

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the)	
)	
Washington Independent Telecommunications)	DOCKET NO. UT-083056
Association and Lewis River Telephone Company,)	
d/b/a TDS Telecom Petition for Declaratory Ruling)	
)	
)	

ANSWER OF COMCAST PHONE OF WASHINGTON, LLC

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ATTORNEYS FOR COMCAST PHONE
OF WASHINGTON, LLC

November 17, 2008

ANSWER TO PETITION

Pursuant to WAC 480-07-930(3), Comcast Phone of Washington, LLC (“Comcast”) provides the following Answer to the Petition of the Washington Independent Telecommunications Association (“WITA”) and Lewis River Telephone Company d/b/a TDS Telecom (“TDS”) (collectively “Petitioners”) for Declaratory Ruling (“Petition”).

1. Comcast is a necessary party whose rights might, and in fact would, be substantially prejudiced by entry of a declaratory order, and Comcast does not consent to a determination of the issues presented by the Petition through a declaratory order proceeding under RCW 34.05.240. The issues raised in the Petition are more properly considered, if at all, in the arbitration proceeding between Comcast and TDS in Docket No. UT-083055. The Commission should, therefore, dismiss the Petition.

2. In light of its procedural infirmities and the dismissal sought by this Answer, Comcast does not address the substantive allegations in the Petition. Comcast respectfully requests the right to do so in the event that the Commission considers those allegations in this proceeding.

A. The Commission Lacks Authority to Enter a Declaratory Ruling in the Absence of Comcast’s Written Consent.

3. The Petition is governed by RCW 34.05.240 and WAC 480-07-930. The statute provides, in relevant part, that the Commission “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.” RCW 34.05.240(7). The Commission rule similarly states, in relevant part,

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.

WAC 480-07-930(3). Comcast is a necessary party whose interests would, not just might, be substantially prejudiced by entry of the requested declaratory order, and Comcast does not consent to the determination of the matters raised in the Petition by a declaratory order proceeding. The Commission, therefore, lacks authority to enter the requested declaratory ruling.

4. Comcast unquestionably is a necessary party to any proceeding seeking to determine Comcast's rights and obligations under federal and state law. Nor can there be any doubt that the declaratory order the Petitioners seek would substantially prejudice Comcast's existing rights to interconnect with incumbent local exchange carriers ("ILECs") under the federal Communications Act of 1934, as amended ("Act"). The attached Affidavit of Beth Choroser provides more than ample support for Comcast's assertion of substantial prejudice. Comcast, therefore, has fully complied with the requirements of RCW 34.05.240(7) and WAC 480-07-930(3).

5. The Petitioners do not dispute that Comcast is a necessary party, but they claim that Comcast will not be substantially prejudiced by the entry of a declaratory order. The Petitioners assert, "[i]f Comcast Phone is not entitled to seek negotiations for interconnection terms for the VoIP service that it or its affiliate will provide, then there is no prejudice to Comcast Phone by entry of an order to that effect." Petition ¶ 47. But this tautological assessment of the prejudice Comcast would suffer sweeps too broadly, as the Petitioner's view would nullify the limits on the Commission's authority to issue declaratory rulings placed on it by the statute. Under the Petitioner's interpretation, no necessary party would ever be able to claim substantial prejudice

because the order would do nothing more than state what that party's rights have allegedly always been. Neither RCW 34.05.240(7) nor WAC 480-07-930(3) is susceptible to such an interpretation.

6. The Petitioners seek an order declaring that Comcast is not a telecommunications carrier under federal or state law and thus has no rights under Section 251 or 252 of the Act. In other words, Petitioners effectively ask the Commission to revoke Comcast's prior registration and classification as a competitive telecommunications company in Washington and to nullify the seven interconnection agreements that Comcast has executed with other ILECs in Washington, and which this Commission has approved. A more clear-cut example of substantial prejudice to a party's rights is difficult to imagine.

