

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

	)	
In the Matter of	)	DOCKET NOS. UT-031459 and
	)	UT-031626 (consolidated)
COMCAST PHONE OF	)	
WASHINGTON, LLC	)	
	)	ORDER NO. 04
Application for Mitigation of	)	
Penalties or for Stay	)	
.....	)	
In the Matter of	)	
	)	
COMCAST PHONE OF	)	FINAL ORDER AFFIRMING AND
WASHINGTON, LLC	)	ADOPTING INITIAL ORDER
	)	GRANTING MITIGATION, ON
Petition for an Interpretive and	)	CONDITION; DENYING
Policy Statement or Declaratory	)	EXEMPTION FROM RULE
Ruling	)	
.....	)	

1 **Synopsis:** *This final Order denies all petitions for administrative review. In doing so, the Commission affirms and adopts an initial order, ruling as follows: (1) WAC 480-120-439 applies to all local exchange companies, including CLECs such as petitioner; (2) Comcast should be not be granted an exemption from the requirements of WAC 480-120-439 to file service quality information; and (3) the penalty assessed against Comcast for its failure to file the reports required under WAC 480-120-439 should be fully mitigated, subject to the condition that Comcast demonstrate in a subsequent filing, to be made within thirty days after a final Commission order in these proceedings, acceptable alternative means by which the company can satisfy the rule.*

**I. SUMMARY**

2 **PROCEEDINGS:** Docket No. UT-031459 concerns a Penalty Assessment against Comcast Phone of Washington, LLC, d/b/a Comcast Digital Phone (“Comcast”). The Commission determined that Comcast’s failure to file a service quality

report was an apparent violation of WAC 480-120-439. The Commission assessed a penalty against Comcast in the amount of \$1,000 for the violation pursuant to RCW 80.04.405 on September 12, 2003. Comcast applied on September 30, 2003, for mitigation of the penalty and asked for a stay of the penalty proceeding pending resolution of its petition for an interpretive or policy statement or declaratory order. The latter petition, filed on October 2, 2003, in Docket No. UT-031626, posed alternative means to address issues associated with the penalty.

3 The Commission consolidated the petitions for hearing. The Commission denied the petition for an interpretive statement or a declaratory order in Docket No. UT-031626 on October 24, 2003. The Commission determined that the remaining issues should be resolved in an adjudicative proceeding. Pursuant to process determined at a prehearing conference before Administrative Law Judge Dennis J. Moss on November 17, 2003, parties desiring to do so filed cross-motions for summary determination on December 5, 2003, and responses on December 23, 2003.

4 **INITIAL ORDER:** The presiding administrative law judge entered an initial order on January 16, 2004. The order proposed denial of Comcast's requests to find the rule inapplicable to competitive local exchange companies and to deny Comcast's request for exemption from the rule. The order proposed to grant the application for mitigation on condition that Comcast file an acceptable alternative to elements of WAC 480-120-439 that are inappropriate to its circumstances.

5 **PETITIONS FOR ADMINISTRATIVE REVIEW:** Comcast and AT&T petitioned for review of the initial order's proposed rejection of Comcast's position that the rule is inapplicable to CLECs.<sup>1</sup> Comcast sought review of the

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<sup>1</sup> Comcast also sought the opportunity for oral argument. The Commission believes that the parties' positions and arguments are thoroughly and skillfully presented in the petitions for

proposed rejection of Comcast's request for exemption from the rule.  
Commission Staff petitioned for review of the proposal to mitigate the penalty.

6 **PARTY REPRESENTATIVES:** Judith A. Endejan, Graham & Dunn PC, Seattle, Washington, represents Comcast. Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, represents Time Warner Telecom of Washington LLC ("TWTC"). Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T Communications of the Pacific Northwest and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T"). Michel L. Singer Nelson, MCI Senior Regulatory Attorney, Denver, Colorado, represents MCI. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents WebTEC. Adam Sherr and Lisa A. Anderl, Qwest, Seattle, Washington, represent Qwest Corporation. Simon ffitch, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section of the Washington Office of Attorney General. Shannon E. Smith, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").<sup>2</sup>

7 **COMMISSION DETERMINATION:** The Commission affirms the initial order, deciding the issues as follows:

1) WAC 480-120-439, requiring service quality reports from local exchange companies serving 2 percent or more of the access lines within the State of Washington, applies to all local exchange companies (*i.e.*, both incumbent and competitive). Comcast serves 2 percent or more of the access lines in Washington and therefore must file service quality reports.

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administrative review and answers, and finds that it has no unanswered questions or concerns that would benefit from exploration in the setting of oral argument.

