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

In the Matter of the

Washington Independent
Telecommunications Association and Lewis
River Telephone Company, d/b/a TDS
Telecom Petition for Declaratory Ruling

DOCKET NO. UT-_____

PETITION

**WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION
AND LEWIS RIVER TELEPHONE COMPANY, D/B/A TDS TELECOM
PETITION FOR DECLARATORY RULING**

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1. The Washington Independent Telecommunications Association (“WITA”) and Lewis River Telephone Company, d/b/a TDS Telecom (“TDS”) respectfully submit this petition for a declaratory ruling (“Petition”) requesting that the Washington Utilities and Transportation Commission (“Commission”):

- i. Declare whether WITA’s member companies and, specifically TDS, are required to negotiate terms of interconnection pursuant to Section 251 of the Communications Act of 1934, as amended (the “Act”) with Comcast Phone (see, Paragraph 7, below, for the identification of Comcast Phone) for the provision of fixed location VoIP services by Comcast Phone or an affiliate of Comcast Phone; and,
- ii. Declare that Comcast Phone is not acting as a telecommunications carrier¹ for purposes of its VoIP service, whether provided by itself or through an affiliate, and, thus, is not entitled to interconnection rights pursuant to Section 251 of the Act; or,
- iii. In the alternative, declare that Comcast Phone is a telecommunications carrier and the VoIP service that it, or its affiliate, is offering is a telecommunications service² and is subject to regulation for those services as a telecommunications company offering telecommunications within the state of Washington.

2. In addition, WITA and TDS respectfully request that the Commission toll the running of the interconnection clock between Comcast Phone and any WITA member that has received what purports to be a bona fide request for interconnection from Comcast Phone. At the current date,

¹ The term “telecommunications carrier” is defined at 47 U.S.C. § 153(44).

² 47 U.S.C. § 153(46).

WITA is aware that TDS has received what is purported to be a bona fide request for interconnection from Comcast Phone.

3. To effectuate the foregoing, WITA respectfully requests that the Commission accept this Petition, set a pre-hearing conference at the earliest possible date and establish a schedule for discovery and hearing to determine the factual matters underlying this Petition.

I. INTRODUCTION AND BACKGROUND

4. WITA is a trade association representing telecommunications companies that are classified as rural telephone companies³ under the Act. WITA's business address is as follows:

2405 Evergreen Park Drive SW
Suite B-2, Olympia, WA 98502.

WITA is represented by Richard A. Finnigan whose business address and contact information is as follows:

2112 Black Lake Blvd SW
Olympia, WA 98512
(360) 956-7001
(360) 753-6862 (fax)
rickfinn@localaccess.com

5. WITA's members that are classified as rural telephone companies under the Act are as follows:

Asotin Telephone Company d/b/a TDS Telecom
CenturyTel of Cowiche, Inc.
CenturyTel of Inter-Island, Inc.
CenturyTel of Washington, Inc.
Ellensburg Telephone Company d/b/a FairPoint Communications
Embarq
Hat Island Telephone Company
Hood Canal Telephone Co., Inc. d/b/a Hood Canal Communications
Inland Telephone Company
Kalama Telephone Company
Lewis River Telephone Company, Inc. d/b/a TDS Telecom
Mashell Telecom, Inc. d/b/a Rainier Connect

³ 47 U.S.C. § 153(37).

McDaniel Telephone Co. d/b/a TDS Telecom
Pend Oreille Telephone Company
Pioneer Telephone Company
St. John Co-operative Telephone and Telegraph Company
Tenino Telephone Company
The Toledo Telephone Co., Inc.
United Telephone Company of the Northwest, Inc. d/b/a Embarq
Western Wahkiakum County Telephone Company d/b/a Wahkiakum West
Whidbey Telephone Company d/b/a Whidbey Telecom
YCOM Networks, Inc. d/b/a FairPoint Communications

6. TDS is a rural telephone company serving areas in and around La Center, Washington.

The business address for TDS is as follows:

210 East Fourth Street
PO Box 218
La Center, WA 98629

TDS is represented by Richard A. Finnigan whose business address and contact information is as follows:

2112 Black Lake Blvd SW
Olympia, WA 98512
(360) 956-7001
(360) 753-6862 (fax)
rickfinn@localaccess.com

TDS received what purports to be a bona fide request for interconnection from Comcast Phone on or about May 20, 2008. A copy of the letter received by TDS is attached hereto as Exhibit 1 to the Declaration of Linda Lowrance, which Declaration is attached as Attachment A.

7. Comcast Phone of Washington, LLC (“Comcast Phone”) is registered with the Commission and is classified as a competitive telecommunications company. Comcast Phone’s contact information as listed with the Commission is as follows:

Comcast Phone of Washington, LLC
Rhonda Weaver, Director, Government Affairs
440 Yauger Way
Olympia, WA 98502

8. For purposes of this Petition, the defined term “telecommunications carrier” shall be referred to with initial capitalization as “Telecommunications Carrier” and the defined term “telecommunications service” shall be referred to with initial capitalization as “Telecommunications Service.” The terms “Incumbent Local Exchange Company” or “ILEC” and “Competitive Local Exchange Company” or “CLEC” are used throughout this Petition.

