

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In re the Petition of	)	
	)	
WASHINGTON INDEPENDENT	)	DOCKET NO. UT-020667
TELEPHONE ASSOCIATION	)	
For a Declaratory Order on the	)	ORDER DECLINING TO
Use of Virtual NPA/NXX	)	ENTER DECLARATORY
Calling Patterns	)	ORDER
.....)	)	

**I. SYNOPSIS**

1 *This Order declines WITA’s request for entry of a declaratory order on the use of Virtual NPA/NXX calling patterns because a necessary party refuses to consent to the entry of an order. The Order directs interested participants to meet and seek agreement on the appropriate procedural vehicle to resolve the issues raised in WITA’s petition.*

**II. MEMORANDUM**

2 **Background.** On May 29, 2002, Washington Independent Telephone Association (WITA) filed with the Commission a petition for declaratory order pursuant to RCW 34.05.240 and WAC 480-09-230.<sup>1</sup> In general, WITA seeks a declaratory ruling on the question of WITA’s members’ obligation to honor a VNXX<sup>2</sup> service arrangement in light of statutory obligations, and the effect of VNXX services on number conservation.

3 On June 7, 2002, the Commission gave notice of receipt of the petition for declaratory order, and gave interested persons the opportunity to submit statements of fact and law in response to the petition. AT&T Communications of the Pacific Northwest,

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<sup>1</sup> The full text of RCW 34.05.240 and WAC 480-09-230 is attached as Appendix A to this Order.  
<sup>2</sup> VNXX is “Virtual NPA/NXX,” “Virtual FX,” or “foreign exchange” service. See paragraphs 6 and 7 infra for a fuller description.

Inc., TCG Oregon and TCG Seattle, Focal Communications Corporation of Washington, Fox Communications Corp., International Telecom, Inc., Pac West Telecom, Inc., TimeWarner Telecom of Washington, LLC, WorldCom, Inc., and XO Washington, Inc. (collectively, Joint CLECs) filed a joint statement of fact and law. KMC Telecom, Sprint, Verizon Northwest Inc., and Level 3 Communications, LLC, filed individual statements of fact and law.

4 On June 28, 2002, the Commission issued a Notice of Prehearing Conference, setting a prehearing conference in this matter for July 18, 2002. The Commission stated in the Notice, among other matters, that the purpose of the prehearing conference would be to consider the issue of defining *necessary parties* referenced in RCW 34.05.240(7). The Commission issued a Notice of Change of Date for Prehearing Conference, rescheduling the prehearing conference for July 19, 2002.

5 **Appearances.** Richard A. Finnegan, Olympia, Washington represents Washington Independent Telephone Association (WITA). Rogelio Pena, Boulder, Colorado, represents Level 3 Communications (Level 3). Gregory J. Kopta, Davis Wright, Tremaine, Seattle, Washington, represents 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., TimeWarner Telecom of Washington, LLC, XO Washington, Inc., and AT&T Wireless Services, Inc. (Joint CLECs). Tre Hendricks, Hood River, Oregon, represents Sprint. Shannon Smith, Assistant Attorney General, Olympia, Washington represents Commission Staff. Robert S. Snyder, Seattle, Washington, represents Whidbey Telephone Company, Tenino Telephone Company, and Kalama Telephone Company. Kendall Fisher, Stoel Rives, LLP, Seattle, Washington, represents Verizon Northwest, Inc. (Verizon) Todd Daubert, Kelley Drye and Warren, Washington, D.C., represents KMC Telecom (KMC).

### III. DISCUSSION AND DECISION

6 **WITA's Petition.** WITA states that several of its members have received requests from ICG Telecom Group, Inc. (ICG) and Level 3 Communications, LLC (Level 3) to enter into a relationship under which a virtual NPA/NXX (VNXX) would be established within the WITA members' individual rate centers. According to WITA, the use of a VNXX allows a CLEC to market services to a customer as if the customer has a local calling area which includes rate centers where the customer has

no physical presence. To the CLEC's customer this is a substitute for 800-type services, a substitute that does not have the associated charges for an 800-type service.