<sup>2</sup> In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

2) Comcast did not demonstrate a sufficient basis for its requested complete exemption from the reporting requirements of WAC 480-120-439. However, the Commission may grant authority for Comcast to use an alternative measurement or reporting format for any of the reports required and, if necessary, a partial exemption, in subsequent proceedings upon a demonstration that specific requirements of the rule are inappropriate for application to Comcast and that the company can better satisfy the rule's purpose by alternative measures or reports.

3) The penalty assessment should be fully mitigated, conditioned on Comcast's filing within 30 days of the date of this order a proposal for alternative measurement or format that demonstrates acceptable alternative means by which the company can satisfy the rule.

## II. MEMORANDUM

### A. Background and Procedural History

8 These proceedings raise issues about the interpretation and application of rules the Commission adopted in General Order No. R-507, which was entered in December 2002. The rule most centrally at issue, WAC 480-120-439, became effective on July 1, 2003, pursuant to that Order. WAC 480-120-439, reproduced in full as Appendix A, establishes record-keeping and reporting requirements related to service quality standards that are set forth in various sections of chapter 480-120 WAC.

9 **Legal basis for the decision.** RCW 80.04.010 defines "local exchange company" as "a telecommunications company providing local exchange telecommunications service." RCW 80.04.530 draws distinctions between local exchange companies serving 2% or more of the state's access lines and those

serving less than that number, exempting the latter from reporting requirements. RCW 80.04.320(2) exempts CLECs from specified regulatory requirements and gives the Commission the authority to exempt them from other requirements.

- 10 WAC 480-120-021 defines “Class A” and “Class B” local exchange companies, according to the number of access lines served, in parallel with RCW 80.04.530. According to WAC 480-120-021, its definitions apply throughout Chapter 120 WAC, “except where there is an alternative definition in a specific section, or where the context clearly requires otherwise.”
- 11 Washington State Legislature enacted RCW 80.04.530 in 1995, ten years after the Legislature enacted RCW 80.36.320 to create competitive telecommunications companies. The enactment of RCW 80.04.530 did precede the enactment of the federal Telecommunications Act of 1996, which created competition on a national scale and gave rise to a number of competitive local exchange companies. The Commission adopted WAC 480-120-021, however, in late 2002. At that time, the Commission was frequently faced with issues involving competition, the approach to competitive issues, and the operations of competitive local exchange companies.
- 12 WAC 480-120-439 places different requirements related to tracking and reporting indicators of service quality on the two classes of local exchange companies, WAC 480-120-021 defines a “Class A” company as “a local exchange company with two percent or more of the access lines within the state of Washington.” WAC 480-120-439 requires a Class A company to report certain information monthly. WAC 480-120-021 defines a “Class B” company as “a local exchange company with less than two percent of the access lines within the State of Washington.” WAC 480-120-439 requires a Class B company to keep certain records related to service quality standards, but not to file reports. It thus follows the admonition of RCW 80.04.530 to exempt smaller local exchange

companies from reporting requirements. WAC 480-120-439 makes no distinction between ILECs and CLECs.

- 13 **Factual basis for the proceedings.** Comcast serves more than 2% of the state's access lines. The Company and Commission Staff disagree over whether it is therefore a Class A company and subject to the service quality reporting requirements of WAC 480-120-439. That is because Comcast and Commission Staff also disagree over whether Comcast is a local exchange company at all, within the meaning of the rule, inasmuch as Comcast is a competitive local exchange company or CLEC, and not an incumbent local exchange company, or ILEC.
- 14 On July 17, 2003, Commission Staff informed Ms. Weaver via e-mail that Staff believes Comcast is a Class A company and is required to file monthly reports under WAC 480-120-439. Staff's communication to Ms. Weaver did not cite the Class A definition in WAC 480-120-021, but rather referred Comcast to WAC 480-120-302, which establishes "Accounting requirements for companies not classified as competitive."
- 15 Comcast and Staff immediately began further discussions on the subject at Staff's request. Comcast had some question concerning whether it had reached the 2 percent threshold for Class A status, under any definition of the term. On October 30, 2003, the Staff published its determination that the total number of access lines in the state is 4,090,455. Comcast's access lines, measured against that total, exceed the 2 percent threshold.
- 16 The Company and Commission Staff met and corresponded about the matter during July, August, and September 2003. They continued to disagree about the meaning of relevant terms and about whether Comcast is subject to the requirements of WAC 480-120-439. Ms. Weaver told Commission Staff in early September that Comcast would request a declaratory ruling from the

Commission on the applicability of WAC 480-120-439, or, in the alternative, request a waiver, because Comcast Phone could not comply with all of the rule's reporting requirements. She stated that Comcast Phone was working on this filing when it received a Penalty Assessment on September 15, 2003, and that Staff had never indicated that it would seek a penalty for Comcast Phone's asserted noncompliance with WAC 480-120-439.