7. The Petitioners, moreover, ignore prior Commission determinations of when a necessary party would be substantially prejudiced by a declaratory order. The most recent such decision was the Commission's dismissal of WITA's petition for a declaratory order on VNXX issues. In that case, the Commission declined to enter a declaratory order because Level 3 was a necessary party and refused to consent to a declaratory order proceeding. Level 3's assertion of substantial prejudice – which the Commission accepted as sufficient grounds for declining to enter the declaratory order WITA requested – was that the requested declaratory order “would affect the exchange of traffic and intercarrier compensation arrangements between Level 3 and WITA's member companies.” *In re Petition of WITA for a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-020667, Order Declining to Enter Declaratory Order ¶¶ 13 & 19 (Aug. 19, 2002).¹

¹ Under the Petitioners' interpretation, such an assertion would have been insufficient to demonstrate substantial prejudice because, to paraphrase Petitioners' argument here, if Level 3 were not entitled to provide VNXX service, then there would have been no prejudice to Level 3

8. The declaratory order that WITA and TDS seek in *this* proceeding would have a far greater negative impact on Comcast than the substantial prejudice Level 3 asserted would result from the order WITA sought in the VNXX proceeding. The declaratory ruling WITA and TDS currently request would prevent Comcast from exchanging *any* traffic with WITA members and would effectively preclude Comcast from serving customers, including its interconnected VoIP service provider customers, in any WITA member service territory, or potentially in the state of Washington. Choroser Aff. ¶¶ 6-7.

9. Alternatively, the Petitioners ask that the Commission classify VoIP service as an intrastate telecommunications service within the Commission's jurisdiction, which could require Comcast's interconnected VoIP service provider affiliates (and other VoIP providers operating in the state) to register as telecommunications companies and be subject to state, rather than FCC, oversight. As the Commission is aware, however, the Federal Communications Commission ("FCC") is currently considering the appropriate regulatory treatment for VoIP, and a Commission proceeding on that issue would be needlessly duplicative and wasteful of party resources and could subject Comcast and other service providers to inconsistent state and federal regulatory requirements. Such an impact represents significant and substantial prejudice to Comcast's rights.

10. Comcast has demonstrated that it will be substantially prejudiced by the declaratory order requested in the Petition. Accordingly, the Commission cannot enter such an order without Comcast's written consent, which Comcast refuses to provide. Consistent with RCW 34.05.240(7) and WAC 480-07-930(3), therefore, the Commission should decline to enter a declaratory order.

by entry of an order to that effect. The Commission obviously has not adopted this reasoning when interpreting RCW 34.05.240(7).

B. The Issues Raised in the Petition Are More Properly Considered, if at All, in the Arbitration Proceeding Between Comcast and TDS.

11. The Commission not only lacks statutory authority to enter the requested declaratory order but should not consider the issues raised in the Petition except to the extent those issues are germane to Comcast's petition for arbitration with TDS. The sole issue in that arbitration is whether Comcast is a telecommunications carrier entitled to interconnection and related rights under Sections 251 and 252 of the Act. Commission consideration and resolution of the issue in Docket No. UT-083055 is the only procedurally appropriate means for addressing the concerns expressed in the Petition.

12. Even casual scrutiny of the Petitioners' requested declarations demonstrates that Commission consideration of their request should be confined to the arbitration between Comcast and TDS. Petitioners request that the Commission:

- i. Declare whether WITA's member companies and, specifically TDS, are required to negotiate terms of interconnection pursuant to Section 251 of the [Act] with Comcast Phone . . . for the provision of fixed VoIP services by Comcast Phone or an affiliate of Comcast Phone; and
- ii. Declare that Comcast Phone is not acting as a telecommunications carrier for purposes of its VoIP service, whether provided by itself or through an affiliate, and thus is not entitled to interconnection rights pursuant to Section 251 of the Act

Petition ¶ 1 (footnotes omitted).

13. The Petitioners' first request, to be relieved of the obligation to negotiate an interconnection agreement with Comcast, is moot, at least with respect to TDS.² As described in Ms. Choroser's affidavit, Comcast and TDS have been engaged in negotiations for an interconnection agreement for several months, the result of which is a fully negotiated

² This request is also moot with respect to the three other WITA members with which Comcast has Commission-approved interconnection agreements. *See* Choroser Aff. ¶ 3.

interconnection agreement. Choroser Aff. ¶ 4. TDS refuses to sign that agreement, but no further negotiation between the parties over the terms and conditions of interconnection are contemplated or required.³ *Id.* ¶¶ 4-5. If TDS disagrees, TDS has every opportunity in the arbitration proceeding to litigate its obligation to negotiate with Comcast under Sections 251 and 252. No additional proceeding or Commission consideration of this request is required.

14. The Petitioner's second request is for the Commission to declare that Comcast is not a telecommunications carrier entitled to interconnection under Section 251 of the Act, which is the issue that lies at the heart of the arbitration proceeding. TDS is not entitled to bypass that proceeding through the filing of a petition for declaratory ruling. Indeed, a TDS affiliate just filed its own petition for arbitration with a Comcast affiliate in Michigan to litigate this exact same issue. *Id.* ¶ 4. TDS thus will have every opportunity to litigate this issue in Docket No. UT-083055, and no additional proceedings are necessary or warranted.