- 7 In support of its petition, WITA contends that uncertainty necessitates resolution of the issues through a declaratory order. *RCW 34.05.240(1)(a)*. WITA offers the following scenario as illustrative of this uncertainty. A CLEC requests that a WITA member treat a call as part of the local calling area even though the physical end-to-end nature of the call is between remote rate centers. Such a call made between the same originating and terminating destinations when carried by an IXC would be a toll call. The possibility of differing rates and routing for the same call creates uncertainty as to how the call should be treated.
- 8 WITA further posits an actual controversy arising from this uncertainty exists. *RCW 34.05.240(1)(b)*. In support of its contention, WITA references the requests from ICG and Level 3 that VNXX arrangements be implemented. According to WITA, some VNXX arrangements are already being used by CLECs, which place WITA members in jeopardy of finding themselves in violation of *RCW 80.36.170* "Unreasonable preference prohibited", *RCW 80.36.180*, "Rate discrimination prohibited", and *RCW 80.36.186*, "Pricing of or access to noncompetitive services—Unreasonable preference or advantage prohibited."
- 9 WITA also asserts that the uncertainty adversely affects WITA's members because they are being placed at risk of violation of the statutes cited above. *RCW 34.05.240(1)(c)*. In addition, to the extent that calls are routed and rated as local calls that should be routed and rated as interexchange calls, WITA's members are denied appropriate compensation for those calls. WITA asserts that the fact that its members face potential damages, fines and penalties for violation of the statutes cited above outweighs any other adverse affect that may be found to exist. *RCW 34.05.240(1)(d)*.
- 10 WITA also asserts that depending on the method of deployment of the VNXX, it can raise other significant public interest issues related to either number resources or number portability.

11 WITA asks the Commission to declare that:

1. The use of VNXX-like services are not in the public interest and prohibiting their use, or in the alternative, use of VNXX-like services are appropriately classified as inter-exchange services subject to the assessment and payment of access charges where the call originates and terminates in two separate rate centers without a Commission approved extended area service arrangement between those rate centers.
2. Such service arrangements are an inappropriate use of numbering resources where that service uses a new NPA/NXX for each rate center, and prohibit such practice.
3. Where a single NPA/NXX is desired to be spread over several rate centers, such practice would violate standards needed to implement number portability, and is prohibited.

12 **Joint CLECs' Response.** Joint CLECs urge that the petition be denied because it fails to make the requisite showing for a declaratory order, because it is not an appropriate procedure for addressing the issues raised in the petition, and because WITA is not entitled to the relief requested. Joint CLECs suggest that WITA be given leave to initiate a more appropriate proceeding in which to develop the factual record needed to address the issues WITA raises. KMC Telecom and Level 3 also oppose the petition because it does not satisfy the requirements for a declaratory order.

13 **Level 3.** Level 3 objects to the determination of this matter through a declaratory order proceeding. In support of its position, Level 3 cites RCW 34.05.240(7) which provides that an agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding. Level 3 maintains that it is a necessary party because it seeks interconnection with WITA member companies, and because Level 3 intends to provide VNXX-like service in the state of Washington. According to Level 3, the declarations WITA seeks would affect the exchange of traffic and intercarrier compensation arrangements between Level 3 and WITA's member companies. Further, Level 3 asserts that the declarations WITA requests would affect the entire

telecommunications industry. Thus, all local exchange carriers, both incumbent and competitive, are necessary parties to this proceeding, and the Commission may not issue a declaratory order without written consent from all such carriers. *Cascade Natural Gas Corporation, Docket No. UG-001119, First Supplemental Order Denying Summary Determination; Notice of Prehearing Conference (Jan. 19, 2001).*

14 **Argument and Comments on “necessary parties.”** Pursuant to the Commission’s request, a major portion of the July 19, 2002, prehearing conference was dedicated to the issue of defining “necessary parties.” Level 3 maintains that it is a necessary party, and adds that all incumbent local exchange companies (ILECs) and any company that provides VNXX-type service should be considered a necessary party. In support of its position, Level 3 argues that it has approached several WITA member companies to discuss the provision of VNXX service. Level 3 also notes that the company is mentioned in WITA’s petition for declaratory order. Level 3 reiterates its objection to a determination of this matter by a declaratory order proceeding, but clarifies that it does not necessarily object to the Commission addressing the issues, rather it is the form of the vehicle for addressing the issues to which it objects.

