the Appropriate Procedure for Addressing the Issues Raised in the Petition.

Washington statutes authorize any person to "petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the

agency." RCW 34.05.240(1). WITA identifies three such statutory provisions, RCW 80.36.170 (unreasonable preference prohibited), 80.36.180 (rate discrimination prohibited), and 80.36.186 (unreasonably preference or advantage prohibited in pricing of or access to noncompetitive services). WITA alleges that its members *may* be liable for violation of these statutes if they route as local calls traffic to and from telephone numbers assigned to *another* carrier that *that* carrier uses to provide service to customers located outside the geographic area to which those numbers are homed for rating and routing purposes. Petition at 6-7. WITA fails to make even a *prima facie* showing of how any such violations are possible, much less likely.

The numbering administrator assigns telephone numbers, generally in blocks of 10,000 numbers (NXX blocks), for use by local exchange and wireless carriers to assign to their end user customers when providing telephone service. Each NXX block is "homed," *i.e.*, assigned for rating purposes to a particular geographic area and for routing purposes to the switch location where carriers are required to route traffic directed to these numbers pursuant to the local exchange routing guide ("LERG"). When the NXX block is assigned to a competing local exchange carrier ("CLEC"), all carriers are required to route traffic destined to those telephone numbers to the CLEC. In general CLECs serve similar geographic areas as ILECs albeit with fewer switches. Consequently for the majority of exchanges the CLEC routing point will necessarily be outside the exchange boundary. The actual routing of calls has nothing to do with the rating of a call. A call is rated as local when the originating NPA-NXX ("calling party") is assigned to the same local calling area as the terminating NPA-NXX ("called party").

WITA fails even to attempt to explain how any of its members would be violating anti-discrimination or undue/unreasonable preference statutes if its members route and rate traffic pursuant to the LERG. Even assuming for the sake of argument that another carrier is somehow acting improperly

by assigning telephone numbers homed to one rate center to customers located in another rate center, nothing in those statutes or Commission rules requires – or even authorizes – ILECs to police other carrier's use of number resources. WITA thus has failed to demonstrate any uncertainty with respect to the interpretation or application of RCW 80.36.170, 80.36.180, or 80.36.186, much less the existence of an actual controversy arising out of any such uncertainty.

WITA does not legitimately fear that its members are in any danger of violating the statutory provisions cited in the Petition, or the relief WITA requests would have been an order declaring that no such violations occur under the circumstances described in the Petition. Rather, WITA's goal is to prohibit other carriers from using number resources in a manner of which WITA disapproves. WITA, however, cites no statute or Commission rule that addresses how carriers are required to use number resources or that otherwise governs the circumstances WITA describes. The Petition thus seeks relief that is not available in the form of a declaratory order but that would be more properly requested through a complaint or other proceeding that enables interested parties to develop an appropriate factual record. All but one of the orders from other state commissions that WITA cites (and attaches) as support for its Petition were entered in arbitration proceedings, [1] in which the parties developed a full factual and legal record prior to a commission decision.[2]

The Petition, therefore, fails to comply with the requirements of RCW 34.05.240 and should be denied on that basis.

B. WITA Is Not Entitled to the Relief Requested in the Petition.

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[1] Arbitrations by definition seek to resolve disputes between two particular carriers based on a factual record compiled by those parties and should not be used to establish industry wide policy decisions.

[2] The only exception is the order from the Maine Public Utilities Commission (attached to the Petition as Exhibit 4), but that order was the result of a lengthy commission investigation, not a declaratory order

The Petition does not comply with RCW 34.05.240, but even were that not the case, WITA is not entitled to the relief it has requested in the form of a declaratory order. WITA requests "an order declaring that use of VNXX-like services are not in the public interest and prohibiting their use," or alternatively, that "use of VNXX-like services are appropriately classified as interexchange services subject to the assessment and payment of access charges." Petition at 13-14. Neither order would be consistent with applicable law or the public interest.

