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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

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BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of)
COMCAST PHONE OF WASHINGTON, LLC) Docket No.
)
)
) 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;
)
)
_____)

I. INTRODUCTION

Comcast Phone of Washington, LLC (“Comcast Phone” or “Company”) is the leading facilities-based competitive local exchange company (“CLEC”) in the State of Washington, providing services to residential customers in competition with incumbent local exchange companies (“ILECs”). By this Petition, Comcast Phone requests the Commission to issue a ruling clarifying that the new service quality reporting rule (WAC 480-120-439) does not apply to Comcast Phone because it is a CLEC. If the Commission nevertheless finds that the rule applies to Comcast Phone, then Comcast Phone requests a waiver.

WAC 480-120-439 (alternatively, “new rule” or “Reporting Rule”) does not apply to Comcast Phone for several reasons. First, the new rule does not state that it applies to CLECs, but only to “Class A companies.” Second, within the context of WAC Ch. 480-120, and

historically, the term “Class A company” has only applied to ILECs. WAC 480-120-439 does not provide otherwise, and should be read in context with the rest of WAC Ch. 480-120. Third, the FCC “Class A/B” categorization only applies to ILECs. Fourth, construing WAC 480-120-439 to apply to CLECs such as Comcast Phone violates state law and public policy which favor flexible and streamlined competition to promote competition. Finally, the public interest would not be served by punishing competitive success with burdensome, costly regulations with no perceivable customer benefit.

II. RELIEF SOUGHT

Comcast Phone hereby petitions the Commission for the following relief:

1. **Declaratory Order or Interpretive and Policy Statement.** The Commission, pursuant to WAC 480-09-200 and WAC 480-09-230, should issue an interpretive and policy statement or a declaratory ruling stating that the service quality performance reports required by WAC 480-120-439(3), (4), and (6) through (10) do not apply to Comcast Phone.

2. **Permanent, Total Exemption.** Pursuant to WAC 480-120-015, if the Commission does not grant Comcast Phone’s request in Section II.(1), the Commission should instead grant a permanent exemption from WAC 480-120-439.

3. **Permanent Exemptions.** If the Commission does not grant Comcast Phone’s requests above, the Commission, pursuant to WAC 480-120-015, should instead grant a permanent exemption for the installation/activation, summary trouble, switching reports, trunk blocking reports, business office and repair answer system reports required by WAC 480-120-439(4), (6) (7), (8) and (10) respectively.

4. **Temporary Exemptions and Modified Reporting.** If the Commission does not grant Comcast Phone’s requests for relief in Section II.(1) or (2), the Commission, pursuant to WAC 480-120-015 and WAC 480-120-439(12), should instead grant a temporary exemption for six months for the “missed appointment” and “repair” reports required by WAC 480-120-439(3) and (9).

III. BACKGROUND

A. COMCAST PHONE IS A CLEC.

Comcast Phone, while a modest wireline local exchange service provider in comparison with the operations of many Washington ILECs such as Verizon Northwest Inc. and Qwest Communications, Inc., is the leading residential facilities-based CLEC in the state. Historically, the Comcast family of companies (“Comcast”) and its predecessors provided primarily cable video and cable Internet services. Following the merger with AT&T Broadband in November 2002, Comcast Phone added to its portfolio of services the provision of voice-grade telephony services in the State of Washington. Even though Comcast Phone may serve the same or similar number of customer lines as some “Class A” ILECs, Comcast Phone, as discussed below, is a CLEC – not a “Class A company.” As such, the Commission’s new Reporting Rule does not apply to Comcast Phone.¹

B. THE COMMISSION DID NOT ADOPT ANY RULE THAT REQUIRES CLECS TO COMPLY WITH WAC 480-120-439.

As the result of a lengthy rulemaking proceeding in Docket No. UT-990146, the Commission released General Order No. R-507 in December 2002, which adopted the rule at issue in this case, WAC 480-120-439, requiring the submission of certain service quality performance reports from “Class A companies.”² While the definition for a “Class A company” in WAC 480-120-021 is “a local exchange company with 2% or more of the access lines within the State of Washington,” this definition does not state that it applies to a CLEC.³ Likewise,

¹ As explained in the Declaration of Rhonda Weaver, filed herewith in Docket No. UT-031459, (“Exhibit A”), Comcast, despite reasonable efforts, has been unable to obtain the number of “total state access lines” from the Commission in order to verify whether Comcast access lines exceed the percentage required for a “Class A company.”

