

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

IN THE MATTER OF THE PETITION OF THE)
)
WASHINGTON INDEPENDENT)
TELEPHONE ASSOCIATION)
)
FOR DECLARATORY ORDER)
_____)

DOCKET No. UT-020667

KMC TELECOM STATEMENT OF
FACT AND LAW

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STATEMENT OF FACT AND LAW**

KMC Telecom Holdings, Inc. (“KMC” or the “Company”), by its attorneys, submits this Statement of Law and Fact in response to the Notice of the Washington Utilities and Transportation Commission (“Commission”) requesting statements of fact and law upon the matters alleged in the above-captioned Petition of the Washington Independent Telephone Association (“WITA” or “Petitioner”) for Declaratory Order.¹ KMC respectfully urges the Commission to deny the Petition because WITA has failed to meet the standard set forth in RCW 34.05.240 for obtaining a declaratory order.

WITA has failed to demonstrate that a declaratory order is necessary to resolve an actual controversy regarding uncertainty in the law about the establishment of a “virtual NPA/NXX” (“VNXX”), or that any uncertainty has had an adverse effect on WITA. Moreover, the declaratory order that WITA requests would have a seriously adverse effect on other parties and the general public if granted. Accordingly, WITA has not satisfied the requirements of RCW 34.05.240, which authorizes the Commission to grant a petition for a declaratory order only if the petition “set[s] forth facts and reasons on which the petitioner relies to show” that: (a)

¹ Notice of Receipt of Petition For Declaratory Order; Opportunity to Submit Statement of Fact and Law, dated June 7, 2002 (“Notice”)

uncertainty necessitating resolution exists; (b) there is actual controversy arising from the uncertainty such that a declaratory order will not merely be an advisory opinion; (c) the uncertainty adversely affects the petitioner; (d) the adverse effect of the 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) the petition “complies with any additional requirements established by the agency under subsection (2) of RCW 34.05.240.”² KMC addresses each of these requirements in turn below.

1. WITA HAS FAILED TO DEMONSTRATE ANY UNCERTAINTY REQUIRING RESOLUTION.

WITA has not met its burden under RCW 34.05.240(1)(a) to set forth facts and reasons showing uncertainty regarding VNXX. WITA provides no factual or legal support for its assertion that there is uncertainty regarding the proper rating and routing of calls to so-called “VNXXs.” The 1996 Act and the Commission’s rules require carriers to rate and route calls based on the dialed NXX without regard to the type of carrier being called, the network configuration of that carrier, or the class of customer that the carrier is serving.³ Similarly, traffic is routed to telephone numbers from so-called “VNXX” codes in exactly the same way that traffic is routed to telephone numbers from any other NXX codes. For all of this traffic, the originating carrier is responsible for delivering the calls to a designated point of interconnection (“POI”) with the terminating carrier.⁴ The respective locations of the POI and the terminating and originating carriers do not change based on the number that the called party has opted to use, and the originating carrier uses the same switches, transport facilities, routing tables and

² RCW § 34.05.240(1)(a)-(e).

³ See, e.g., *Joint Reply Comments of e.spire Communications, Inc. and KMC Telecom, Inc. before the Federal Communications Commission*, CC Docket No. 01-92, at 2, 15-34 (filed on Nov. 5, 2001).

⁴ Specifically, the calling party originates a call by dialing a seven- or ten-digit number, the originating carrier delivers the call to the terminating carrier’s switch pursuant to the interconnection agreement that

interconnection points to complete the call. Consequently, there is no uncertainty whatsoever about the way in which WITA members must rate and route calls: they must rate and route all calls based on the dialed NXX, regardless whether the NXX is a so-called “VNXX.”

WITA also makes a vague and unsupported allegation about potential violations of “industry standards” on local number portability and “concern about the mechanics of number portability” associated with the practice of spreading a single NPA/NXX across multiple rate centers.⁵ Although WITA’s failure to explain its allegation makes a full response difficult, the use of a VNXX arrangement – regardless of the configuration of the arrangement – raises no uncertainty with respect to “the mechanics of number portability” and does not violate any LNP rules or standards.

The Federal Communications Commission (“FCC”) requires carriers to make available “*Service Provider Portability*,” which is the “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”⁶ Pursuant to this requirement, a number must be ported from an existing carrier to a new carrier for the *same customer*, at the *same location*, for the *same service*. Nothing about a VNXX arrangement interferes with any aspect of this process: A number can be ported to or from a VNXX arrangement for the same customer at the same location, and for the same service

governs the relationship between the originating and terminating carrier, and the terminating carrier delivers the call to the called party.

⁵ *Washington Independent Telephone Association Petition* at 10.

⁶ *See Telephone Number Portability*, 13 FCC Rcd. 11701, ¶3 (1998); *see also* 47 U.S.C. §153(30). The FCC has not mandated *Location Portability*, which allows a number to be ported to a different physical location, *see, e.g., Telephone Number Portability*, 11 FCC Rcd. 8352, ¶174 (1996), or *Service Portability* which allows an end-user to retain a number when switching from one type of telecommunications service to another (for example, from POTS to ISDN). *See Telephone Number Portability*, 13 FCC Rcd 21204, n.13 (1998).

(i.e., an FX-type service). Therefore, WITA has failed to meet its burden of demonstrating any uncertainty with respect to VNXX arrangements.