The Petition defines a "virtual NPA/NXX" ("VNXX") as an NXX where none of the carrier's local exchange customers are located and/or that covers a geographic area that is larger than an ILEC's single local calling area so that "[a] call from the WITA member's rate center to the rate center where the [other carrier's] customer is located would, but for the VNXX, be classified as an interexchange call." Petition at 2. WITA requests that the Commission prohibit VNXXs (or authorize ILECs to impose access charges on traffic to and from VNXX numbers), but the Petition's implicit allegation that such services represent an attempt to bypass switched access charges is vastly overstated, overly simplistic and inconsistent with the types of service that use VNXXs, including comparable services provided by WITA members and other ILECs.

LECs offer a variety of services that use VNXXs as WITA defines that term. Qwest Corporation ("Qwest"), for example, offers Market Expansion Line ("MEL") service, which permits a customer to receive calls at a telephone number in one local calling area that are automatically forwarded to a different number outside that local calling area. Qwest Exchange and Network Services Tariff WN U-40, Section 5.4.4. Such calls would be toll calls if dialed directly to the forwarded number, but the subscriber placing the call does not incur a toll charge. If a carrier other than Qwest

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proceeding.

serves that subscriber, moreover, that carrier does not receive originating access charges from Qwest for delivering the call but actually is responsible for paying Qwest any reciprocal compensation charges applicable to local calls. Other LECs – undoubtedly including WITA members – offer a similar service, usually called Foreign Exchange service, which permits a customer to make and receive local calls to/from subscribers in an exchange in which the customer is not physically located.

Other state commissions have concluded that CLECs are entitled to offer such services without paying access charges to the ILECs. The New York Public Service Commission rejected the argument that ILECs' provisioning of Foreign Exchange service is distinguishable from CLECs' provisioning of a comparable service and refused to impose any requirements beyond those included in the LERG:

> The Small Companies defined foreign exchange based on technology used to complete the call. This definition requires that the terminating carrier have a physical presence in the exchange, and provide "dial tone" from a switch physically located in the exchange. Small Companies detailed technical and rate structure differences between what the incumbent telephone industry has called foreign exchange service and the service now offered by CLECs. However, the [Commission's prior] Order does not so narrowly define foreign exchange service based on call completion technology. Instead, it defines foreign exchange service operationally, i.e. making local service possible in an exchange where the customer has no physical presence.
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> We have previously recognized that the architecture of new entrant networks will differ from that of incumbents and stated that CLECs need not replicate the incumbent's service offerings, rate centers, or customer mix. The Small Companies' foreign exchange definition does not take into account that CLEC networks do not and are not expected to mirror networks of incumbent carriers. *The only standard that must be met is that established in the LERG which requires calls to be rated based on the NPA-NXX of the called number, not the customer's physical location*. Petitioners have not presented any error of law or fact to challenge the underlying principle adopted by the Commission; i.e., non-discriminatory treatment of calls from Independent customers to incumbent foreign exchange numbers vis-a-vis calls to CLEC numbers with virtual NXXs.

Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to

Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies, NYPSC Case 00-C-0789, Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates at 4-5 (Sept. 7, 2001) (emphasis added and footnotes omitted) (a copy of which is attached to this Statement as Exhibit A).

Contrary to WITA's alleged fears of violating RCW 80.36.170, RCW 80.36.180 & RCW 80.36.186 if its members route and rate traffic as required by the LERG, WITA members would be engaging in unlawful discrimination and undue and unreasonable prejudice if they do *not* comply with the standards in the LERG. The California Public Utilities Commission also found "no basis to require a [CLEC] to establish separate switching facilities in each exchange where it seeks to offer foreign exchange service merely because that is how the ILEC configures its network," and concluded that a CLEC's provision of VNXX service "constitutes a form of foreign exchange service from the perspective of the end user" and "warrants rating of the calls from the rate center of the foreign exchange in similar fashion to more traditional forms of foreign exchange service." *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, et al.*, Rulemaking No. 95-04-043, Investigation No. 95-04-044, Decision No. 99-09-029 at 8 & 14 (Sept. 2, 1999) (attached to this Statement as Exhibit B). The California commission also dismissed the argument WITA raises in its Petition that the use of VNXXs allegedly wastes numbering resources:

