

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

COMCAST PHONE OF
WASHINGTON, LLC

Application for Mitigation of Penalties
or for Stay

.....

In the Matter of

COMCAST PHONE OF
WASHINGTON, LLC

Petition for an Interpretive and Policy
Statement or Declaratory Ruling

DOCKET NOS. UT-031459 and
UT-031626

COMMISSION STAFF'S
MOTION FOR SUMMARY
DETERMINATION

1 The Washington Utilities and Transportation Commission (Commission) Staff (Staff) brings this motion for summary determination in accordance with Order No. 2 in this Docket and WAC 480-09-426. For the reasons set forth in this motion, the Commission should grant the Staff's motion for summary determination and hold that the service quality rules apply to Comcast Phone of Washington, LLC (Comcast Phone) and deny Comcast Phone's petition to mitigate the penalty.

I. BACKGROUND

A. Procedural History

2 On September 12, 2003, the Commission assessed a penalty against Comcast
Phone in the amount of \$1000 for the company's failure to submit service quality
reports pursuant to WAC 480-120-439. The Commission assigned this penalty
assessment Docket No. UT-031459.

3 In its September 30, 2003, response to the penalty assessment, Comcast Phone
requested mitigation of the penalty. On October 2, 2003, Comcast filed a request for an
interpretive and policy statement or declaratory order defining the scope of the service
quality report filing requirement set forth in WAC 480-120-439. The Commission
assigned that petition Docket No. UT-031626. At the heart of Comcast Phone's
pleadings is its belief that WAC 480-120-439 does not apply to competitive local
exchange companies (CLECs).

4 At the request of the Commission, Staff filed a response to Comcast Phone's
Application for Mitigation of Penalties. In its response, Staff argued that the
Commission should not mitigate the penalty.

5 On October 24, 2003, the Commission issued an order consolidating Docket Nos.
UT-031459 and UT-031626. The Commission dismissed Comcast Phone's request for an
interpretive and policy statement or declaratory order. The Commission stated that it
would consider whether it should mitigate the penalty, whether WAC 480-120-439

applies to Comcast, and if so, whether it should grant Comcast Phone a waiver of the requirements set forth that rule.

B. The Commission's Rules for Telecommunications Companies

6 The Commission has enacted a body of rules setting forth service quality requirements for telecommunications companies. The Commission requires "Class A companies" to file monthly reports to the Commission detailing their compliance with certain service quality standards. WAC 480-120-439.

7 For purposes of the Commission's rules governing telecommunications companies, "Class A company" is defined as: "a local exchange company with two percent or more of the access lines within the state of Washington." WAC 480-120-021. This "two percent" threshold for compliance with certain regulations mirrors the threshold set forth in RCW 80.04.530, which exempts telecommunications companies serving fewer than two percent of the access lines in Washington from certain statutory reporting requirements.

8 The Commission's rules set forth in WAC 480-120 "apply to any company that is subject to the jurisdiction of the Commission as to rates and services under the provisions of RCW 80.01.040 and chapters 80.04 and 80.36 RCW." WAC 480-120-011(1). Telecommunications companies that violate the Commission's rules are subject to penalties. WAC 480-120-011(4).

The Commission may exempt a company from any provision of its rules, when doing so is in the public interest. WAC 480-120-015(1). The company requesting an exemption must explain fully the reasons why the Commission should grant the request. WAC 480-120-015(2). In considering the request, the Commission “may consider whether application of the rule would impose undue hardship on the requesting person, of a degree or kind different from hardships imposed on other similarly situated persons, and whether the effect of applying the rule would be contrary to the purposes of the rule.” WAC 480-120-015(4).

II. ARGUMENT

The Commission penalized Comcast Phone because it failed to comply with the reporting requirements of WAC 480-120-439. In its Petition for Mitigation, Comcast Phone proffers several arguments to convince the Commission to mitigate the penalty, which are paraphrased as follows. First, Comcast Phone argues that WAC 480-120-439 does not apply to competitive local exchange companies (CLECs). Second, Comcast Phone argues that the penalty does not meet the Commission’s standards for imposing penalties. Third, Comcast Phone argues that Comcast Phone was penalized without first receiving education or assistance from the Commission. None of these arguments justifies mitigation of the penalty.