9. This Petition is filed pursuant to RCW 34.05.240 and the rules of the Commission set forth in WAC 480-07-930. Pursuant to RCW 34.05.240(1), the petition for a declaratory order is to set forth facts and reasons upon which the petitioner relies to show that: (1) there is uncertainty necessitating resolution; (2) there is an actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion; (3) the uncertainty adversely affects the petitioner; (4) the adverse affect of uncertainty on the petitioner outweighs any adverse affects on others or on the general public that may likely arise from the order requested; and (5) the petition complies with any additional requirements established by the agency. In the body of the Petition that follows, WITA will demonstrate that there is substantial uncertainty as to whether WITA’s members, including TDS, must enter into negotiations of the terms of interconnection with Comcast Phone under 47 U.S.C. §251 for the VoIP services that Comcast or its affiliate offer or intend to offer to end users. WITA will further show that there is an actual controversy arising from such uncertainty in that Comcast Phone has delivered a purported bona fide request for interconnection to TDS and, thus, the declaratory order will not be merely an advisory opinion. The need to understand the extent to which Comcast Phone can request interconnection for VoIP services, which Comcast Phone characterizes as information services, not telecommunications services, has a direct effect on WITA’s members, and specifically TDS, and that effect outweighs any adverse effect that may exist on others since it is WITA’s members that receive purported

bona fide requests for interconnection and are required to respond to such requests, if valid.

Finally, WITA is not aware of any additional requirements established by the Commission, except as to the form of the petition and this Petition complies with those requirements.

10. Upon information and belief, it appears that Comcast Phone's business plan is to offer a VoIP service to end users through an unregulated affiliate. However, it is unclear at this time whether Comcast Phone, for the purpose of its interconnection request to TDS, intends to offer a wholesale service, acting as an intermediary carrier between TDS and Comcast Phone's VoIP affiliate, or whether Comcast Phone will use the interconnection with TDS to offer a retail VoIP service directly to end users.⁴ It is also unclear whether, in either case, Comcast Phone will be providing a Telecommunications Service as a Telecommunications Carrier.

II. THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION AND LEWIS RIVER TELEPHONE COMPANY D/B/A TDS TELECOM REQUEST THAT THE COMMISSION DECLARE WHETHER OR NOT WITA'S MEMBERS, AND SPECIFICALLY TDS, MUST ENTER INTO INTERCONNECTION NEGOTIATIONS WITH COMCAST PHONE

11. At issue in this Petition is the question of whether Comcast Phone should be treated as a Telecommunications Carrier providing a Telecommunications Service which is subject to regulation for the purpose of the VoIP services that Comcast Phone has proposed to introduce into the service territories of WITA's members. If the Commission determines that Comcast Phone is a Telecommunications Carrier providing a Telecommunications Service, it should declare that Comcast Phone is subject to carrier rights and obligations pursuant to Section 251 of the Act and regulations applicable to telecommunications companies in the state of Washington. If the Commission determines that Comcast Phone is not a Telecommunications Carrier, however, it should declare that WITA's members, including TDS, do not have to enter into interconnection

⁴ See, Declaration of Linda Lowrance set out in Attachment A.

negotiations with Comcast Phone and that Comcast Phone does not have Section 251 interconnection rights.

12. The Federal Communications Commission (“FCC”) has yet to provide clear guidance on this issue and, as described below, appears to have left the issue to the states. Thus, WITA’s members, including TDS, are not certain of their obligations under the Act in relation to Comcast Phone. Comcast Phone also appears to be uncertain of its responsibilities in this area based on its recent statements that “[s]ince the FCC has not determined the appropriate classification of interconnected VoIP service, the precise scope of ILEC interconnection rules applicable to interconnected VoIP providers is not entirely clear.”⁵

13. The FCC has not yet determined whether the vast majority of retail VoIP services are ‘Telecommunications Service’ or whether providers of these VoIP services are ‘Telecommunications Carriers.’ The FCC’s inaction in this respect has created an atmosphere of confusion in the industry. Thus, in the midst of VoIP’s pending status with the FCC, there exists a great need for clarification in this area from the states. As a result, WITA’s members need guidance as to their responsibilities under Section 251 as these responsibilities relate to the provision of VoIP services by Comcast Phone or its affiliate.

III. THE SERVICES THAT COMCAST PHONE DESIRES TO PROVIDE HAVE NOT BEEN CLASSIFIED BY THE FCC FOR REGULATORY PURPOSES NOR IS STATE REGULATION PREEMPTED.

14. Comcast Phone has indicated the service it provides is not the type of VoIP service for which the FCC has already designated a regulatory classification, nor is it the type of VoIP service for which state regulation has been preempted.⁶ It is important to understand why

⁵ Comcast’s 2007 Annual Report in its 10-K filing with the Securities and Exchange Commission (“SEC”), excerpted as Exhibit 2 to the Declaration of Linda Lowrance. The entire SEC filing is available for viewing at <http://www.sec.gov/Archives/edgar/data/1166691/000119312508034239/0001193125-08-034239-index.htm>.