² WAC 480-120-439(2) lists seven purported “service quality standards” that must be reported. Of these, one does not exist (480-120-107), two are not service quality standards (WAC 480-120-132, 411), one does not apply to CLECs (WAC 480-120-105) and one cannot apply to Comcast Phone because it is measured on a “central office” basis, which by definition, cannot apply because Comcast Phone’s network architecture does not include its own central office (WAC 480-120-401).

³ General Order R-507 added this definition without comment on whether it could apply to a CLEC. Had the Commission intended this to apply to CLECs it could have, and should have, stated this application as it did

WAC 480-120-439 does not state that it applies to CLECs. Therefore, the new rule does not apply to Comcast Phone.

IV. ARGUMENT

A. THE TERM “CLASS A COMPANIES” IN WAC 480-120-439, WHEN VIEWED IN THE CONTEXT OF THE ENTIRE CHAPTER, FCC RULES AND STATE LAW, CAN APPLY ONLY TO ILECS.

The applicability of new WAC 480-120-439 hinges upon whether Comcast Phone is a “Class A company.” As further discussed below, usage throughout the entire WAC Ch. 480-120 of the term “Class A company” limits its application to ILECs. The definitions of a “Class A company” in WAC 480-120-021 shall not apply where “the context clearly requires otherwise.” Here, for the following reasons, the context requires that the term “Class A company” be applied only to ILECs with respect to the service quality reporting under WAC 480-120-439.

1. Commission rules that reference a “Class A company” do not apply to CLECs.

The rule at issue in this Petition, namely, WAC 480-120-439, does not define the term “Class A company.” Instead, that definition, as noted above, is found in WAC 480-120-021, which states that the definitions in that section apply “unless there is an alternate definition in a specific section or **“where the context clearly requires otherwise”** (emphasis added). The use of the term “Class A company” in context throughout WAC Ch. 480-120 makes clear that the term applies only to ILECs. For example, the Commission’s new accounting and financial reporting rules in WAC 480-120-302 reserve the use of the “Class A” or “Class B” distinction for companies that are not classified as competitive or that file tariffs, i.e., for ILECs. *See, e.g.*, WAC 480-120-304, 305, 306. By way of further example, the Commission’s new line extension rule, WAC 480-120-071(4), applies to “Class A companies” which have in effect a service extension tariff, i.e., to ILECs (inasmuch as CLECs file price lists rather than tariffs).

elsewhere in the rules such as WAC 480-120-105. Further, the context within which the term “Class A” has always been understood, and its use throughout WAC Ch. 480-120, limits this definition to ILECs.

No new or existing rule specifically ties any “Class A or B” classification to a CLEC.⁴ In fact, the rulemaking that produced WAC 480-120-439 made clear to CLECs, including Comcast Phone, that such a tie could not reasonably be anticipated or expected. That is because the Commission clearly recognized that CLECs and ILECs can and should be held to different service performance standards. For instance, WAC 480-120-105 addresses performance standards and specifically applies only to ILECs. As a practical matter, if the Commission intended to apply the “Class A or B” classification to CLECs for the very first time (changing the historical use of the term as used throughout WAC 480-120), it certainly would have referenced the dramatic change in the rules.⁵

Furthermore, nothing in the rulemaking put CLECs on notice that the Commission intended CLECs to be subject to service quality reporting rules. During the rulemaking, no CLEC objected to WAC 480-120-439 because CLECs reasonably believed that the Commission did not intend this rule to cover them. It is contrary to principles of equity and due process to introduce a new meaning to an old term to CLECs, such as Comcast Phone, with no discussion or warning.

In sum, when one reads WAC 480-120-439 in the context of the rulemaking process and WAC 480-120, it becomes clear that the new rule was not intended to apply to a CLEC.