A. WAC 480-120-439 Applies to All Class A Companies, Including Competitively Classified Companies Serving More Than Two Percent of the Access Lines in Washington

1. Comcast Phone Serves More Than Two Percent of the Access Lines in Washington.

11 As stated above, all “Class A companies” must file the reports required by WAC 480-120-439. There are 4, 090,455 access lines in Washington. Blackmon Decl, ¶ 10. Two percent of the total is 81,809 access lines. *Id.* Comcast Phone serves 117,535 access lines in Washington. *Id.*, ¶ 7. Therefore, Comcast is a Class A company as that term is defined in WAC 480-120-011. Comcast does not dispute that it serves more than two percent of the access lines in Washington. Tr. at 22, ll. 4-8.

2. Competitively Classified Companies That Serve More Than Two Percent of Access Lines Must Comply With WAC 480-120-439.

12 In its petition for mitigation of the penalty, Comcast Phone contends that only incumbent local exchange companies (ILECs) can be Class A companies and that CLECs cannot be Class A companies. Petition, at 3. Based on the plain language of WAC 480-120-021, this contention must fail. The Commission’s rules plainly require all companies serving more than two percent of access lines in the state of Washington to comply with WAC 480-120-439, regardless of whether the company is an ILEC or a CLEC. *See* WAC 480-120-439; WAC 480-120-011. Nothing in the definition of “Class A company” suggests that competitively classified companies¹ fall outside the definition.

¹ A “competitively classified company” is “a company that is classified as competitive by the Commission pursuant to RCW 80.36.320.” “CLEC” and “competitively classified company” are used interchangeably in this brief.

See WAC 480-120-021. *Id.* To the contrary, the rule defines Class A and Class B companies in terms of the number of access lines they serve. *Id.*

13 In its petition, Comcast Phone makes several arguments to support its contention that it cannot be a Class A company because it is a CLEC. As explained below, these arguments are without merit.

14 First, Comcast claims (without analysis) that the Commission's distinctions between Class A and Class B companies in WAC 480-120 "parallels" FCC accounting rules. Petition, at 3-4. It is unclear what point Comcast Phone tries to make. The only similarity between the FCC's definitions of Class A and Class B companies and the Commission's definitions is that in both cases a Class A company is larger than a Class B company. Otherwise, the specific definitions are not at all comparable. The FCC has limited its definitions "for accounting purposes." 47 C.F.R. § 32.11(a). The Commission has not so limited its definitions. WAC 480-120-021. Therefore, that the FCC's Part 32 rules apply only to ILECs is of no help in exempting Comcast Phone from the definition of Class A company in WAC 480-120-021.

15 Second, Comcast Phone tries to blur the definition of Class A company with its argument that because WAC 480-120-302(2)(a), which uses the term Class A company, applies only to ILECs, CLECs cannot be Class A companies because WAC 480-120-302 does not apply to CLECs. This argument makes no sense. WAC 480-120-302 uses the terms Class A and Class B because non-competitive companies (ILECs) may have more

or less than two percent of access lines. WAC 480-120-302 does nothing to narrow the definition of Class A company to include only ILECs. Rather it requires ILECs serving more than two percent of access lines to use the FCC's Class A accounting, and permits ILECs serving less than two percent of access lines to use the FCC's Class B accounting. Competitively classified companies, regardless of the number of access lines they serve, are required to keep their books in accordance with generally accepted accounting principles. WAC 480-120-301. Simply put, WAC 480-120-302 sets forth the accounting requirements for Class A and Class B companies that are not competitively classified. WAC 480-120-301 sets forth the accounting requirements for Class A and Class B companies that are competitively classified.

16 Third, Comcast argues that because WAC 480-120-071(4)(b)(i) uses the term "Class A companies" in the same sentence as "tariff," a CLEC cannot be a Class A company. This argument must fail. The intent of this rule is not to exempt CLECs with more than two percent of access lines from the definition of Class A company. The point is to treat Class A and Class B ILECs differently.