⁶ See, Declaration of Linda Lowrance.

Comcast Phone's interconnected VoIP services are distinct from the services the FCC has previously addressed.

15. First, Comcast Phone indicates in its 2008 10-K filing with the Securities and Exchange Commission that it is "using interconnected VoIP technology."⁷ The FCC has defined "interconnected VoIP services" as "a service that (1) Enables real-time, two-way communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network."⁸ In its *IP-Enabled Services Order*,⁹ the FCC established E911 regulation for providers of Interconnected VoIP services, but stopped short of designating a regulatory classification for the service.¹⁰ Specifically, the FCC stated that it had "not decided whether interconnected VoIP services are telecommunications services or information services...."¹¹ Thus, if Comcast Phone is offering interconnected VoIP services as defined by the FCC, it is not providing the type of VoIP services for which the FCC has determined a regulatory classification as either Telecommunications Service or an information service.

16. Further, if Comcast Phone is providing a fixed interconnected VoIP service, then its service is not of the type for which regulation has been preempted by the FCC. To the best of WITA's information and understanding, Comcast Phone's interconnected VoIP service is a fixed

⁷ Exhibit 2 to Declaration of Linda Lowrance.

⁸ 47 C.F.R. § 9.3.

⁹ *In the Matter of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36 and 05-196, *First Report and Order and Notice of Proposed Rulemaking*, FCC 05-116 (rel. Jun. 3, 2005) ("*IP-Enabled Services Order*").

¹⁰ *IP-Enabled Services Order* at ¶ 22.

¹¹ *Id.*

VoIP service.¹² In 2004, the FCC made a distinction between fixed VoIP services and VoIP services able to move around with the subscriber, known as nomadic VoIP services.¹³ In the *Vonage Order*, the FCC reviewed the Minnesota Public Utilities Commission’s (“MPUC”) decision to apply state regulation to the VoIP services of Vonage. The FCC found that for Vonage’s VoIP service “it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service. Rather, Vonage’s service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet.”¹⁴ In preempting the MPUC’s decision to regulate Vonage’s service, the FCC found that “the characteristics of [Vonage’s] DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme....”¹⁵ That is not the case with Comcast Phone’s VoIP service.

17. Comcast Phone’s service is a fixed service and not a nomadic service. It appears that an end user must utilize Comcast Phone’s service from that end user’s fixed residential or business location. Accordingly, to the extent that Comcast Phone’s service is a fixed Interconnected VoIP service, it is distinct from Vonage’s VoIP service and does not fall into the category of VoIP services expressly preempted by the FCC.

¹² Declaration of Linda Lowrance.

¹³ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, *Memorandum Opinion and Order*, FCC 04-267 (rel. November 12, 2004) (“*Vonage Order*”) at ¶ 5.

¹⁴ *Vonage Order* at ¶ 5.

¹⁵ *Vonage Order* at ¶ 14.

IV. A DETERMINATION BY THE COMMISSION AS TO WHETHER COMCAST PHONE IS A TELECOMMUNICATIONS CARRIER PROVIDING A TELECOMMUNICATIONS SERVICE IS CONSISTENT WITH THE LAW.

18. In its *Time Warner* decision,¹⁶ the FCC left it to the states to determine, based on the facts of each case, whether a service provider is a Telecommunications Carrier providing a Telecommunications Service.¹⁷ The FCC stated it would not address “any state commission’s evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service.”¹⁸ And, further, that “we do not find it appropriate to revisit any state commission’s evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier....”¹⁹

19. The Act makes clear that a carrier must be a Telecommunications Carrier in order to have Section 251 interconnection rights. Under Section 251, a Telecommunications Carrier must, at minimum, “interconnect. . . with the facilities and equipment of other *telecommunications carriers....*” (Emphasis added.)²⁰ As part of its interconnection duties pursuant to Section 251, a local exchange carrier must also provide dialing parity to “competing providers of *telephone exchange service and telephone toll service*” and access to rights-of-way “to competing providers of *telecommunications service....*” (Emphasis added.)²¹ Furthermore, the FCC has concluded

¹⁶ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, *Memorandum Opinion and Order*, DA 07-709 (rel. Mar. 1, 2007)(“*Time Warner*”).

¹⁷ *Time Warner* at ¶ 14. In addition, in *Time Warner*, the FCC stated that “the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.” *Id.* at ¶ 12 quoting from the *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21905 (1996) at 22033, ¶ 264.

¹⁸ *Time Warner* at ¶ 14.

¹⁹ *Time Warner* at ¶ 17.

²⁰ 47 U.S.C. § 251(a).

²¹ 47 U.S.C. § 251 (b)(3) and (4).

that Section 251 obligations “are triggered by the provision of a ‘telecommunications service’.”²² Section 51.100 of the FCC’s rules requires that there be Telecommunications Services over facilities obtained pursuant to Section 251 before other non-telecommunications services may be provided over the same facilities.²³ Accordingly, the Commission must declare Comcast Phone to be a Telecommunications Carrier providing Telecommunications Services in order for a WITA member to be obligated to negotiate interconnection terms with Comcast Phone and, conversely, for Comcast Phone to obtain interconnection rights pursuant to Section 251.