15 Joint CLECs agree with Level 3 that necessary parties would include ILECs, as well as competitive local exchange carriers (CLECs). Joint CLECs would also expand the scope of necessary parties to include anyone who provides service using NPA/NXX codes, because the petition sweeps broadly in terms of how number resources can be used, and how services can be provided using those number resources. According to Joint CLECs, any company that is assigned number resources in the state of Washington is a company that, at a minimum, needs to be provided notice that this is an issue that the Commission wants to investigate, and needs to be provided with the opportunity to participate. In conclusion, Joint CLECs express their desire not to elevate form over substance. Joint CLECs represent that they do not have a problem with the Commission addressing the substantive issues that WITA has raised. Rather, the question is one of what is the appropriate procedural vehicle. Accordingly, Joint CLECs do not take a position as to whether or not they consent to a declaratory order type of proceeding.

16 KMC agrees with Joint CLECs and Level 3 that the definition of necessary parties would include any carrier that uses NXX codes in Washington. KMC believes that it

is a necessary party. KMC does not consent to resolving this matter through this particular procedural format.

- 17 WITA argues that no specific company is a necessary party, as that term is used in RCW 34.05.240(7), in order for the Commission to make a determination on this issue. WITA contends that its petition presents a question of what is or is not authorized as an industry practice. By analogy, WITA references the EAS complaint proceeding where the Commission addressed EAS bridging issues by a complaint against a particular entity that was engaged in that practice. In that instance, notice was not provided to every company that could possibly have been engaged in EAS bridging, and the Commission's order became precedent for what was or was not the allowed practice for EAS bridging.
- 18 WITA joins joint CLECs in opposing the elevation of form over substance. WITA suggests that the Commission possesses the authority to convert this proceeding to a format it believes more appropriate. WITA notes that the Commission could use any number of vehicles, one of which would be a rulemaking, where it would not be necessary for the Commission to provide notice to each and every entity that held an NPA/NXX within the state of Washington. Another vehicle would be a complaint action. Another would be for the Commission to issue a declaratory ruling as to what is or is not an authorized practice within the State of Washington.<sup>2</sup>
- 19 **Decision.** According to RCW 34.05.240(7), 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."<sup>3</sup> Under CR 19(a), a necessary party is one who has sufficient interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved.<sup>4</sup> Level 3 has stated its role as a necessary party whose rights would be substantially prejudiced by entry of a declaratory order on these facts, and has indicated it will not consent in writing to determination of this matter by declaratory order. Therefore, in accordance with

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<sup>2</sup> Verizon recommends that the proceedings be converted to an adjudicative proceeding should the Commission decide to reject the petition for declaratory order and/or convert the proceedings.

<sup>3</sup> See, *In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. for Declaratory Order Regarding Responsibilities of the Designated Toll Carrier*, Docket No. UT-961012 (October 30, 1996).

<sup>4</sup> *Harvey v. Board of County Comm'rs*, 90 Wn. 2d 473, 474, (1978).

RCW 34.05.240(7), the Commission declines to enter a declaratory order as requested by WITA.

20 It appears from the discussion at the prehearing conference that the participants are in general agreement that the issues raised in WITA's petition merit the Commission's review, but that a declaratory order is not the appropriate procedural vehicle. The Commission therefore asks WITA, Level 3, Commission Staff, and those companies who entered appearances at the July 19, 2002 prehearing conference to meet and seek agreement upon the appropriate procedural vehicle for exploring the issues raised by WITA's petition. They may consider whether a rulemaking, a formal complaint proceeding, or some other and more efficient process is appropriate. In any event, the issues presented in the WITA petition appear to deserve consideration. We direct the participants to report on the progress of their efforts within thirty days of entry of this order with a recommendation as to appropriate process or to file individual statements of positions. In the absence of a proposal from the parties, the Commission may consider process independently or may choose not to proceed.

#### IV. FINDINGS OF FACT

21 Having discussed above in detail all matters material to this decision, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that state finds pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 22 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, and practices of public service companies, including water companies.
- 23 (2) Washington Independent Telephone Association (WITA) is an organization whose members provide telecommunication services to customers in the State of Washington.
- 24 (3) On May 29, 2002, WITA filed a petition for a declaratory order asking the Commission to determine whether local exchange companies must honor virtual foreign exchange service proposed to them by other carriers.