- 17 Dr. Blackmon, of Commission Staff, states that he "repeatedly and consistently advised the company that it should either comply with the rule or make a formal filing to confirm its belief that the company was not required to report." According to Dr. Blackmon, by the time he recommended a penalty assessment to the Commissioners, Comcast "had missed several informal commitments to petition to the WUTC for a clarification." Dr. Blackmon asserts that the company's failure to file a petition after he informed Ms. Weaver in August that "the dispute should be resolved by the WUTC" means that the company "was not acting in good faith to resolve the issue when the WUTC issued the penalty assessment" on September 12, 2003.
- 18 Comcast received the Commission's penalty assessment notice on September 15, 2003, and timely filed an "Application for Mitigation of Penalties or for Stay Pending Resolution of Petition for Interpretive and Policy Statement or Declaratory Order" on September 30, 2003. Two days later, on October 2, 2003, Comcast filed its "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 Exemptions from Reporting Regulations. "
- 19 The Commission entered its "Order Consolidating Proceedings and Denying Petition for an Interpretive and Policy Statement or a Declaratory Ruling" on October 24, 2003. The Commission convened a prehearing conference on November 17, 2003. Comcast agreed not to contest that it does, in fact, operate 2

percent or more of the access lines in Washington. Comcast has not filed a report under WAC 480-120-439.<sup>3</sup> The parties agreed that no material facts were disputed, and agreed to proceed on the basis of cross-motions for summary determination. Parties wishing to do so filed such motions on December 5, 2003, and responses on December 23, 2003.

### **B. The Initial Order**

- 20 The initial order was entered on January 16, 2004. It found that Comcast is a local exchange company as the term is used in the statutes and the Commission rules, and that it is a Class A company under WAC 480-120-021. Hence, the order concluded, Comcast is subject to the reporting requirements of WAC 480-120-439. The order rejected Comcast's argument that the terms Class A and Class B company apply only to ILECs – incumbent local exchange companies that served prior to the advent of competition.
- 21 The order acknowledged Comcast's claim that some of the reports were inappropriate to its operations. The order found that Comcast had not demonstrated facts that entitled it to a complete exemption from the rule, but noted that an avenue set out in the rule for such situations is to develop alternate measures or to seek a partial waiver.
- 22 Finally, the order proposed to mitigate the entire penalty, conditioned on Comcast's filing a proposal for alternative measures, accompanied if needed by a request for partial exemption from the rule, within 30 days following entry of a final order. The order encouraged Comcast to work closely with Staff, and to develop alternative measures.

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<sup>3</sup> The first reports required under WAC 480-120-439 were due by September 2, 2003, for the July 2003 period.

## C. Discussion and Rulings on Administrative Review

### 1. Introduction

23 For the most part, the parties carry to the Commission the same arguments that  
they raised to the Administrative Law Judge on their motions for summary  
determination. We will follow the structure of the initial order in addressing  
them.

24 Comcast asserts that the initial order erred as a matter of law by ruling that WAC  
480-120-439 applies to CLECs such as itself. AT&T also petitions for  
administrative review on this point.

25 Comcast also alleges that the initial order erred by ruling that Comcast was not  
entitled to an exemption from the rule, and by ruling that Comcast should not be  
authorized to satisfy the requirements of the rule by alternative means unless it  
first demonstrates that specific proposed alternative measures or formats will  
satisfy the requirements of WAC 480-120-439(12). That subsection sets out the  
opportunity to propose alternative measures or reports, and the standards for  
determining whether the alternatives should be accepted.

26 Commission Staff petitions for administrative review, arguing that the initial  
order erred in mitigating the penalty.

27 Commission Staff answered the Comcast petition and Comcast answered  
Commission Staff's petition. Public Counsel answered in opposition to Comcast  
and AT&T, and supported Commission Staff's petition. Qwest took no position  
on Commission Staff's petition. However, Qwest argued in opposition to the  
Comcast and AT&T petitions, urging affirmation of the relevant portions of the  
initial order, for reasons set out in its dispositive motion.

## 2. Interpretation of WAC 480-120-439

- 28 Comcast first argues that it is not subject to the terms of WAC 480-120-439 because the rule and its predecessors have only applied to ILECs, and therefore the term “local exchange carrier” as used in the rule does not include a CLEC such as Comcast. Comcast argues that it follows from that proposition that a CLEC cannot be considered a Class A company for purposes of WAC 480-120-439. AT&T also opposes the ruling that service quality recordkeeping and reporting standards are applicable to Class A CLECs.
- 29 The initial order noted that the definition in WAC 480-120-021, by its plain terms, includes all local exchange companies (LECs), whether in the subset of incumbent (ILEC), or competitive (CLEC) local exchange company. The definitions of Class A company and Class B company in WAC 480-120-021 do not expressly refer to either ILECs or CLECs.
- 30 As the initial order noted, the plain meaning of the term is contrary to Comcast’s position.<sup>4</sup> The unambiguous language in the definitions, considered in the context of WAC 480-120-439, leave no doubt about the meaning or application of the rule. In the absence of ambiguity, it is improper to search among alternative meanings.<sup>5</sup>

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<sup>4</sup> “Were we to accept Comcast’s argument that the absence of a specific reference to CLECs means they are not included in the definitions, we would have to accept the equally unlikely proposition that the definitions do not include ILECs. This would make the rule provisions utterly meaningless, a result not permitted under the rules of statutory construction.” Initial order, paragraph 22.