20. In addition, to the extent that Comcast Phone will act as an intermediary carrier providing wholesale services to its affiliate VoIP provider, Comcast Phone only has Section 251 interconnection rights to the extent that the wholesale services it provides are Telecommunications Services as determined by this Commission based on the facts in this proceeding. The FCC stated that “we emphasize that the rights of telecommunications carriers to section 251 interconnection are limited to carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”²⁴ Thus, in order for Comcast Phone to have the right to obtain Section 251 interconnection facilities for the purpose of offering a wholesale service, it must have Telecommunications Services over those facilities as a precondition to transmitting non-telecommunications services over the same facilities.²⁵

²² See, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, et al., *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24011 at ¶ 34 (rel Aug. 7, 1998).

²³ 47 C.F.R. § 51.100(b); see, also, *Time Warner* at fn 39 (quoting 47 C.F.R. § 51.100(b): “[a] telecommunications carrier that has interconnected or gained access under section [] 251(a) . . . of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.”) (Emphasis in the original.)

²⁴ *Time Warner*, ¶ 14.

²⁵ *Time Warner* at fn 39; see, also, 47 C.F.R. § 51.100(b).

21. The Commission’s determination whether Comcast Phone is a Telecommunications Carrier is consistent with the law because: (1) the FCC has left to the states to determine whether an entity is at Telecommunications Carrier providing a Telecommunications Service; (2) only Telecommunications Carriers are subject to Section 251 interconnection rights and regulation; and (3) to the extent that Comcast Phone’s VoIP service is a fixed Interconnected VoIP Service, it is not the type of VoIP service the regulation of which has been preempted by the FCC. In addition, Comcast Phone is only entitled to 251 interconnection rights for the purpose of offering a wholesale service to the extent that Comcast Phone is a Telecommunications Carrier offering a Telecommunications Service.

V. IS COMCAST PHONE ACTING AS A TELECOMMUNICATIONS CARRIER PROVIDING A TELECOMMUNICATIONS SERVICE?

22. The Act defines a “Telecommunications Carrier,” in relevant part, as “. . . any provider of telecommunications services”²⁶ The Act defines “Telecommunications Service” as “. . . the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²⁷ Under the Act, “Telecommunications” is defined as “. . . the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”²⁸ In addition, the FCC has determined that Telecommunications Services “are intended to encompass only telecommunications provided on a common carrier basis.”²⁹

23. Under Washington law, the equivalent to the federal definition of “Telecommunications

²⁶ 47 U.S.C. § 153 (44).

²⁷ § 153 (46).

²⁸ § 153 (43).

²⁹ *Time Warner* at ¶ 12 citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776, 9177-8, ¶ 785 (1997).

Carrier” is “Telecommunications Company,” which is defined as including “every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state.”³⁰

24. The important term in this definition is “telecommunications.” RCW 80.04.010 goes on to define telecommunications as “the transmission of information by wire, radio, optical cable, electromagnetic, or similar means. As used in this definition, ‘information’ means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.”

25. Assuming that Comcast Phone will offer the VoIP service directly to end users, not through an affiliate, if the VoIP service is not a Telecommunications Service, then Comcast Phone is not a Telecommunications Carrier. Nor would Comcast Phone be a telecommunications company under Washington law. On the other hand, if the VoIP service is a Telecommunications Service offered on a common carrier basis, Comcast Phone is a Telecommunications Carrier. For federal law purposes, this question becomes whether Comcast Phone’s VoIP service is offered (a) on a common carriage basis and (b) is the transmission between or among points specified by the user of information of the user’s choosing without change in the form or content of the information as sent and received.

26. If Comcast Phone is offering the service directly to end users, it appears that Comcast Phone is a common carrier. This meets part “a” of the test stated in Paragraph 25, above. Since the information that is transmitted starts and ends as voice traffic and is transmitted from the

³⁰ RCW 80.04.010.

calling party to the called party at the calling party's direction, this appears to meet the definition of a Telecommunications Service and part "b" of the test stated in Paragraph 25, above. Under this analysis, Comcast Phone's VoIP service, if offered directly to end users, appears to make Comcast Phone a Telecommunications Carrier.

27. This result appears to be logically consistent with the FCC's IP-in-the-middle decision. As stated by the FCC, "When VoIP is used, a voice communication transverses at least a portion of its communication path in an IP packet format using IP technology and IP networks. VoIP can be provided over the public Internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless)."³¹ The FCC concluded that the use of IP technology did not change the nature of the service: "To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be 'internetworking' conversions, which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T's specific service constitutes a telecommunications service."³²

28. The same result is produced under state law. Looking to the definitions in RCW 80.04.010, the "signals" used in the VoIP service are transmitted by "wire, radio, optical, cable, electromagnetic, or similar means." If offered by Comcast Phone to the general public, this means Comcast Phone is, by definition, a telecommunications company for its VoIP services under Washington law.