17 Fourth, Comcast Phone argues that because no rule ties a Class A or Class B label specifically to CLECs, it is not reasonable to include CLECs in the definition of Class A company. Petition, at 4. Comcast Phone supports this contention by stating that WAC 480-120-105, which sets forth service quality performance standards for which WAC 480-120-439 requires reporting, "specifically applies only to ILECs." *Id.* As a

preliminary matter, WAC 480-120-105 applies to ILECs and CLECs, but it exempts CLECs from the requirements of subsections (1)(a) and (b) of the rule. Even if the whole of WAC 480-120-105 applied only to ILECs this would not help Comcast Phone. Simply because the Commission may exempt CLECs from certain requirements, does not mean that it must exempt CLECs from all requirements.

18 Finally, Comcast Phone states that, “if the Commission would have wanted WAC 480-120-439 to apply to CLECs, it would have said so.” Petition, at 4. That is precisely what the Commission did by defining Class A companies as all local exchange companies serving more than two percent of access lines and requiring those companies to comply with WAC 480-120-439. As with other rules, had the Commission intended to exempt CLECs or competitively classified companies, it expressly would have done so. *See, e.g.*, WAC 480-120-105(4)(exempting competitively classified companies from certain access line installation or activation requirements); 480-120-540(5)(exempting small businesses or competitively classified companies from terminating access charge requirement if they concur in a tariff filed by another local exchange company). In addition, the Commission does not waive the service quality rules upon granting a petition for competitive classification. WAC 480-121-063 (listing regulatory requirements that are waived for competitively classified companies).

19 For purposes of Chapter 480-120 WAC, a “Class A company” is one that serves more than two percent of the access lines within Washington. There is no other applicable definition.

3. The Policy Behind WAC 480-120-439 Does Not Favor Exempting CLECs Serving More Than Two Percent of Access Lines From Its Requirements.

20 WAC 480-120-439 does not itself set service quality standards. Instead, it requires Class A companies to file monthly reports to the Commission regarding their compliance with specific service quality requirements set forth in WAC 480-120. The purpose of the rule is to allow the Commission to monitor the quality of local exchange service provided in Washington. Making these rules applicable to those companies serving more than two percent of access lines in Washington helps enable the Commission to ensure good quality service, without unduly burdening smaller companies. *See* Blackmon Decl., ¶¶ 15-16.

21 WAC 480-120-439 requires Class A companies to report on the following service quality standards:

- Missed appointments: Class A companies must report whether they completed service orders within the timelines set forth in WAC 480-120-105 and 480-120-112. These rules apply to all local exchange companies; however, competitively classified companies are exempt from the requirements in WAC 480-120-105(1)(a) and (b).
- Installation or activation of basic service: Class A companies must report, by central office, the total number of orders taken in a month and the number of orders the company was unable to complete within the

timeframes set forth in WAC 480-120-105. To comply with this rule, a CLEC would report the number of orders it was unable to complete within the timeframe set forth in WAC 480-120-105(c). WAC 480-120-105(c) applies to CLECs.

- Summary trouble reports: Class A companies must submit a report summarizing the trouble reports at each central office, including the number of lines served by the central office. The report must include an explanation of causes when the number of reports exceeds the standards set forth in WAC 480-120-438. WAC 480-120-438 does not exempt CLECs from its requirements.
- Switching report: Class A companies must report switching problems that exceed the minimum service quality standard for switches set forth in WAC 480-120-401(2)(a). WAC 480-120-401 applies to local exchange companies. It does not exempt CLECs from its requirements.
- Interoffice, intercompany and interexchange trunk blocking report: Class A companies must report trunk blocking in excess of the standards set forth in WAC 480-120-401(3) and (5) and the steps taken to relieve the blockage. WAC 480-120-401 applies to all local exchange companies and does not exempt CLECs.
- Business office and repair answering system reports: If requested, Class A companies must report compliance with WAC 480-120-133, which requires companies to answer calls to their business or repair centers during regular business hours, within a specified, average period of time. This rule applies to all local exchange companies and does not exempt CLECs.
- Repair report: Class A companies must report the number of service interruptions and the number repaired within 48 hours, and the number not repaired within 48 hours as required by WAC 480-120-440. Companies also must report the service impairments and the number repaired within 72 hours, and the number not repaired within 72 hours as required by WAC 480-120-440. WAC 480-120-440 applies to CLECs.