<sup>5</sup> *HJS Dev. Co., Inc. v. Pierce County ex rel. Dept of Planning & Land Services*, 148 Wn.2d 451, 61 P.3d 1141 (2003); *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655, cert. den. 123 S. Ct. 2221, 155 L2d 1107 (2002).

31 Moreover, some statutes do distinguish in operating provisions between CLECs and ILECs, notably RCW 80.36.320,<sup>6</sup> demonstrating that the legislature is capable of drawing a distinction when necessary. The Commission also is capable of making that distinction in its rules (*see, e.g.*, RCW 80.36.320(2), which authorizes the Commission to relax the regulation of competitive companies, and WAC 480-120-302, which by its terms applies only to ILECs). Comcast's argument that the term "local exchange company" does not include CLECs would at best make those legislative and quasi-legislative provisions meaningless.

32 Comcast cites to the provisions of RCW 80.04.530, distinguishing local exchange companies on the basis of size and exempting smaller companies from some regulatory requirements. Comcast argues that CLECs irrespective of size should be afforded the same status as small ILECs because of the legislative intent to minimize regulation of CLECs. In effect, Comcast asks us to amend the law. The legislature has shown in RCW 80.36.320 that it can make specific laws relating to regulatory distinctions between CLECs and ILECs. It could have included all CLECs in the reduced reporting requirements of RCW 80.04.530, and not just those holding less than 2 per cent of the state's access lines, but it did not.

33 AT&T argues that the initial order erred in failing to consider policy arguments in interpreting the meaning of the statute and the rule.<sup>7</sup>

34 We reject AT&T's contention. Our task at this juncture is to determine the meaning of the statute defining local exchange company and the rules defining Class A and B companies and establishing service quality reporting

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<sup>6</sup> The legislature enacted RCW 80.36.320 in 1985, prior to enactment of the Federal Telecommunications Act in 1996 that led to an increase of CLECs on the national scene.

<sup>7</sup> AT&T also states that the Commission failed to analyze the costs of CLEC compliance with WAC 480-120-439, contrary to Governor Locke's Executive Order No. 97-02. AT&T does not allege that the rule must fail because its adoption failed to comply with the law relating to rule adoption. We therefore do not address the matter, except to note that WAC 480-120-439(12) does provide means to minimize burdens on companies whose compliance is difficult.

requirements. It is not our task here to determine what the law or the rules should be. Instead, we must look to the plain meaning of the terms as used in the statute and the rule.

35 The rule itself addresses the policy arguments that Comcast and AT&T cite. It contains accommodations for companies finding the reporting requirements difficult, added at the time of adoption in response to company comments. *WAC 480-120-439(12); General Order No. 507, pages 45-47, December 12, 2002.*

36 The Commission concludes that the plain meaning of “local exchange company” as defined in RCW 80.04.010 includes both incumbent and competitive LECs. RCW 80.36.320 acknowledges and affirms the applicability of the term and of regulation to CLECs by means of the distinctions that it draws and its mandate that existing regulations apply to CLECs unless excepted by statute or by the Commission.<sup>8</sup> The Commission rules that the plain meaning of Class A and Class B local exchange companies as used in WAC 480-120-439 includes both incumbent and competitive LECs.

37 We reject Comcast’s arguments on review and we affirm and adopt the resolution articulated in the initial order.

38 **Conclusion.** We conclude, as a matter of law, that CLECs such as Comcast that have more than 2 percent of the access lines within the state of Washington are Class A companies within the meaning of WAC 480-120-439 and are subject to the reporting requirements of the rule.

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<sup>8</sup> RCW 80.36.320(2) provides in pertinent part:

Minimal regulation means that competitively classified companies may file, instead of tariffs, prices lists. The Commission may also waive other regulatory requirements under this title for competitive telecommunications companies when it determines that competition will serve the same purposes as public interest regulation.

### 3. Exemption

39 Comcast argued in its motion for summary determination that it should be granted an exemption from the reporting requirements of WAC 480-120-439 WAC 480-120-015 because it “cannot comply . . . without undue hardship.” *Comcast Motion at 9*. It also argued, alternatively, that “a partial waiver should be granted and the Company should be allowed to satisfy the new rule by alternative means.” The Company asked that the Commission allow it to devise alternative measurements and reports to satisfy all reporting requirements of WAC 480-120-439. Comcast suggested certain general guidelines for alternative reporting, but did not provide a detailed proposal for the Commission’s consideration.