³¹ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, FCC 04-97 (rel. April 21, 2004) at ¶ 3.

³² *Id.* at ¶ 12.

29. However, Comcast Phone has allegedly ceased the provision of telecommunications services in Washington and other states.³³ For example, in an FCC filing related to the Comcast Phone services in Washington, Comcast Phone stated it “plans to discontinue its provision of telecommunications service in Washington on or after November 28, 2007.”³⁴ Thus, based on this and other similar filings in at least seventeen other states, it is apparent that Comcast Phone will cease, or has already ceased, the provision of what it considers as telecommunications service pursuant to state rules and regulations in states where Comcast Phone has been registered or certified as a telecommunications carrier.

30. Further, it appears that Comcast Phone is asserting its VoIP service is not a Telecommunications Service (or telecommunications) under federal and state law. As discussed in this Petition, if Comcast Phone is intending to transmit only “non-telecommunications” traffic over interconnection facilities, it is not entitled to Section 251 interconnection. So, on the one hand, what Comcast Phone is doing with its VoIP service looks like a Telecommunications Carrier offering Telecommunications Service (a telecommunications company offering telecommunications under state law). On the other hand, what Comcast Phone is saying about its

³³ See, Section 63.71 Application of Comcast Phone of Washington, LLC, WC Docket No. 02242 (filed October 9, 2007) (“Washington 63.71”); see also Section 63.71 Application of Comcast Phone of Illinois, LLC, WC Docket No. 08-41 (filed March 6, 2008) (Illinois); Section 63.71 Application of Comcast Phone of Massachusetts, Inc., *et al*, WC Docket Nos. 08-45 and 08-52 (filed February 20, 2008 and April 3, 2008, respectively) (Massachusetts, New Hampshire, Ohio and Pennsylvania); Section 63.71 Application of Comcast Phone of Virginia, Inc., WC Docket No. 08-42 (filed February 20, 2008) (Virginia); Section 63.71 Application of Comcast Phone of California, LLC, WC Docket No. 08-35 (filed February 16, 2008) (California); Section 63.71 Application of Comcast Phone of Maryland, LLC, WC Docket No. 07-276 (filed November 19, 2007) (Maryland); Section 63.71 Application of Comcast Phone of Minnesota, LLC, WC Docket No. 07-277 (filed November 20, 2007) (Minnesota); Section 63.71 Application of Comcast Phone of Oregon, LLC, WC Docket No. 07-228 (filed September 28, 2007) (Oregon); Section 63.71 Application of Comcast Phone of Colorado, LLC, WC Docket No. 07-231 (filed October 1, 2007) (Colorado); Section 63.71 Application of Comcast Phone of Connecticut, LLC, WC Docket No. 07-200 (filed August 6, 2007) (Connecticut); Section 63.71 Application of Comcast Phone of Georgia, LLC, WC Docket No. 07-187 (filed August 8, 2007) (Georgia); Section 63.71 Application of Comcast Phone of Florida, LLC, WC Docket No. 07-189 (filed August 20, 2007) (Florida); Section 63.71 Application of Comcast Phone of Utah, LLC, WC Docket No. 07-185 (filed August 20, 2007) (Utah); Section 63.71 Application of Comcast Phone of Michigan, WC Docket No. 07-177 (filed August 2, 2007) (Michigan).

³⁴ *Washington 63.71* at ¶ 2. See, also, UT-072024, Comcast Phone notice to the Commission of its FCC filing.

VoIP service looks like Comcast Phone is not a Telecommunications Carrier offering Telecommunications Service. Thus, the uncertainty as to the scope of WITA members' obligations.

31. However, this Commission could look to the actions of the state of Missouri and assert jurisdiction over Comcast Phone to regulate its VoIP service or those of its affiliate as a Telecommunications Carrier (a "telecommunications company" under Washington law). The state of Missouri has opted to regulate Comcast Phone's retail VoIP services because it determined that (1) Comcast Phone's services are a Telecommunications Service (or state law equivalent) pursuant to Missouri regulations; (2) the Missouri Commission may look to the federal definition of "telecommunications" for guidance in determining whether Comcast Phone's service is a Telecommunications Service; and (3) the FCC has not asserted jurisdiction over the sort of VoIP service that Comcast Phone is providing because it is not a nomadic service.³⁵ The Missouri Commission determined that it had the authority to regulate Comcast Phone's Digital Voice VoIP service.³⁶ It concluded that Comcast Phone's service met the Missouri definition of telecommunications service because the service was "used by customers 'to transmit information by wire, radio and optical cable' both within and between exchanges."³⁷ It also concluded that the FCC "has not yet preempted state regulation of fixed VoIP service."³⁸ The Missouri Commission concluded that Comcast Phone "is offering and providing local

³⁵ See, *Staff of the Public Service Commission of the State of Missouri v. Comcast IP Phone, LLC*, Report and Order, Case No. TC-2007-0111 (Nov. 1, 2007) ("Missouri PSC Order"); see, also, *Comcast IP Phone of Missouri, LLC, et al. v. The Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL, Order (U.S. Dist. Court – W.D. Mo.) (filed Jan. 18, 2007) ("Missouri District Court Order").