22

Comcast Phone argues that it is reasonable to exempt CLECs from the definition of Class A company—and the reporting requirements of WAC 480-120-439—because CLECs should be subject to minimal regulation. Petition, at 5 (citing RCW 80.36.300(6)). Staff agrees that competitively classified companies should be subject to minimal regulation. See RCW 80.36.320(2). “Minimal regulation means that competitively classified companies may file, instead of tariffs, prices lists.” *Id.* The more flexible regulatory requirements for competitively classified companies does not mean that the Commission should exempt CLECs serving more than two percent of the access lines from the service quality rules.

B. The Commission’s Criteria for Assessing Penalties Do Not Preclude the Penalty Imposed Against Comcast

23

Comcast Phone contends that the Commission’s discretion whether to impose penalties against a telecommunications company is “dictated” by the criteria the Commission set forth in *MCI Metro Access Transmission Services, Inc. v. US West Communications, Inc.*, Docket No. UT-971063, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, In Part, and Affirming, In Part (Feb. 10, 1999). Staff disagrees that *MCI Metro* controls the Commission’s imposition of penalties against Comcast Phone.

24

The *MCI Metro* case was very complex and highly contested. That case involved MCI Metro Access Transmission’s allegations that US West breached contracts for

interconnection facilities and violated state law by failing to adequately forecast network growth provide interconnection facilities in a timely manner. *Id.*, ¶ 1. The complexity of the issues, and the difficulties that are created when competitors are obligated to cooperate were factors the Commission considered in declining to impose penalties against US West:

In deciding whether to assess penalties against U S WEST, the Commission considers the challenge of forecasting and provisioning facilities in a multi-provider environment, and the ongoing evolution of interconnection processes. The record in this case reflects the fundamental complexity in structuring a cooperative enterprise between competing entities.

Id., ¶ 154. Unlike the *MCI Metro* case, there is no complexity in Comcast Phone's obligation. WAC 480-120-439 unequivocally requires Comcast Phone to file service quality reports. Comcast Phone has failed to comply with the rule.

25 Contrary to Comcast Phone's petition, this case does not present a matter of first impression. *See* Petition, at 6. There is nothing new about reporting requirements being different for smaller companies. While WAC 480-120-439 is a new rule, Comcast Phone was required to comply with the old rule, as well. *See infra* n.2.

26 Comcast Phone should have known its conduct was in violation of the rule because the Commission had informed the company that it was required to report. Blackmon Decl., ¶¶ 5, 8. A plain reading of WAC 480-120-439 and 480-120-021 also put

the company on notice of its obligation. As the above argument shows, there can be no tenable argument that the rule does not apply CLECs.

C. The Commission Offered Comcast Phone Technical Assistance

27 Comcast Phone argues that the Commission should mitigate the penalty because the Commission failed to assist the company in meeting its obligations under WAC 480-120-439. This argument fails.

28 Staff agrees with Comcast Phone that the parties tried to resolve Comcast Phone's reporting requirement issue prior to the time the Commission issued the penalty. Blackmon Decl., ¶¶ 5, 8. Staff alerted Comcast Phone of the need to report as soon as Staff became aware of the company's access line court, and it responded promptly and proactively to every question and issue raised by Comcast Phone. *Id.*, ¶¶ 10-14. To the extent Comcast Phone was dissatisfied with this information, there was sufficient time for Comcast Phone to seek formal clarification before the initial report was due on September 2, 2003.

29 The issue of whether the reporting requirements of WAC 480-120-439 apply to CLECs or competitively classified companies is not one that lends itself to technical assistance. *See generally* chapter 43.05 RCW. This is a matter of law, and as argued above, the rule applies to all local exchange companies serving more than two percent of access lines.

