

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

In the Matter of the Petition of)
) DOCKET NO. UT-041239
THE WASHINGTON EXCHANGE)
CARRIER ASSOCIATION) ORDER NO. 02
)
For Order Requiring WebTel Wireless,)
Inc. to Register as a) GRANTING MOTION FOR
Telecommunications Company or) SUMMARY
Cease and Desist Doing Business as a) DETERMINATION
Telecommunications Company)
.....)

- 1 **PROCEEDINGS:** On July 12, 2004, the Washington Exchange Carrier Association (WECA) filed a Petition requesting the Commission to enter an order requiring WebTel Wireless, Inc. (WebTel), to register as a telecommunications company or to cease and desist doing business as a telecommunications company in Washington. WebTel did not exercise its option to file an answer by August 1, 2004, the deadline under WAC 480-07-370.

- 2 WECA filed its Motion for Summary Determination on August 3, 2004. The Commission conducted a prehearing conference before Administrative Law Judge Dennis J. Moss on August 13, 2004. The Commission’s regulatory staff (Commission Staff or Staff)¹ filed its Memorandum In Support of WECA’s Motion for Summary Determination on August 27, 2004.

¹ In formal proceedings, such as this case, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an “*ex parte* wall” separating the Commissioners, the presiding ALJ, and the Commissioners’ policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

3 WebTel was required to file its Answer, if any, to WECA's Motion for Summary
Determination by September 17, 2004. WebTel did not file an Answer.²

4 **PARTY REPRESENTATIVES:** Richard A. Finnigan, attorney, Olympia,
Washington, represents WECA. Henry K. Hamilton and Jeffrey M. Grieff, Grieff
& Hamilton, PLLC, Seattle, Washington, represented WebTel.³ Jonathan
Thompson, Assistant Attorney General, Olympia, Washington, represents the
Commission's regulatory staff ("Commission Staff" or "Staff").⁴

5 **COMMISSION DETERMINATION:** The Commission determines that there
are no genuine issues of material fact in dispute and that Complainants are
entitled to judgment as a matter of law. WebTel is a telecommunications
company doing business in Washington and is subject to our jurisdiction.
WebTel is an interexchange carrier and subject to Complainants' tariffs to the
same extent as other interexchange carriers that provide intrastate long distance
service in Washington for Complainants' local exchange service customers.
WebTel must register with the Commission as required by RCW 80.36.350 and
must cease and desist from providing jurisdictional services until it complies
fully with all legal requirements for telecommunications companies that do
business in Washington.

² Counsel for WebTel filed a letter and a Notice of Intent To Withdraw on September 13, 2004, stating that his firm was withdrawing from representation of the company effective September 20, 2004. Counsel's letter also conveyed that WebTel refused to comply with the Commission's discovery requirements and that the company "intends to cease and desist operations in the State of Washington."

³ *Id.*

⁴ In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455.*

MEMORANDUM

I. Background and Procedural History.

- 6 On July 12, 2004, the Washington Exchange Carrier Association (WECA) filed its Petition for Order Requiring WebTel Wireless, Inc. To Register as a Telecommunications Company or, in the Alternative, for an Order Requiring Them To Cease and Desist Doing Business for Failure To Comply with Washington Laws.” WebTel did not exercise its option to file an answer by August 1, 2004, the deadline under WAC 480-07-370.
- 7 WECA filed its Motion for Summary Determination on August 3, 2004. The Motion was accompanied by sworn declarations by Mr. Finnigan, counsel to WECA, who authenticated certain exhibits, and by Mr. Cowles, an employee of one of the Complainant local exchange carriers.
- 8 The Commission conducted a prehearing conference before Administrative Law Judge Dennis J. Moss on August 13, 2004. The Commission established a procedural schedule, including dates for additional filings related to WECA’s Motion for Summary Determination. Commission Staff filed its Memorandum In Support of WECA’s Motion for Summary Determination on August 27, 2004. Staff’s Memorandum was supported by sworn declarations by Mr. Robert Williamson and Mr. Robert B. Shirley, and by certain exhibits.
- 9 WebTel was required to file its Answer, if any, to WECA’s Motion for Summary Determination by September 17, 2004. WebTel did not file an Answer.⁵

⁵ See *supra*, note 2.

II. Governing Law.

10 The Commission's general powers and duties are set forth in RCW 80.01.040. Under that statute, the Commission is required to:

Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to . . . telecommunications companies.

11 According to RCW 80.04.010:

"Telecommunications company" includes 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.

and

"Telecommunications" is the transmission of information by wire, radio, optical cable, electromagnetic, or other 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.

12 RCW 80.04.015 provides in relevant part:

Whether or not any person or corporation is conducting business subject to regulation under this title, or has performed or is performing any act requiring registration or approval of the

commission without securing such registration or approval, shall be a question of fact to be determined by the commission . . .

After investigation, the commission is authorized and directed to issue the necessary order or orders declaring the activities to be subject to, or not subject to, the provisions of this title. In the event the activities are found to be subject to the provisions of this title, the commission shall issue such orders as may be necessary to require all parties involved in the activities to comply with this title, and with respect to services found to be reasonably available from alternative sources, to issue orders to cease and desist from providing jurisdictional services pending full compliance.