³⁶ See, generally, *Missouri PSC Order*.

³⁷ *Id.* at Conclusion of Law 11.

³⁸ *Id.* at Conclusion of Law 14.

exchange and interexchange telecommunications services”³⁹ and ordered Comcast Phone to cease the provision of service or to obtain a certificate of public convenience and necessity.⁴⁰

32. In denying a request by Comcast Phone for an injunction of the Missouri Commission’s decision to regulate Comcast Phone’s VoIP service, the District Court for the Western District of Missouri agreed that the Missouri Commission has the authority to interpret “federal statutes necessary to classify communications services as either telecommunications or information services.”⁴¹ The court concluded that a state may interpret and apply a federal statute “unless preempted or faced with a contrary decision from a relevant federal agency...”⁴² and concluded that the Missouri Commission was not preempted from “classifying, or potentially regulating, Comcast’s Digital Voice service on the ground that it cannot be separated into interstate and intrastate components.”⁴³

VI. COMCAST PHONE MUST PROVIDE TELECOMMUNICATIONS SERVICE TO BE ABLE TO TRANSMIT NON-TELECOMMUNICATIONS TRAFFIC OVER INTERCONNECTION FACILITIES.

33. Whether Comcast Phone is offering the VoIP service directly to end users or is providing service to its affiliate on a wholesale basis, in order to be able to request interconnection for transmission of non-telecommunications traffic, which is apparently what Comcast Phone is seeking from TDS, Comcast Phone must first demonstrate it will provide telecommunications service traffic.

³⁹ *Id.* at “Decision.”

⁴⁰ *Id.* at Ordering Clause 1.

⁴¹ *Missouri District Court Order*, p. 5.

⁴² *Id.*, p. 8-9.

⁴³ *Id.*, p. 9.

34. In *Time Warner*, the FCC concluded that a Telecommunications Carrier must use its Section 251 interconnection rights to actually provide a Telecommunications Service.⁴⁴ The FCC quoted 47 C.F.R. § 51.100(b):

A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, *so long as it is offering telecommunications services through the same arrangement as well.* (Emphasis in original.)

Thus, the FCC made it clear that a Telecommunications Carrier must have Telecommunications Service over the Section 251 facilities that it has obtained if it also wants to have non-telecommunications service over the same facilities.⁴⁵

35. This means that under the terms of 47 C.F.R. § 51.100(b), Comcast Phone may not obtain interconnection exclusively for traffic that is non-telecommunications in nature. It must exchange telecommunications service traffic over the requested trunks and facilities before it can use the same interconnection arrangement to exchange information services traffic.⁴⁶ Comcast Phone must use the requested interconnection arrangement in accordance with section 51.100(b) of the FCC's rules for the exchange of Telecommunications Service traffic and not simply as a pretense to justify the provision of non-telecommunications service traffic.⁴⁷ Thus, if this Commission determines that Comcast Phone will use the requested interconnection arrangement exclusively for the transmission of VoIP service traffic, which Comcast Phone apparently claims is a non-

⁴⁴ *Time Warner* at ¶ 14 and fn 39.

⁴⁵ *Time Warner* at fn 39.

⁴⁶ See, e.g., *F. Cary Fitch D/B/A/ Fitch Affordable Telecom Petition For Arbitration Against SBC Texas Under § 252 of the Communications Act*, Proposal for Award, Texas PUC Docket No. 29415, p. 20 (Jun. 2005) ("*Fitch Arbitration*"), *aff'd*, *F. Cary Fitch v. Public Utility Commission of Texas*, No. 07-50088 (5th Cir. 2008) ("*Fitch v. TX PUC*"). The Fifth Circuit Court of Appeals described section 51.100(b) on appeal as being "the heart of this dispute" on the issue of the use of interconnection facilities to carry information service traffic. *Fitch v. TX PUC* at p. 7. The Fifth Circuit Decision is attached as Attachment B.

⁴⁷ See, *Fitch Arbitration*, p. 21, stating "47 C.F.R. § 51.100(b), by allowing delivery of information service over interconnection facilities, does not change the purpose of interconnection facilities. That is, a carrier may only obtain interconnection facilities for telecommunications purposes. Otherwise, a carrier could obtain interconnection facilities unnecessary for telecommunications service and instead use them for information service."

telecommunications service, then Comcast Phone is not meeting the requirements of section 51.100(b) and this Commission should find that Comcast Phone does not have rights to Section 251 interconnection.

VII. IF COMCAST PHONE WILL PROVIDE A WHOLESALE SERVICE TO ITS AFFILIATE VOIP PROVIDER, THIS COMMISSION SHOULD DETERMINE WHETHER COMCAST PHONE IS A TELECOMMUNICATIONS CARRIER PROVIDING TELECOMMUNICATIONS SERVICE ON A COMMON CARRIER BASIS.