- 25 (4) On July 19, 2002, upon due and proper notice, the Commission convened a prehearing conference on the petition, over which Karen M. Caillé presided as Administrative Law Judge.
- 26 (5) Level 3 Communications, LLC, is a telecommunications carrier that proposes to provide virtual foreign exchange service to customers within exchanges of WITA member companies. Level 3's plans could be adversely affected if the Commission were to grant WITA's request for a declaratory order. Level 3 expressly refuses to consent to a Commission determination by a declaratory order.

## V. CONCLUSIONS OF LAW

- 27 Having discussed above in detail all matters material to our decision, and having stated findings and conclusions upon contested issues, the Commission now makes the following summary conclusions of law. Those portions of the preceding discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 28 (1) The Commission has jurisdiction over the parties to and subject matter of this proceeding under Chapter 80 RCW.
- 29 (2) The Commission may not enter a declaratory order that would substantially prejudice the rights of a necessary party who does not consent in writing to the determination of the matter by a declaratory order. *RCW 34.05.240(7)*.
- 30 (3) Level 3 Communications, LLC, is a necessary party under RCW 34.05.240(7).
- 31 (4) Granting WITA's petition could result in entry of a declaratory order that would substantially prejudice the rights of Level 3 Communications, LLC.
- 32 (5) The Commission should decline to enter a declaratory order.



**VI. ORDER**

33 THE COMMISSION declines to enter a declaratory order as requested in the petition of the Washington Independent Telephone Association. Participants must report by letter to the Commission's Executive Secretary within 30 days after the date of this order with a proposal for an appropriate process.

DATED at Olympia, Washington, and effective this \_\_\_\_ day of August, 2002.

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 480-09-810, or a Petition for Rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**

## APPENDIX A

### **RCW 34.05.240 Declaratory order by agency--Petition.**

(1) Any person may 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. The petition shall set forth facts and reasons on which the petitioner relies to show:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

(2) Each agency may adopt rules that provide for:

- (a) The form, contents, and filing of petitions for a declaratory order;
- (b) The procedural rights of persons in relation thereto; and
- (c) The determination of those petitions. These rules may include a description of the classes of circumstances in which the agency will not enter a declaratory order and shall be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agencies to provide reliable advice.

- (3) Within fifteen days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons to whom notice is required by law, and may give notice to any other person it deems desirable.
- (4) RCW 34.05.410 through 34.05.494 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.
- (5) Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:
  - (a) Enter an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;
  - (b) Set the matter for specified proceedings to be held no more than ninety days after receipt of the petition;
  - (c) Set a specified time no more than ninety days after receipt of the petition by which it will enter a declaratory order; or
  - (d) Decline to enter a declaratory order, stating the reasons for its action.
- (6) The time limits of subsection (5) (b) and (c) of this section may be extended by the agency for good cause.
- (7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.
- (8) A declaratory order has the same status as any other order entered in an agency adjudicative proceeding. Each declaratory order shall contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusions.

**WAC 480-09-230 Declaratory orders.** As prescribed by RCW 34.05.240, any interested person may petition the commission for a declaratory order. The commission will consider the petition. Within fifteen days after receiving the petition, the commission will give notice of the petition to all persons required by law

and to any other person the commission deems desirable. Within thirty days of receipt of a petition for declaratory order, the commission will:

- (1) Enter a declaratory order; or
- (2) Notify the petitioner that no declaratory order is to be entered and state reasons for the action; or
- (3) Set a specified time, no later than ninety days after the day the petition was filed, by which the commission will enter a declaratory order; or
- (4) Set a reasonable time and place for a hearing. If a hearing is held, it must be held no more than ninety days after receipt of the petition. If a hearing is held, the commission will give at least seven days' notification to the petitioner, all persons to whom notice is required by law and any other person it deems desirable. The notice must include the time, place, and the issues involved.
- (5) The commission may upon a finding of good cause extend the times specified in subsections (3) and (4) of this section
- (6) If a hearing is held or statements of fact are submitted, as provided in subsection (4) of this section, the commission shall within a reasonable time:
  - (a) Enter a declaratory order; or
  - (b) Notify the petitioner that no declaratory order is to be entered and state the reasons for the action.
- (7) The Commission will serve its order upon all persons who are required to receive notice under subsection (4) of this section.