- 13 In addition to the statutes previously cited, we consider our rule governing summary determination. WAC 480-07-380(2) provides:

A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (*e.g.*, affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules.

- 14 Fundamentally, then, we must make two determinations. We must review the pleadings and supporting evidence to ascertain whether there is a dispute as to any question of fact material to our determination of the issues that cannot be resolved without resorting to further process, such as an evidentiary hearing, to develop additional evidence. If we can make all findings of fact necessary to a decision on the basis of the pleadings and supporting evidence, we consider that evidence in the light most favorable to the nonmoving party and determine whether the moving party is entitled to judgment as a matter of law.

15 Considering the definitions of “telecommunications” and “telecommunications company” enunciated in RCW 80.04.010, the facts material to our determination of the issues in this proceeding are those that inform us about WebTel’s business, including the nature of WebTel’s intrastate long distance calling service in Washington and the technology by which it is provided. Those facts, discussed below, are not in dispute; they are established by uncontroverted evidence submitted by WECA and Staff in support of the pending Motion for Summary Determination.

III. Discussion and Decision

16 The facts material to our determination are established principally by the sworn declaration of Bob Williamson, attached to Staff’s Memorandum, and in various exhibits attached to WECA’s Motion and Staff’s Memorandum. The exhibits are reproductions of digital images and text taken from WebTel’s world wide web pages that are published on the Internet. The web pages include WebTel advertising and descriptive information about the company and its services.

17 Mr. Williamson states, and the exhibits confirm, that WebTel offers service it advertises as “[a]ffordable, unlimited long-distance calling plans to and from major metropolitan areas and surrounding communities within one state for a flat rate,” that require neither special equipment nor any connection to the Internet. According to Mr. Williamson’s Declaration, and exhibits to Staff’s Memorandum, WebTel provides flat-rate long distance calling within Washington described as follows:

It’s simple and requires nothing more than a telephone. First, you dial a WebTel™ local-access number to enter our system. Once the number is verified, a voice prompt will instruct you to enter the area code and phone number of the person you want to call—no need to dial “1” first. The WebTel™ Voice over Internet Protocol (VoIP) gateway server seamlessly sends this call information over

the network to the gateway server that's closest to your call's destination. The VoIP gateway server at the destination site dials the phone number you've entered. After the connection is established both you and the person you're calling will be talking over the WebTel™ network.

Based on his professional experience and his investigation into this matter, Mr. Williamson states that he sees “no possible technical differences of any significance between the services provided by WebTel and LocalDial,” a company recently determined by the Commission to be providing services that are “a form of intrastate interexchange (*i.e.*, long distance) telecommunications service that subjects [the provider] to the obligation to pay access charges payable to originating and terminating local exchange carriers . . . to extent required of interexchange carriers by those carriers' tariffs.”⁶

18 WebTel does not dispute any aspect of Mr. Williamson's analysis. We have no reason to doubt that he has accurately described a WebTel service offered in Washington that is, in all material respects, identical to the service we considered in the LocalDial proceeding. We find under the undisputed facts before us that WebTel offers telecommunications service for sale to the general public in Washington and is a telecommunications company subject to our jurisdiction under chapter 80 RCW. In terms of the service under consideration here, WebTel is no different from other interexchange carriers that do business in Washington. To the extent Complainants' tariffs require interexchange carriers to pay access charges for interexchange calls made by or to Complainants' customers, those tariffs must be enforced as to WebTel.

⁶ *Wash. Exchange Carrier Ass'n v. WebTel Corp.*, Order No. 08—Final Order Granting Motions for Summary Determination, Docket No. UT-031472 (June 11, 2004).

19 The access charge regime in Washington is mandated by RCW 80.36.160. It is implemented by the local exchange companies' tariffs. Complainants' tariffs, once approved by the Commission, have the force and effect of law.⁷ They must be applied uniformly to all interexchange carriers to avoid giving undue preference under RCW 80.28.090 or allowing for the application of discriminatory rate practices under RCW 80.28.100. WebTel's phone-to-phone IP telephony service is "telecommunications service," and is functionally identical to the inter-local-calling area service that is provided by other interexchange carriers that pay access charges. WebTel obtains the same access to the Complainants' networks as obtained by other interexchange carriers. WebTel, therefore, imposes the same burdens on the local exchange carriers as do other interexchange carriers. WebTel should bear its fair share of the associated costs, as reflected in the local exchange carriers' tariffs. WebTel should be regulated in the same fashion and to the same extent as any other interexchange carrier.

20 Given our conclusion that WebTel is conducting business subject to our regulatory authority, it clearly is necessary for WebTel to meet the registration requirement under RCW 80.36.350 and to otherwise conform to the other requirements imposed on telecommunications companies under Title 80 RCW and under the Commission's rules. We take notice of the fact that WebTel filed for registration on September 7, 2004, in Docket No. UT-041609. Since that filing, however, counsel for WebTel has informed the Commission that the company intends to withdraw its filing and to cease and desist from doing business in Washington. WebTel has not withdrawn its registration request as of the date of this Order.