36. Comcast Phone has stated that “we plan to phase out our circuit-switched phone service in 2008....”⁴⁸ Further, Comcast noted that the uncertainty of the applicability of interconnection rules for interconnected VoIP providers and stated “We have arranged for such interconnection rights through our own CLECs and through third party CLECs.”⁴⁹ However, in order for this statement to be carried into effect, if Comcast Phone is proposing to offer a wholesale service to its VoIP affiliate in an ILEC service area, Comcast Phone must demonstrate that it is a Telecommunications Carrier providing a Telecommunications Service. The Commission should make the determination on the extent WITA members are obligated to negotiate interconnection terms for wholesale service based on (1) whether Comcast Phone is meeting the FCC’s rule governing access to interconnection facilities codified at 47 C.F.R. § 51.100(b), discussed above, and (2) whether Comcast Phone is providing its wholesale service on a common carrier basis. If Comcast Phone is not meeting these standards, this Commission should determine that Comcast Phone is not a Telecommunications Carrier providing a Telecommunications Service and WITA members are not required to negotiate interconnection terms pursuant to Section 251 of the Act.

37. This Commission must find that Comcast Phone is providing its wholesale service on a common carrier basis pursuant to generally available rates, terms and conditions for Comcast

⁴⁸ See, Exhibit 2 to Declaration of Linda Lowrance.

⁴⁹ *Id.*

Phone to have Section 251 interconnection rights for the wholesale service. A Telecommunications Carrier is offering its Telecommunications Services on a common carrier basis⁵⁰ when it “hold[s] oneself out indiscriminately” to the public; “But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”⁵¹ Furthermore, a carrier can be a common carrier with respect to some of its activities and not with respect to others.⁵² For example, if Comcast Phone were offering local exchange services on a common carrier basis in other parts of Washington, it does not follow necessarily that Comcast Phone is offering its wholesale services in, for example, the TDS service areas on a common carrier basis.

38. Thus, if Comcast Phone has not offered its wholesale services to other similarly-situated VoIP or other providers, it is not offering its services on a common carrier basis. If Comcast Phone is offering its wholesale services pursuant to a private agreement with its affiliate VoIP provider, then Comcast Phone’s wholesale arrangement is a private arrangement. Thus, to the extent that Comcast Phone is providing a wholesale service to its VoIP affiliate, if this Commission determines that Comcast Phone is not providing such services on a common carrier basis, it must declare that Comcast Phone does not have rights to Section 251 interconnection.

VIII. PUBLIC POLICY CONSIDERATIONS

39. This Commission has the authority to regulate intrastate telecommunications services. If Comcast Phone will offer a retail VoIP service for the purpose of its interconnection request to, for example, TDS, this Commission may look to the state regulations, as well as to the federal

⁵⁰ See, e.g., *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“NARUC I”); see, also, *Southwestern Bell Telephone Company v. Federal Communications Commission*, 19 F.3d 1475 (D.C. Cir. 1994) (“*Southwestern Bell Decision*”).

⁵¹ NARUC I at 641.

⁵² *Southwestern Bell Decision* at 1481: “[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others,” quoting *National Ass’n of Regulatory Util. Comm’ers v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

statutory definitions of ‘Telecommunications Carrier’ and ‘Telecommunications Service’ to determine whether Comcast Phone’s service should be regulated. Regulation of Comcast Phone’s (or its affiliate) services as a “Telecommunications Carrier” would end confusion in the marketplace regarding Comcast Phone’s rights and obligations and would move Comcast Phone towards a more level playing field with other Telecommunications Carriers.

40. Furthermore, this Commission could regulate Comcast Phone (or its affiliate) to ensure that Comcast Phone remains on a level playing field in terms of regulations with other telecommunications companies in the industry. If Comcast Phone is allowed to reap the benefits of Section 251 interconnection without being subject to regulation as a telecommunications company as to those services, it will be patently unfair to other telecommunications companies in the state of Washington.

41. Comcast Phone, or its unregulated affiliate, should not be able to offer the VoIP service to end users without meeting the same standards that other Competitive Local Exchange Company must meet while garnering the benefits of interconnection rights. If what Comcast Phone or its affiliate are providing to customers is functionally the equivalent of a telecommunications service under Washington law, those customers should be entitled to the same protections they receive when served by other telecommunications companies. The provision of service that allows communications between the calling and called party through a platform that happens to involve VoIP on the originating side of the call should not be a shield that hides the provider from even-handed regulation, while leaving the provider’s customers without protection. Nor should the provision of communications through a VoIP technology be a spear that allows the provider to force interconnection for the provision of a competitive service that the provider claims is not a Telecommunications Service. If the VoIP service provided by Comcast Phone or its affiliate is a

Telecommunications Service, or, under Washington law, the provision of telecommunications as defined by statute, then the service should be subject to the same level of regulation as the telecommunications service provided by any other CLEC. If, however, the service is an information service, and Comcast Phone cannot otherwise demonstrate that it is entitled to interconnection rights under the FCC's rules, the interconnection obligation should not apply for such an information service.

42. In addition, if Comcast Phone has ceased the provision of its telecommunications services, it is no longer providing the services for which it obtained its CLEC authorization. If the only reason the registration is maintained in Washington is to give Comcast Phone the appearance of the ability to demand Section 251 interconnection rights, its registration has become an empty shell. If the CLEC status is maintained only as a pretext, the Commission should give serious consideration to revoking the registration.