C. The Commission Should Not Conduct a Proceeding on the Regulatory Jurisdiction of VoIP.

15. Petitioners request in the alternative that the Commission declare Comcast "is a telecommunications carrier and the VoIP service that it, or its affiliate, is offering is a telecommunications service and is subject to regulation for those services as a telecommunications company offering telecommunications within the state of Washington." Petition ¶ 1 (iii). That request is both unwarranted and imprudent.

16. The Petitioners' alternative request is unnecessary to the extent that it seeks a declaration that Comcast is a telecommunications carrier. The Commission has more than

³ Petitioners' request that the Commission "toll the running of the interconnection clock" is similarly moot with respect to TDS. Petition ¶ 2. The only portion of the "interconnection clock" left to run is the time within which the Commission must resolve the disputed issue in the arbitration proceeding. The Petitioners have offered no basis on which the Commission could determine that this issue cannot be resolved under the timelines specified in the Act.

adequately affirmed Comcast's status by registering and classifying Comcast as a competitive telecommunications company and by approving Section 251-252 interconnection agreements between Comcast and seven other ILECs. Comcast clearly qualifies as a telecommunications carrier, and its offerings qualify as telecommunications services. *See Choroser Aff.* ¶¶ 6-7.

17. The Petitioners' further request that the Commission declare VoIP service to be a telecommunications service subject to Commission regulation is problematic for at least three reasons.

18. First, the Petitioners have failed to comply with the statutory requirement that they demonstrate any uncertainty with respect to the regulation of VoIP service or service providers adversely impacts the Petitioners. RCW 34.05.240(1)(c). The Petitioners allege only that lack of intrastate regulation is "patently unfair to other telecommunications companies in the state of Washington" and that VoIP "customers should be entitled to the same protections they receive when served by other telecommunications companies." Petition ¶¶ 40-41. The Petitioners identify no basis on which the regulatory treatment of VoIP service is any less "fair" to them than the lack of state regulation over interstate or information services or the reduced regulation accorded competitively classified telecommunications companies. Comcast is fully responsible for making all applicable access charge and reciprocal compensation payments as required by the interconnection agreements and applicable tariffs, so the Petitioners could not claim any financial harm. Nor can the Petitioners claim to be safeguarding the welfare of consumers they do not serve. That responsibility lies with the applicable regulatory bodies, and Comcast's interconnected VoIP service provider affiliate must comply with all of the regulatory obligations imposed by the FCC, including making universal service fund contributions, providing emergency calling ("E-911") services to end users, protecting customer proprietary

network information (“CPNI”), providing disability access, assuring compliance with law enforcement “wire tapping” requests (“CALEA”), and providing number portability. In sum, the Petitioners have failed to allege any adverse impact on them as a result of the lack of state regulation of VoIP services and providers.

19. The second problem with the Petitioners’ alternative request is that the issue of the appropriate classification of VoIP service is currently pending before the FCC in a number of different dockets. At a minimum, any Commission proceeding would duplicate the FCC’s investigation, and any action the Commission takes would pose the very real risk of federal preemption and the waste of Commission and party resources.

20. Finally, the Petitioners’ alternative request would affect not just Comcast and its affiliate but all other companies who provide or have affiliates who provide VoIP services in Washington. On information and belief, such companies include Qwest Corporation, Verizon Northwest, Inc., and virtually all, if not all, competitively classified providers of local telecommunications services in Washington. The Commission should expect that any proceeding to address the regulatory treatment of VoIP service and providers will be extremely controversial, time-consuming, and resource intensive for the Commission as well as a multitude of interested parties. The Commission should not initiate such a proceeding without a compelling reason for doing so, and the Petition offers no such compelling reason.

21. WHEREFORE, Comcast respectfully requests the following:

(a) That the Commission find that Comcast is a necessary party whose rights would be substantially prejudiced by the entry of a declaratory order and that Comcast objects and does not consent in writing to determination of the matters raised in the Petition by declaratory order;

(b) That in accordance with RCW 34.05.240(7) and WAC 480-07-240(3), the

Commission decline to enter the declaratory order requested in the Petition;

(c) That the Commission require any and all issues between Comcast and TDS with respect to execution of a Section 251 interconnection agreement be resolved in Docket No. UT-083055;

(d) That the Commission dismiss the Petition; and

(e) That the Commission grant such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

Respectfully submitted:



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