

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Petition of:

WASHINGTON INDEPENDENT
TELECOMMUNICATIONS ASSOCIATION
and LEWIS RIVER TELEPHONE COMPANY,
D/B/A TDS TELECOM

For Declaratory Ruling

Docket No. UT-083056

**WEBTEC'S COMMENTS ON
THRESHOLD ISSUES UNDER
RCW 34.05.240(7)**

1. Pursuant to Prehearing Conference Order, Washington Electronic Business and Telecommunications Coalition ("WeBTEC") submits the following comments on the threshold issues under RCW 34.05.240(7) of whether there are any necessary parties to the proceeding, whether they object in writing to deciding the issues in a declaratory order proceeding, and whether entering a declaratory order would substantially prejudice the rights of a necessary party.

2. The Washington Independent Telecommunications Association ("WITA") and Lewis River Telephone Company, d/b/a TDS Telecom ("TDS") seek an order declaring:

- i. 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 for the provision of fixed location VoIP services by Comcast Phone or an affiliate of Comcast Phone; and,
- ii. 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; or,
- iii. In the alternative, 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.

3. Comcast Phone has filed a written objection to the determination of this matter through a declaratory order proceeding. In support of its position, Comcast Phone 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."

4. Comcast Phone maintains that it is a necessary party because it seeks interconnection with WITA member companies, and because Comcast Phone is a competitively classified, registered telecommunications company in Washington that has approved Section 251 interconnection agreements with seven other incumbent local exchange carriers ("ILECs") in this state. See Affidavit of Beth Choroser, ¶¶ 3, 6-7, attached to Comcast Phone's Answer to the WITA/TDS Petition. Since the order sought by WITA and TDS would

specifically adjudicate the rights of Comcast Phone to interconnect with ILECs, its regulatory status as a telecommunications company under state law, and the regulatory status of the interconnected VoIP services provided by its affiliate, Comcast IP, Comcast Phone clearly is a necessary party.

5. WITA and TDS, in fact, do not contest the fact that Comcast Phone is a necessary party; however, they assert that Comcast Phone will not be substantially prejudiced by the entry of the order they seek because, “[i]f Comcast Phone is not entitled to seek negotiations for interconnection terms for the VoIP service that it or its affiliate will provide, then there is no prejudice to Comcast Phone by entry of an order to that effect.” Petition, ¶ 47. This is the equivalent of saying, “We can litigate your rights in your absence, and, as long as we win, you can’t claim substantial prejudice even though you didn’t have the opportunity to protect your interests.” That is nonsensical and negates the concept of a “necessary party.”

6. Under CR 19(a), a necessary party is one who “claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest. . .” The concern is with ensuring that parties have the opportunity to protect their interests. And the determination of whether a party is necessary and would be substantially prejudiced by the requested order is a threshold one; it is not a determination made ex post facto, after the litigation is completed and the opportunity to protect the necessary party’s interests has passed. The WITA/TDS argument should be rejected.

7. Contrary to the assertions of WITA and TDS, a declaratory order stating that Comcast is not a telecommunications carrier with corresponding interconnection and related rights under the Act clearly would substantially prejudice Comcast. According to Ms. Choroser’s affidavit, Comcast Phone offers various telecommunications services to the public, including both telephone exchange and exchange access service offerings. It provides

wholesale telecommunications services to its affiliate, Comcast IP, which in turn provides interconnected VoIP services to thousands of Washington customers. Choroser Affidavit, ¶ 4. Through Comcast Phone's Local Interconnection Service offering, a publicly available telecommunications service offered to qualified providers of interconnected VoIP services, Comcast IP relies on Comcast Phone to provide connectivity between Comcast IP's customers and the public switched telephone network. Comcast IP also relies on Comcast Phone to provide it with access to numbering resources, number portability, E911 calling, and other essential telecommunications services. Choroser Affidavit, ¶ 7. As stated by Ms. Choroser:

Comcast relies on its status as a telecommunications carrier to negotiate, and if necessary arbitrate, interconnection agreements with the ILECs in Washington. If Comcast is denied these rights, Comcast might not be able to interconnect its network with ILECs' networks and exchange traffic. Comcast's inability to interconnect with the ILECs under Section 251 would severely hamper, and could preclude, Comcast's ability to provide the services it offers in Washington.

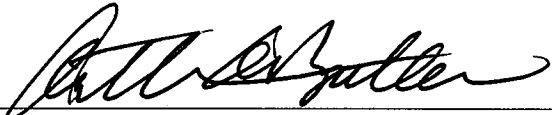
Choroser Affidavit, ¶ 6 (emphasis added). Given the fact that its ability to provide its services in Washington would be jeopardized, there is no doubt that Comcast Phone is a necessary party whose rights would be substantially prejudiced by the order WITA and TDS seek.

8. Further, WeBTEC believes that the broad declarations WITA and TDS request would affect much of the telecommunications industry. In fact, all local exchange carriers, both incumbent and competitive, are necessary parties to this proceeding, as are all providers of interconnected VoIP services, and the Commission may not issue a declaratory order if any of them, properly joined, objects in writing. But the Commission need not address this issue, because Comcast Phone has stated its role as a necessary party whose rights would be substantially prejudiced by entry of a declaratory order as requested by WITA and TDS, and has indicated it will not consent in writing to determination of this matter by declaratory order. That is enough.

9. In accordance with RCW 34.05.240(7), the Commission should dismiss the WITA/TDS petition.

RESPECTFULLY SUBMITTED this 11th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of December, 2008, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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