2. WITA HAS FAILED TO DEMONSTRATE THE EXISTENCE OF AN ACTUAL CONTROVERSY.

WITA has not met its burden under RCW 34.05.240(1)(b) to demonstrate that an actual controversy regarding VNXX exists. WITA alleges that certain VNXX arrangements “place WITA members in jeopardy” of providing unreasonable preference between CLECs that use VNXX and IXC’s which do not, in violation of RCW 80.36.170; engaging in rate discrimination in violation of RCW 80.36.180 and providing undue preference or advantage to certain carriers over certain IXC’s in violation of RCW 80.36.186.⁷ WITA’s argument is fundamentally flawed, because the law requires its members to rate and route all calls based on the dialed NXX. So long as WITA’s members rate and route all calls based on the dialed NXX, they are at no risk of violating RCW 80.36.170, RCW 80.36.180, or RCW 80.36.186.

Similarly, WITA has alleged only that VNXX arrangements could place its members in “jeopardy” of violating the law at some undefined point in the future. However, WITA has not alleged that any existing VNXX arrangements are currently causing its members to violate the law, or even that WITA is currently in a dispute with any specific party.⁸ Further, to the extent that a specific WITA member believes that its interconnection agreement with another carrier prohibits the routing of traffic to a VNXX arrangement or mandates a different compensation scheme, a declaratory order is not the appropriate forum to resolve the dispute. In any event, WITA has failed to demonstrate an actual controversy, and thus its Petition does not support the issuance of a declaratory order.

⁷ See *Washington Independent Telephone Association Petition* at 6-8.

⁸ Although WITA briefly mentions a request from ICG to enter into a relationship under which VNXX would be established, WITA fails to explain how allege any specific controversy with respect to this request.

3. WITA HAS FAILED TO DEMONSTRATE THAT UNCERTAINTY ADVERSELY AFFECTS ITS MEMBERS.

WITA did not, and cannot, demonstrate that its members are adversely affected by the uncertainty it alleges. WITA has provided no legal or factual support for its claim that its members should be receiving access charges for traffic to VNXX arrangements, much of which likely represents ISP or wireless traffic to which access charges do not apply. Indeed, WITA did not identify any specific arrangements in support of its allegation.

WITA also makes vague allegations that VNXX services are not an appropriate use of numbering resources, but provides no explanation or support for this claim. KMC agrees that number conservation is an important goal, however VNXX service is an appropriate use of numbering resources because it uses the **same** amount of numbers as traditional telecommunications services. The requested declaratory order would affect the configuration of networks, and thus the cost of services for end users, but not the rate at which numbering resources are utilized. Consequently, the Commission would save no numbers by granting the requested declaratory order.

4. WITA HAS FAILED TO DEMONSTRATE THAT THE ALLEGED ADVERSE EFFECT OF UNCERTAINTY OUTWEIGHS THE ADVERSE EFFECTS ON OTHERS THAT THE REQUESTED ORDER WOULD CAUSE.

WITA has failed to meet its statutory obligation to demonstrate that the adverse effect of the uncertainty on the Petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested.⁹ As explained above, WITA has not demonstrated any uncertainty that adversely affects its members. Further, the declaratory order that WITA requests would have a seriously adverse effect on other parties and the general public if granted. For example, a blanket ban on VNXX arrangements would end most wireless

⁹ RCW 34.05.240(1)(d).

services in Washington. Wireless service providers “have utilized virtual NXXs almost since the inception of mobile wireless services,”¹⁰ and “the continued availability of virtual NXXs is critical to promoting CMRS competition and ensuring efficient network development.”¹¹ Thus, without VNXX, wireless telecommunications services could not be offered, which would have a seriously adverse effect on wireless service providers and the general public.

Similarly, grant of the requested declaratory order would harm citizens of Washington who currently use, or would like to use, services that rely on VNXX arrangements, including Internet access services. WITA admits this fact in its Petition.¹² Even citizens who receive service from carriers who do not rely on VNXX arrangements will be harmed, because their service providers will no longer face competitive pressure from the carriers that rely on VNXX arrangements. As such, these citizens will not enjoy the lower prices, higher quality and greater selection that vigorous competition brings. WITA did not, and cannot, explain how these harms are outweighed by the harm, that its members allegedly face. Therefore, WITA has not satisfied its burden under RCW 34.05.240(1)(d).

¹⁰ *Reply Comments of the Cellular Telecommunications & Internet Association before the Federal Communications Commission*, CC Docket No. 01-92, at 47 (filed on Nov. 5, 2001).

¹¹ *Id.* at 48.

¹² *See Washington Independent Telephone Association Petition* at 8-9 (stating that “there would be no adverse affect on others or the general public other than that members of the public currently using VNXX services would be placed in the same position as all other members of the public who do not use VNXX service”).

CONCLUSION

KMC respectfully urges the Commission to deny WITA's Petition, because WITA has failed to satisfy the requirements of RCW 34.05.240.

Respectfully submitted this 21st day of June 2002.

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CERTIFICATE OF SERVICE

I hereby certify that the original and 19 copies of the foregoing Statement of Law and Fact was sent via e-mail and facsimile and by FedEx Priority Overnight on this 21st day of June, 2002, addressed to the following:

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DATED at Seattle, Washington this 21st day of June 2002.

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