40 The initial order found that Comcast failed to support its contention that it should be exempted entirely from the rule,<sup>9</sup> but said, at paragraph 33,

The record in this proceeding strongly supports the idea that the Commission should authorize Comcast to satisfy the reporting requirements under WAC 480-120-439 by alternative means that reflect the company’s network architecture and operations. The record is inadequate, however, to establish exactly what alternative reporting methods should be approved.

41 The initial order authorized Comcast to make a specific proposal to the Commission.<sup>10</sup>

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<sup>9</sup> Finding of fact No. 5, paragraph 48.

<sup>10</sup> At a later point, the initial order conditioned mitigation of the penalty on Comcast’s making such a proposal. *See*, the discussion later in this order.

- 42 On review, Comcast argues that the initial order erred in failing to grant its request for total exemption. It argues that the order states no reason for failing to grant Comcast's alternative request. Comcast urges that the policies favoring reduced regulation of CLECs and the forces of competition (it has no captive customers, says Comcast) are persuasive arguments that render service quality reports unnecessary.
- 43 The initial order stated that the ruling should be without prejudice to a limited exemption necessary to permit satisfaction of the underlying purpose of the rule, as provided in WAC 480-120-439(12). That provision allows alternatives when the company cannot reasonably provide the measure or reports as required, when the alternative will provide a reasonably accurate measure of performance relative to the standard, and when the alternative allows enforcement of the substantive standard.
- 44 The initial order suggests the only logical means to resolve the issues. Comcast is arguing that it can and should be allowed to comply with alternative provisions of WAC 480-120-439(12) while at the same time saying that it cannot comply with the rule at all. If we accept its argument, as did the initial order, that Comcast is willing and able to develop reasonable alternatives under WAC 480-120-439(12), then it is by definition able to comply with the rule and ineligible for total exemption under WAC 480-120-015.<sup>11</sup> The initial order did not err. The initial

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<sup>11</sup> WAC 480-120-015 reads in relevant part as follows:

- (1) The commission may 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.
- (2) To request a rule exemption, a person must file with the commission a written request identifying the rule for which an exemption is sought, and provide a full explanation of the reason for requesting the exemption. \* \* \*
- (4) In determining whether to grant the request, the commission may consider whether application of the rule would impose undue hardship on the requesting person, of a degree or a kind different from hardships imposed on other similarly situated persons, and whether the effect of applying the rule would be contrary to the purposes of the rule.

order noted that a further determination on exemptions must await a review of the company's proposal.<sup>12</sup>

- 45 The initial order noted that Comcast had demonstrated an inability to provide some of the information specifically required by the rule, and determined that a decision on a partial exemption should await production of a record on the adequacy of alternative measures or reports—as specified in the rule itself. That result is fully consistent with the policies underlying the rule in question, and with the policy of minimizing burdens on CLECs to the lowest level necessary to achieve the purposes of regulation.
- 46 We deny Comcast's petition for review on the issue of Comcast's entitlement to a total exemption from WAC 480-120-439, and affirm and adopt the decision of the initial order on exemptions. We ask the Company and Commission Staff to work together to develop a proposal for alternative measurements and reporting. We will set a deadline for compliance, below. As the initial order proposed, this decision is without prejudice to further consideration of exemptions after a review of Comcast's proposals for alternative measures or reports.

#### **4. Penalty Mitigation**

- 47 The initial order granted mitigation, in full, conditionally. The condition is that Comcast make a good-faith filing meeting the requirements of WAC 480-120-439(12), proposing alternative measures and reporting for provisions in the rule for which Comcast finds compliance unreasonably difficult.

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<sup>12</sup> Comcast assigns error to Conclusion of Law No. 4, stating that Comcast should not be allowed to satisfy WAC 480-120-439 by alternative measures unless it demonstrates specific measures that will comply with the rule. It offers no argument specifically addressed to the asserted invalidity of the conclusion, but apparently views Conclusion No. 4 as being improper if we accept Comcast's arguments on total exemption. The conclusion is an appropriate statement of the Commission's responsibility under subsection 439(12) to authorize alternative measures or