> We disagree with Pacific's claim that the Pac-West service arrangement should be prohibited because it contributes to the inefficient use of NXX number resources. While we are acutely aware of the statewide numbering crisis and are actively taking steps to address it, we do not believe that imposing restrictions or prohibitions on [CLEC] service options is a proper solution to promote more efficient number utilization. Under present industry rules, a carrier seeking to provide service in a given rate center must obtain NXX codes in blocks of numbers no smaller than 10,000. This requirement applies whether the customer being served is an ISP or any other customer. Moreover, there is

> no reason to conclude necessarily that a carrier will use any NXX code only to provide service to ISPs which are located outside of the assigned NXX rate center. For example, both Pac-West and WorldCom report they are actively pursuing numerous opportunities to provide profitable telecommunications services throughout their service areas. Their current subscribers include paging companies that have a significant demand for local DID numbers, which they, in turn, assign to local end users who typically are physically located in the assigned rate centers. Customers also include banks, retail stores, and other businesses, both located inside and outside the assigned rate centers.
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> Rather than imposing policies restricting carriers' service options, we believe the proper approach is to provide incentives for carriers to expand their service offerings so that NXX codes will become more fully utilized.
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> Accordingly, we find no basis to prohibit carriers from assigning NXX prefixes rated for one exchange to customers located in another exchange as a means of offering a local presence where such an arrangement is technologically and economically efficient, and where intercarrier compensation is fairly provided. We shall not prohibit [CLECs] from designating different rating and routing points just because such an approach may differ from traditional methods used by ILECs. Such a prohibition could undermine the incentives for carriers to develop innovative service alternatives in the most economically and technologically efficient manner.

Id. at 9-10 (footnotes omitted).

The Connecticut Department of Public Utility Control approached the issue somewhat differently but reached a similar result. The Department concluded that Foreign Exchange ("FX") service was interexchange service but that traffic routed to subscribers of this service is not entitled either to mutual compensation or to switched access charges:

> The CLECs points in this matter are well taken. While the Department believes that it is inappropriate that calls of this nature be subject to mutual compensation, the imposition of access charges on these calls is similarly improper. In the opinion of the Department, imposition of access charges on these calls would clearly not be in the public interest due to the level of customer confusion that would most likely be generated as well as the costs incurred by the CLECs in resolving those complaints. In addition, if the ILECs are permitted to imposing originating access charges for these calls, fairness would dictate that the CLECs also be permitted to apply terminating access charges as

> well. The public interest clearly would not be served. Accordingly, the Department will deny the Telco's request to impose FGA access charges on the carriers for these calls.

DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Docket No. 01-01-29, Decision at 45 (Jan. 30, 2002) (attached to this Statement as Exhibit C).[3]

WITA ignores these decisions, as well as the legal and public policy ramifications of its requested relief. As the California commission observed, CLECs often provide "VNXX" services in order to enable consumers to obtain dial-up access to the Internet as part of their local telephone service. Internet Service Providers ("ISPs") often seek to provide service in geographic areas where they do not have facilities deployed but realize that they would attract few, if any, customers if those customers had to pay toll charges when accessing the Internet. Accordingly, ISPs seek local telephone numbers from a local service provider in each of the geographic areas in which they offer or intend to offer Internet access. CLECs thus may obtain VNXXs in rate centers where they do not have customers physically located to enable ISP customers to provide service to their customers. The Commission has disclaimed jurisdiction over ISP-bound traffic in light of the FCC's determination that such traffic is jurisdictionally interstate.[4] Consistent with that decision, the Commission should not

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[3] The state commissions in Michigan, Pennsylvania, and North Carolina have issued similar decisions. *See In the Matter of the Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation,* Michigan PSC Case No. U-12969, Opinion and Order at 10-11 (January 23, 2001); Pennsylvania PUC Docket No. A-310630F0002 (January 24, 2001); *In the Matter of Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996,* North Carolina Utils. Comm'n Docket No. P-474 Sub 10, Recommended Arbitration Order at 66-74 (April 3, 2001).