IX. THE TIME PERIOD FOR INTERCONNECTION NEGOTIATIONS SHOULD BE TOLLED WHILE THIS DOCKET IS CONSIDERED BY THE COMMISSION.

43. There is at least one WITA member, TDS, that is facing what is purported to be a bona fide request for interconnection from Comcast Phone. Given the uncertainty of the status of Comcast Phone and the uncertainty of its rights to request interconnection, that request should be considered tolled or stayed until this docket has been resolved.

44. WITA has not found any authority on the issue of tolling or staying the time period for interconnection discussions prior to the statutory date to file a request for arbitration, either one way or the other. However, from a logical standpoint, it makes sense that if the status of the carrier requesting interconnection is in doubt as to the legal authority to request such interconnection, then until that issue is resolved, the time periods for negotiation should not commence. On behalf of TDS, WITA specifically requests that the Commission enter an order

tolling the time for negotiation and seeking arbitration under Comcast Phone's purported bona fide request to TDS until this docket has been concluded.

X. THE COMMISSION SHOULD CONVENE A PRE-HEARING CONFERENCE, INVOKE THE DISCOVERY RULES AND PROCEED WITH AN INVESTIGATION TO RESOLVE THE ISSUES RAISED IN THIS DOCKET.

45. WITA has brought this matter forward based on its best information and belief as to the state of the facts. However, clearly there is some clarification of facts that are needed to be able to provide a definitive determination in this matter. On this basis, WITA respectfully requests that under WAC 480-07-930(5)(d) the Commission accept this Petition, set a pre-hearing conference at the earliest possible time and allow discovery to be sure that there is a clear understanding as to the state of the facts related to Comcast Phone's offering of VoIP service, either through itself or through an affiliate, and hold a hearing. At the pre-hearing conference, it could be determined whether an extension of time under WAC 480-07-930(6) is warranted.

XI. COMCAST PHONE IS NOT SUBSTANTIALLY PREJUDICED BY THE ENTRY OF A DECLARATORY ORDER

46. Pursuant to RCW 34.05.240(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. In this case, Comcast Phone will not be substantially prejudiced by the entry of a declaratory order.

47. If Comcast Phone is not entitled to seek negotiations for interconnection terms for the VoIP service that it or its affiliate will provide, then there is no prejudice to Comcast Phone by entry of an order to that effect. On the other hand, if WITA members, such as TDS, are required to negotiate the terms of interconnection with Comcast Phone for the described VoIP service, then at most Comcast Phone will experience a slight delay in the negotiations. A slight delay certainly would not constitute "substantial prejudice" to the rights of Comcast Phone.

48. On the other hand, a declaratory order will clarify the duties and responsibilities of WITA's members, including TDS. A declaratory order will have the benefit of establishing the reach of Section 251 negotiations and the rules that apply to the provision of VoIP service as deployed by Comcast Phone under Washington law.

XII. CONCLUSION

49. Based on the foregoing, the Commission should declare that it has the authority to make a determination whether or not Comcast Phone is acting as a Telecommunications Carrier offering Telecommunications Services and whether Comcast Phone's (or its affiliate's) VoIP service is subject to state regulation. A declaration to this effect would minimize confusion in the state's telecommunications industry as to Comcast Phone's rights and responsibilities and it would move Comcast Phone towards a more level regulatory playing field for all similarly situated telecommunications companies in the state. In the alternative, however, if this Commission determines that Comcast Phone's VoIP service is not a Telecommunications Service, it must declare that Comcast Phone does not have Section 251 interconnection rights, as such rights are reserved only for Telecommunications Carriers providing Telecommunications Services.

50. WITA and TDS respectfully request that the Commission take the following action:
- i. Declare whether WITA's member companies and, specifically TDS, are required to negotiate terms of interconnection pursuant to Section 251 of the Communications Act of 1934, as amended, with Comcast Phone for the provision of fixed location VoIP services by Comcast Phone or an affiliate of Comcast Phone.
 - ii. Declare that Comcast Phone is not acting as a Telecommunications Carrier for purposes of its VoIP service, whether provided by itself or through an affiliate,

and, thus, is not entitled to interconnection rights pursuant to Section 251 of the Act.

- iii. In the alternative, declare that Comcast Phone is a Telecommunications Carrier and the VoIP service that it, or its affiliate, is offering is a Telecommunications Service and is subject to regulation for those services as a telecommunications company offering telecommunications within the state of Washington.
- iv. That any purported bona fide request filed by Comcast Phone with a WITA member, and, specifically TDS, is tolled for the duration of this proceeding and Comcast Phone may not invoke any rights to arbitration until its status to request interconnection pursuant to Section 251 of the Act for its VoIP services, or the VoIP services of its affiliate, are determined.
- v. That the Commission accept this Petition, set a pre-hearing conference at the earliest possible date and establish a schedule for discovery and hearing to determine the factual matters underlying this Petition.

Respectfully submitted this 28th day of October, 2008.

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