- 48 The initial order noted that, while the law and the rule are not ambiguous, arguments to the contrary are not necessarily frivolous. The order found that Comcast disputed the applicability of this rule in good faith and that, while the company's arguments did not prevail, they were not facially untenable. The order noted that both the company and the Commission Staff first viewed the central issue of whether WAC 480-120-439 applies to CLECs in an atmosphere of uncertainty. Staff first supplied authority for its position in terms that maintained ambiguity, by citing to a rule exempting CLECs from its purview, and Comcast had independent arguments for its views.
- 49 Comcast told Staff that it intended to seek a formal determination from the Commission rather than simply accede to Staff's view and it was preparing a filing to seek exemption when the penalty was assessed. Staff gave Comcast no explicit indication that it would pursue enforcement before Comcast filed for an exemption.
- 50 The Commission views penalties not as retribution, but as a means to ensure compliance with law and rule. In general Penalties as a consequence of violating a rule are not inappropriate. The initial order, however concluded that the goal of compliance would be best accomplished by ordering full mitigation of the penalty assessed against Comcast, conditioned on the company's filing a petition for approval of an alternative measurement or reporting format under WAC 480-120-439(12) within 30 days after the date of a final Commission order.
- 51 Commission Staff petitions for review of this portion of the initial order. It argues that mitigation does not further the goals of future compliance, but signals to Comcast and to other companies that they need comply only after many rounds of discussions, missed deadlines, and completed litigation.

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reports only based on evidence that the standards for approval of alternatives has been met. Comcast acknowledges that no such evidence exists on this record.

52 In this instance the Commission agrees with the decision of the initial order. In the context of this record, we see a good-faith discussion in which both parties acknowledged uncertainty and recognized that the matter would best be decided by the Commission.<sup>13</sup> We think that enforcement will be enhanced when parties are confident of their ability to engage in free discussion of good-faith disagreements and to pursue in a timely manner the resolution of issues of first impression.

53 We do expect Comcast and Staff to work cooperatively together to develop an alternative to literal application of WAC 480-120-439 that will satisfy the underlying purposes of the service quality reporting rules, taking into account the company's network architecture and its operations. To the extent there are specific issues Comcast and Staff cannot resolve, those can be identified and the Commission can resolve them in its review of Comcast's request for alternative measures or reporting.

54 Finally, we reaffirm that the mitigation of the penalty is conditioned on Comcast's pursuing an agreement with Commission Staff for an alternative plan, and filing such a plan within 30 days after the entry of this order. Given the attention the parties have given the issues, the terms of the initial order, and the indications of discussion of such proposals among the parties, we believe that the 30-day period will be adequate for the purpose.

### **III. FINDINGS OF FACT**

55 There are no disputed facts material to the Commission's determination of the issues in this proceeding. The Commission now makes the following summary

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<sup>13</sup> We note that when the penalty was assessed, the Commission had not yet computed the number of lines from which Comcast could formally determine whether it was a Class A or Class B local exchange company within the terms of the rule.

findings of fact. Those portions of the preceding discussion that include findings pertaining to the Commission's ultimate decisions are incorporated by this reference.

- 56 (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, practices, and accounts of public service companies, including electric companies.
- 57 (2) Comcast is a "public service company," a "telecommunications company," and a "local exchange company" as those terms are defined in RCW 80.04.010, and as those terms otherwise may be used in Title 80 RCW. Comcast is engaged in Washington State in the business of supplying utility telecommunications services to the public for compensation.
- 58 (3) Comcast serves more than two percent of the access lines within the state of Washington and is a Class A local exchange company as defined in WAC 480-120-021.
- 59 (4) Comcast, as a Class A company within the meaning of that term as used in WAC 480-120-439, is subject to the reporting requirements for such companies as stated in WAC 480-120-439.
- 60 (5) Comcast failed to file by September 2, 2003, reports of its performance on service quality measures as required by WAC 480-120-439.
- 61 (6) The Commission assessed a penalty of \$1000 pursuant to RCW 80.04.405 on Comcast on September 12, 2003, for failure to file service quality reports as required.

- 62 (7) Comcast acknowledged that it can satisfy the purposes of WAC 480-120-439 by means of alternative measures or reports as contemplated in WAC 480-120-439(12). The record does not demonstrate that a total exemption from the filing requirements of WAC 480-120-439 would meet the standards for exemption found in WAC 480-120-015.
- 63 (8) The record does not contain facts or proposals that establish a basis for specific alternative measurements or reporting formats that would be consistent with the requirements of WAC 480-120-439(12).
- 64 (9) Mitigation of the penalty in this matter, on condition that Comcast present a specific proposal for alternative measures or reports under WAC 480-120-439(12), recognizes the parties' uncertainties during compliance discussions, and will ensure a timely filing to resolve the matters at issue in this docket.

#### **IV. CONCLUSIONS OF LAW**

- 65 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings. *Title 80 RCW.*
- 66 (2) The reporting requirements of WAC 480-120-439 for Class A local exchange companies apply to all local exchange companies, including competitive local exchange companies such as Comcast, that have more than 2 percent of the access lines within the state of Washington. *WAC 480-120-439.*
- 67 (3) Comcast should not be granted a complete exemption under WAC 480-120-015 from the reporting requirements of WAC 480-120-439 because it can comply with provisions of WAC 480-120-439(12) that allow alternative means to meet the requirements of the rule. Comcast should not be

granted a partial exemption from the requirements of WAC 480-120-439 unless it demonstrates in a later docket that reasonable alternative measures or reports do not exist that allow Comcast to satisfy the purposes of the rule.