2. *FCC rules support the application of “Class A/B” to ILECs.*

The applicability of WAC Ch. 480-120 to Class A and Class B parallels the applicability of those terms found in the Uniform System of Accounts (“USOA”) for Class A and Class B

⁴ This makes sense because the “Class A/B” distinction historically arose as a means to alleviate regulatory accounting burdens for smaller, incumbent companies. This was as a result of the adoption in Washington of the FCC’s Uniform System of Accounts that classified incumbents by size and assigned less onerous accounting requirements to small companies. See *In the Matter of Implementation of Uniform System of Accounts by Named Telecommunication Companies*, Docket No. U-87-1676-P. 1988 Wash. UTC Lexis 26 (1988).

⁵ To conclude otherwise is to admit that WAC 480-120-439 is not only inconsistent with the rest of WAC 480-120, but also unconstitutionally vague. *State v. Williams*, 144 Wn.2d 197, 26 P.3d, 890 (2001) (the purpose of the vagueness doctrine is to give the citizens of Washington fair notice of what the law expects of them, and to protect citizens from arbitrary laws and enforcement).

telephone companies. 47 CFR, Part 32. In fact, WAC 480-120-302(2)(a) expressly references Part 32 as the basis for accounting practices applicable to any “Class A and Class B company. Notably, Part 32 applies currently to only *“incumbent local exchange carriers as defined in Section 251(h) of the Communications Act.”* 47 C.F.R. § 32.11 (emphasis added); it does not apply to CLECs such as Comcast Phone.

3. *Washington law, public policy, and the public interest support interpreting WAC 480-120-439 as applicable to ILECs only.*

The Commission should interpret its rules to give effect to the underlying policy and intent of the Washington Legislature in its telecommunications legislation. The Legislature has mandated that CLECs be subject to minimal regulation (RCW 80.36.320(2)), and that the Commission permit flexible regulation of competitive telecommunications companies. RCW 80.36.300. Imposing unnecessary and costly service quality performance reporting obligations on a CLEC clearly defeats underlying legislative policy and intent.

The fact is the new Reporting Rule is unnecessary because competitive choice protects CLEC consumers from poor service quality. A customer can choose another provider if Comcast Phone’s services do not meet any of the customer’s expectations, including service quality. Further, even if a CLEC were to serve more than 2% of the state’s total access lines, that certainly does not mean that the provider has market power that would enable it to keep consumers captive to its services and that would deny consumers competitive options. Indeed, there is no reason to believe that customers will benefit, in any way, from imposing new reporting requirements on Comcast Phone. In addition, as a practical matter, there is no pattern of complaints against Comcast Phone relevant to the service quality reporting requirements set forth in WAC 480-120-439. Therefore, the new rule does not address public concerns or interest.

Customers may, in fact, be disadvantaged by burdening Comcast Phone with costly new regulation which is not the streamlined, flexible regulation intended by the Legislature for CLECs. Instead of continuing to devote its resources to the improvement of its business operations, Comcast Phone will have to devote some of those resources to complying with the

new Reporting Rule and to upgrading existing systems, with no perceivable customer benefit. Comcast Phone's competitive success should not be "rewarded" by the imposition of new, burdensome regulations. Therefore, this Commission should interpret WAC 480-120-439 to minimize harm to its competitive policies and those of the Legislature.

4. *The Commission should interpret WAC 480-120-439 rationally and sensibly to preclude application to a CLEC.*

The Commission should follow the rules of statutory construction that also apply to administrative rules and regulations. *Dept. of Licensing v. Cannon*, 147 Wn.2d 41, 50 P.3d 627 (2002). Administrative regulations are to be interpreted as a whole, giving effect to all language and harmonizing all provisions. *Id.* In other words, the new rule is to be interpreted in context, which means that Class A is intended as a classification only for ILECs, as discussed above in Section IV.(A).

The Commission should interpret WAC 480-120-439 rationally and sensibly, in a manner that does not result in unlikely, absurd or strained consequences. *Id.* Interpreting WAC 480-120-439 to apply to Comcast Phone as a CLEC violates that principle. This is best illustrated by the fact that WAC 480-120-439(4) would require Comcast Phone to report on a service quality performance measure that it is exempt from under WAC 480-120-105. This rule sets performance standards for installation or activation of access lines that do not apply to CLECs. Clearly, this constitutes an absurd or strained consequence, yet this will be the result if the Commission interprets the new rule as applicable to CLECs, as advocated by the Commission.