21 Considering our findings and conclusions here, and the uncertain future status of WebTel's filing in Docket No. UT-041609, we will order WebTel to cease and desist from providing jurisdictional services in Washington pending registration

⁷ *General Tel Co. of Northwest, Inc. v. Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).

as a telecommunications company and full compliance with all requirements of law governing the conduct of business by such companies in Washington. Whether this causes WebTel to cease and desist from doing business, or whether the company already has decided to cease doing business in Washington, as counsel's letter states, it nevertheless is necessary for WebTel to comply with the notice and other requirements of WAC 480-120-083. As Mr. Shirley states in his Declaration that is attached to Staff's Memorandum:

Commission rule WAC 480-120-083 requires telecommunications companies to take several actions in anticipation of cessation of service. The main purpose of the rule is to provide customers with notice of cessation of service thirty days in advance of the cessation so that customers may make other arrangements to obtain telecommunications service of a similar nature. Notice thirty days in advance of cessation is intended to provide customers with sufficient time to make an unhurried search for an alternate provider of the telecommunications services that will cease. WAC 480-120-083 also requires telecommunications companies to inform customers how to obtain a refund; the company must continue to provide information on how to obtain a refund for sixty days after cessation of service.

We caution WebTel that any failure to conform to the requirements of WAC 480-120-083 may result in the imposition of financial penalties under RCW 80.04.380 – 405, or such other action under the laws of Washington as are appropriate.

FINDINGS OF FACT

22 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

23 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

24 (2) WebTel is a Colorado corporation with its principal business address in California. WebTel owns, operates, and manages facilities used to provide telecommunications for sale to the general public in Washington. WebTel is engaged in the business of furnishing telecommunications services within Washington State as a public service company.

25 (3) WebTel is conducting business subject to the Commission's regulatory authority. WebTel is performing acts requiring registration or approval of the Commission.

CONCLUSIONS OF LAW

26 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 27 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings. *Title 80 RCW.*
- 28 (2) WebTel's service that is challenged by WECA is telecommunications service offered to the public in Washington for compensation and WebTel is a telecommunications company within the meaning of Title 80 RCW.
- 29 (3) WebTel's service that is the subject of WECA's Petition is a form of intrastate interexchange (*i.e.*, long distance) telecommunications service that subjects WebTel to the obligation to pay access charges payable to originating and terminating local exchange carriers, including Complainants, to the extent required of interexchange carriers by those carriers' tariffs. In other words, Petitioners' tariffs apply to the intrastate telephone calls made by WebTel's customers as described in the body of this Order.
- 30 (4) The Commission has the statutory and regulatory authority, and obligation, to regulate WebTel to the extent the company provides intrastate long distance telecommunications service in Washington. The Commission lacks the statutory authority to forebear from regulating WebTel in the same manner and to the same extent as it regulates other interexchange carriers offering services in Washington. *See, e.g., RCW 80.28.090 and RCW 80.28.100.*
- 31 (5) WebTel is conducting business subject to the Commission's regulatory authority. WebTel should be required to register with the Commission as required under RCW 80.36.350 and to otherwise conform with the requirements for telecommunications companies operating in Washington under Title 80 RCW and chapters 480.80, 480.120, and 480.121 WAC, and such other of the Commission's regulations as may apply.

- 32 (6) WebTel should be required to cease and desist from providing intrastate telecommunications service in Washington unless and until it registers with the Commission and otherwise conforms to all requirements of law. *RCW 80.04.015.*
- 33 (7) The Commission should retain jurisdiction to effectuate the terms of this Order. *Title 80 RCW.*

ORDER

THE COMMISSION ORDERS THAT:

- 34 (1) WECA's Motion for Summary Determination, supported by Commission Staff and unopposed by WebTel, is GRANTED.
- 35 (2) WebTel is required, within 5 days following the date of this Order, to inform the Commission in writing whether it intends to go forward with its registration with the Commission as required under RCW 80.36.350 and to otherwise conform with the requirements for telecommunications companies operating in Washington under Title 80 RCW and chapters 480.80, 480.120, and 480.121 WAC, and such other of the Commission's regulations as may apply.
- 36 (3) If WebTel does not intend to go forward with its registration with the Commission as required under RCW 80.36.350 and to otherwise conform with the requirements for telecommunications companies operating in Washington under Title 80 RCW and chapters 480.80, 480.120, and 480.121 WAC, and such other of the Commission's regulations as may apply, WebTel nevertheless is required immediately to meet the requirements of WAC 480-120-083. WebTel is required, among other things, to give notice to its Washington customers as required under WAC 480-120-083 within

five days of the date of this Order. On the thirty-fifth day following the date of this Order, at 12:01 a.m., WebTel is required to cease and desist from providing intrastate telecommunications service in Washington unless and until it thereafter registers with the Commission and otherwise conforms to all requirements of law.

- 37 (4) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective this 4th day of October, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.