[4] *E.g., In re Investigation Into [Qwest's] Compliance With Section 271,* Docket Nos. UT-003022

preclude local carriers from serving ISPs using VNXXs.[5]

Nor would such a prohibition be consistent with the public interest. Internet access is quickly becoming as important as basic telephone service, as the Commission implicitly recognized when revising its customer notice rules.[6] Such access is effectively denied if toll charges apply to every minute that the customer is on line. There are many areas in this state – particularly in the less densely populated areas in which WITA members provide local telephone service – where no or few ISPs have a physical presence. Prohibiting (directly or indirectly) ISPs from obtaining local telephone numbers in these areas would eliminate or substantially decrease the availability of Internet access in these areas. At a minimum, customers are left with the ILEC (or its affiliated company) as the sole source of Internet access, further entrenching WITA members' monopoly position. While such a result may be in WITA members' economic interest, it is not in the public interest.

Wireless service providers also make significant use of VNXXs. Wireless customers often make or receive wireless calls outside the local calling area to which the telephone number is assigned for rating and routing purposes. Calls originated by wireless customers are local calls when placed to anyone within the metropolitan statistical area ("MSA"), but calls from "landline" subscribers to wireless customers are local to the calling party only within the ILEC local calling area. Wireless customers thus may not physically be located within the local calling area to which their telephone number is assigned, but calls they receive from landline subscribers who are located in that area are local calls. For that reason, wireless customers may choose telephone numbers for their cellular, paging,

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& UT-003040, 25th Supp. Order at 3-4 (Feb. 8, 2002).

[5] The Connecticut Department of Public Utility Control reached a comparable conclusion. Exhibit C at 41-42.

[6] *See* WAC 480-80-206 (requiring carriers to maintain price lists on websites accessible via the

or other wireless services from a local calling area that is different than the physical location of their residences or businesses to enable their family, friends, or customers to call them without incurring toll charges. Again such services and use of number resources is fully consistent with the public interest.

WITA's requested relief also should preclude *all* forms of Foreign Exchange service – including services provided by ILECs – or require the payment of originating access charges on calls made to customers subscribing to such services. If CLECs cannot provide (or must pay access charges to provide) local service to a customer in an exchange in which the customer is not physically located, neither should the ILECs be permitted to offer (or avoid paying or imputing access charges to offer) such service. Imposition of access charges on calls to customers subscribing to Foreign Exchange service, moreover, could not be implemented. Call routing and billing systems currently rely on NPA/NXX data and are not configured to identify the physical location of the calling or called parties. A requirement to do so (in order to determine when access charges apply) would necessitate the development and implementation of new rules and changes to billing standards on an industry-wide basis at enormous cost.

WITA cannot plausibly claim that the nonexistent liability its members face under RCW 80.36.170, RCW 80.36.180 & RCW 80.36.186 for complying with the LERG outweighs the prohibition on (or extensive restructuring of) Foreign Exchange service by all LECs, the elimination or substantial reduction in the availability of dial-up Internet access in less densely populated areas, and the utility of wireless services.

CONCLUSION

WITA does not actually seek a declaratory order on its liability under RCW 80.36.170, RCW

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worldwide web).

80.36.180 & RCW 80.36.186. Rather, the Petition is a thinly veiled effort to further entrench WITA members' local exchange monopolies by precluding one of the few methods available to CLECs to provide competitive alternatives to consumers in less densely populated regions of the state. The Commission should dismiss the Petition as not properly seeking a declaratory order, with leave to initiate a more appropriate proceeding in which to develop the factual record needed to address the issues WITA raises. If the Commission nevertheless decides to reach the merits of WITA's contentions, the Commission should deny the Petition as fundamentally inconsistent with the law and the public interest in Washington.

DATED this 21st day of June, 2002.

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