In sum, the Commission should issue an interpretive and policy statement or a declaratory rule that Comcast Phone is not subject to the reporting requirements of WAC 480-120-439.

B. IF THE COMMISSION APPLIES WAC 480-120-439 TO COMCAST PHONE, AN EXEMPTION SHOULD BE GRANTED.

Pursuant to WAC 480-120-015(1), the Commission may grant an exemption from provisions of a new rule if such an exemption is consistent with the public interest, the purpose underlying regulation, and applicable statutes. The same reasons for interpreting WAC 480-120-

439 as inapplicable to Comcast Phone warrant a permanent exemption from its terms for Comcast Phone if the Commission were to disagree with Comcast Phone's reasonable interpretation.

When determining whether to grant an exemption, the Commission may consider whether the application of the rule would impose undue hardship on the requesting party. WAC 480-120-015(4). Historically, the Comcast family of companies (of which Comcast Phone is a part) and its predecessors have provided primarily cable video and cable Internet services. However, in November, 2002, Comcast began to offer voice-grade telephony services as Comcast Phone. As a result of its history, the company's internal measurement and reporting systems are not like those of ILECs. They cannot track and produce all of the information needed to report under WAC 480-120-439.

The Declaration of Rhonda Weaver filed in Docket No. UT-031459, attached as Exhibit A herewith, explains how and why Comcast Phone cannot comply with the reporting requirements of WAC 480-120-439 without undue hardship. Comcast Phone currently can only comply with two of these requirements (the "missed appointment" and "repair" reports of WAC 480-120-439(3) and (9)). Even these reports would be provided at considerable expense. Comcast Phone could never technically comply with the remaining reporting requirements in WAC 480-120-439(4), (6), (7) and (8). That is because those reports are premised upon "central offices," which Comcast Phone does not have in its network architecture. Therefore, at the very least, if the Commission resolves the interpretive question against Comcast Phone, the Company requests a temporary exemption from the first two requirements and a permanent exemption from the rest.⁶

⁶ This Commission has allowed temporary exemptions to the application of its new rules. *See, e.g.*, Order Denying Petition for Permanent Exemption and Granting Temporary Exemption, Docket No. UT-031123, Order No. 1. *In the matter of the Petition of Verizon Northwest, Inc. Seeking Exemption from WAC 480-1120-104 Relating to Information to Consumers.*

In the alternative, Comcast Phone requests that the Commission allow it to devise alternative measurements and reports to satisfy all reporting requirements of WAC 480-120-439. Because Comcast Phone cannot currently provide the measurements required by Sections (3), (4), (9), (6)-(10) of WAC 480-120-439, the Commission should approve a permanent “alternative measurement” which allows Comcast Phone a reasonable opportunity to comply with the new rule without extreme disruption to its business.

Under WAC 480-120-439(12), when a company cannot reasonably provide the measurements or reports as required, the Commission may approve an alternative measurement or reporting format. The rules recognize that allowances should be made if a company cannot reasonably comply with the rule’s requirements. WAC 480-120-015; WAC 480-120-439(12).

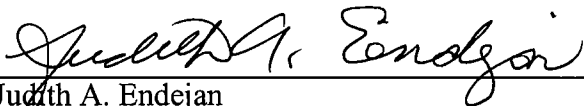
This means that if Comcast Phone is required to provide any service quality reports, it should be allowed to provide (1) reports consistent with its network architecture; (2) quarterly reports instead of monthly ones; and (3) reports based upon statewide averages, which would include data from Comcast Phone’s Portland, Oregon market. (Comcast Phone’s business in Portland, Oregon and Vancouver, Washington customers is run as a single market for internal data collection, reporting and other purposes.)

V. CONCLUSION

The Commission should issue an Interpretive or Policy Statement or Declaratory Ruling that WAC 480-120-439 does not apply to Comcast Phone because it is a CLEC. If it does not, then Comcast Phone requests an exemption from this rule or to be allowed to provide alternative measurements and reports consistent with existing business operations.

DATED this 2nd day of October, 2003.

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