- 68 (4) Comcast should not be authorized to satisfy the requirements of WAC 480-120-439 via alternative measurements or reporting formats absent a showing of specific alternative measurements or reporting formats that will satisfy the rule.
- 69 (5) The penalty assessed against Comcast on September 12, 2003, for its failure to file the reports required under WAC 480-120-439 should be fully mitigated, subject to the condition that Comcast demonstrate in a subsequent filing acceptable alternative means by which the company can satisfy the rule.
- 70 (6) The Commission should retain jurisdiction to effectuate the terms of this Order. *Title 80 RCW.*

## V. ORDER

THE COMMISSION ORDERS THAT:

- 71 (1) The requirements of WAC 480-120-439 for Class A companies apply to all local exchange companies (*i.e.*, ILECs and CLECs) that have 2 percent or more of the access lines within the State of Washington, including Comcast.
- 72 (2) Comcast is required to satisfy the requirements stated in WAC 480-120-439 for Class A companies and its failure to do so is a violation of the Commission's rules.

- 73 (3) Comcast's request for an exemption from the requirements of WAC 480-120-439 is denied.
- 74 (4) Comcast's Petition for Mitigation is granted, subject to the condition that the company make a subsequent filing within 30 days after the date of this order showing reasonable alternative means by which the company can satisfy WAC 480-120-439. If Comcast fails to make a timely subsequent filing, the company's Petition for Mitigation is denied.
- 75 (5) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington and effective this 16th day of March, 2004

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, 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 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.**

## APPENDIX A

**WAC 480-120-439 Service quality performance reports. (1) Class A companies.** Class A companies must report monthly the information required in subsections (3), (4), and (6) through (10) of this section. Companies must report within thirty days after the end of the month in which the activity reported on takes place (e.g., a report concerning missed appointments in December must be reported by January 30).

(2) **Class B companies.** Class B companies need not report to the commission as required by subsection (1) of this section. However, these companies must retain, for at least three years from the date they are created, all records that would be relevant, in the event of a complaint or investigation, to a determination of the company's compliance with the service quality standards established by WAC 480-120-105 (Company performance standards for installation or activation of access lines), 480-120-112 (Company performance for orders for nonbasic services), 480-120-133 (Response time for calls to business office or repair center during regular business hours), 480-120-401 (Network performance standards), 480-120-411 (Network maintenance), and 480-120-440 (Repair standards for service interruptions and impairments, excluding major outages).

(3) **Missed appointment report.** The missed appointment report must state the number of appointments missed, the total number of appointments made, and the number of appointments excluded under (b), (c), or (d) of this subsection. The report must state installation and repair appointments separately.

(a) A LEC is deemed to have kept an appointment when the necessary work in advance of dispatch has been completed and the technician arrives within the appointment period, even if the technician then determines the order cannot be completed until a later date. If the inability to install or repair during a kept appointment leads to establishment of another appointment, it is a new appointment for purposes of determining under this subsection whether it is kept or not.

(b) When a LEC notifies the customer at least twenty-four hours prior to the scheduled appointment that a new appointment is necessary and a new appointment is made, then the appointment that was canceled is not a missed appointment for purposes of this subsection. A company-initiated changed appointment date is not a change to the order date for purposes of determining compliance with WAC 480-120-105 (Company performance standards for installation or activation of access lines) and 480-120-112 (Company performance for orders for nonbasic services).

(c) A LEC does not miss an appointment for purposes of this subsection when the customer initiates a request for a new appointment.

(d) A LEC does not miss an appointment for purposes of this subsection when it is unable to meet its obligations due to force majeure, work stoppages directly affecting provision of service in the state of Washington, or other events beyond the LEC's control.

(4) **Installation or activation of basic service report.** The report must state the total number of orders taken, by central office, in each month for all orders of up to the initial five access lines as required by WAC 480-120-105 (Company performance standards for installation or activation of access lines). The report must include orders with due dates later than five days as requested by a

customer. The installation or activation of basic service report must state, by central office, of the total orders taken for the month, the number of orders that the company was unable to complete within five business days after the order date or by a later date as requested by the customer.

(a) A separate report must be filed each calendar quarter that states the total number of orders taken, by central office, in that quarter for all orders of up to the initial five access lines as required by WAC 480-120-105 (Company performance standards for installation or activation of access lines). The installation or activation of basic service ninety-day report must state, of the total orders taken for the quarter, the number of orders that the company was unable to complete within ninety days after the order date.

(b) A separate report must be filed each six months that states the total number of orders taken, by central office, in the last six months for all orders of up to the initial five access lines as required by WAC 480-120-105 (Company performance standards for installation or activation of access lines). The installation or activation of basic service one hundred eighty day report must state, of the total orders taken for six months, the number of orders that the company was unable to complete within one hundred eighty days.

Orders for which customer-provided special equipment is necessary; when a later installation or activation is permitted under WAC 480-120-071 (Extension of service); when a technician arrives at the customer's premises at the appointed time prepared to install service and the customer is not available to provide access; or when the commission has granted an exemption under WAC 480-120-015 (Exemptions from rules in chapter 480-120 WAC), from the requirement for installation or activation of a particular order, may be excluded from the total number of orders taken and from the total number of uncompleted orders for the month.

For calculation of the report of orders installed or activated within five business days in a month, orders that could not be installed or activated within five days in that month due to force majeure may be excluded from the total number of orders taken and from the total number of uncompleted orders for the month if the company supplies documentation of the effect of force majeure upon the order.

(5) **Major outages report.** Notwithstanding subsections (1) and (2) of this section, any company experiencing a major outage that lasts more than forty-eight hours must provide a major outage report to the commission within ten business days of the major outage. The major outages report must include a description of each major outage and a statement that includes the time, the cause, the location and number of affected access lines, and the duration of the interruption or impairment. When applicable, the report must include a description of preventive actions to be taken to avoid future outages. This reporting requirement does not include company-initiated major outages that are in accordance with the contract provisions between the company and its customers or other planned interruptions that are part of the normal operational and maintenance requirements of the company.

The commission staff may request oral reports from companies concerning major outages at any time and companies must provide the requested information.

(6) **Summary trouble reports.** Each month companies must submit a report reflecting the standard established in WAC 480-120-438 (Trouble report standard). The report must include the number of reports by central office and the number of lines served by the central office. In addition, the report must include an explanation of causes for each central office that exceeds the service quality standard established in WAC 480-120-438 (Trouble report standard). The

reports, including repeated reports, must be presented as a ratio per one hundred lines in service. The reports caused by customer-provided equipment, inside wiring, force majeure, or outages of service caused by persons or entities other than the local exchange company should not be included in this report.

(7) **Switching report.** Any company experiencing switching problems in excess of the standard established in WAC 480-120-401 (2)(a) (Switches -- Dial service), must report the problems to the commission. The report must identify the location of every switch that is performing below the standard.

(8) **Interoffice, intercompany and interexchange trunk blocking report.** Companies that experience trunk blocking in excess of the standard in WAC 480-120-401 (3) (Interoffice facilities) and (5) (Service to interexchange carriers) must report each trunk group that does not meet the performance standards. For each trunk group not meeting the performance standards, the report must include the peak percent blocking level experienced during the preceding month, the number of trunks in the trunk group, the busy hour when peak blockage occurs, and whether the problem concerns a standard in WAC 480-120-401 (3) or (5). The report must include an explanation of steps being taken to relieve blockage on any trunk groups that do not meet the standard for two consecutive months.

(9) **Repair report.**

(a) For service-interruption repairs subject to the requirements of WAC 480-120-440 (Repair standards for service interruptions and impairments, excluding major outages), companies must report the number of service interruptions reported each month, the number repaired within forty-eight hours, and the number repaired more than forty-eight hours after the initial report. In addition, a company must report the number of interruptions that are exempt from the repair interval standards as provided for in WAC 480-120-440.

(b) For service-impairment repairs subject to the requirements of WAC 480-120-440, companies must report the number of service impairments reported each month, the number repaired within seventy-two hours, and the number repaired more than seventy-two hours after the initial report. In addition, a company must report the number of impairments that are exempt from the repair interval standard as provided for in WAC 480-120-440.

(10) **Business office and repair answering system reports.** When requested, companies must report compliance with the standard required in WAC 480-120-133 (Response time for calls to business office or repair center during regular business hours). If requested, companies must provide the same reports to the commission that company managers receive concerning average speed of answer, transfers to live representatives, station busies, and unanswered calls.

(11) The commission may choose to investigate matters to protect the public interest, and may request further information from companies that details geographic area and type of service, and such other information as the commission requests.

(12) If consistent with the purposes of this section, the commission may, by order, approve for a company an alternative measurement or reporting format for any of the reports required by this section, based on evidence that:

(a) The company cannot reasonably provide the measurement or reports as required;

(b) The alternative measurement or reporting format will provide a reasonably accurate measurement of the company's performance relative to the substantive performance standard; and

(c) The ability of the commission and other parties to enforce compliance with substantive performance standard will not be significantly impaired by the use of the alternative measurement or reporting format.

(13) Subsection (12) of this section does not preclude application for an exemption under WAC 480-120-015.