30 The Commission offered Comcast Phone assistance in determining whether it serves more than two percent of the access lines in Washington. The Commission informed Comcast Phone in an e-mail dated July 17, 2003, that Comcast Phone served more than two percent of access lines and that the company was required to comply with WAC 480-120-439. Blackmon Decl. ¶ 8. Therefore, as of July 17, 2003, Comcast Phone was on notice that it apparently is a Class A company.²

31 Comcast Phone apparently disputed the total number of access lines from which Staff devised the two percent figure. Weaver Decl., ¶ 5. Comcast Phone then requested from Staff the data necessary to obtain the total number of access lines in the state. Blackmon Decl., ¶ 10. Under WAC 480-120-302, a company may request information from the Commission's Record Center regarding the total number of access lines.³

32 The Commission offered to compile the total number of access lines in order to assist Comcast Phone, even though the Commission's rules do not provide for the agency to compile that data on behalf of companies. *Id.*⁴ In the meantime, the

² It appears that Comcast Phone's access line count first exceeded the two percent threshold at some point in 2002, at which point the company should have begun reporting service quality performance under the rule that preceded WAC 480-120-439. The former rule, WAC 480-120-535, did not use the term "Class A" that Comcast now relies upon as the basis for its argument that the rule does not apply to CLECs or competitively classified companies. *See former* WAC 480-120-535 (copy attached for ease of reference).

³ WAC 480-120-302(1) instructs companies wishing to conduct their own calculation of the total number of access lines to obtain the raw data from the Commission's Records Center.

⁴ The rule Comcast Phone cites provides, "For purpose of this rule the raw data may be requested from the commission's record center in order *for the company seeking the data to generate its own calculation* subsequent, and pursuant, to this rule. WAC 480-120-302(1)(c) (emphasis added). Comcast has not said whether it made this request of the Records Center.

Commission informed Comcast Phone that the company could use numbers from the Department of Revenue in order to assist it in determining whether it is a Class A company. According to the Department of Revenue numbers, accompany serving at least 68,252 access lines would be a Class A company.

33 Comcast Phone responded to this request by saying that it would request the data from the Records Center. It is unclear whether Comcast Phone made that request. *Id.*; see also *supra* n.4.

34 Plainly, Staff informed Comcast Phone that of its belief that Comcast Phone serves over two percent of access lines and that it must comply with the reporting requirements of WAC 480-120-439. If Comcast Phone disputes that determination, Comcast Phone has the right to conduct a line count and demonstrate that it does not serve two percent of the access lines within the State. However, Comcast Phone cannot claim that Staff failed to assist it in meeting its legal obligation.

D. The Commission Should Not Grant Comcast Phone a Waiver of the Reporting Requirements Set Forth in WAC 480-120-439

35 The Commission should not grant Comcast Phone a waiver of the reporting requirements set forth in WAC 480-120-439. Comcast Phone has stated that it cannot compile information by central office, because Comcast Phone does not use a central office in its network. Weaver, Decl., ¶ 11(b). Comcast Phone also has claimed that it would be burdensome to comply with some of the rules because it does not track the

required information. *Id.*, ¶ 11. Rather than waive the service quality reporting rule, Staff believes that most of the problems Comcast Phone has identified could be addressed through an alternative reporting mechanism.

36 Ideally, an alternative reporting mechanism could have been accomplished last summer, through an informal process leading to an open meeting decision by the Commission. The Commission took this approach in Docket UT-030704,⁵ when it granted Qwest Corporation’s petition for an alternative form of reporting. Within this contested proceeding, Comcast Phone has not provided enough information to allow the WUTC to approve an alternative reporting mechanism. Indeed, its has not even made a specific proposal other than not to report.

E. Whether WAC 480-120-439 Should Apply to CLECs Should Be Considered in a Rulemaking Proceeding, Not In An Adjudication

37 Implicit in Comcast Phone’s petition is the contention that even if CLECs can be Class A companies, they shouldn’t be included in that definition. The definition of Class A company plainly includes CLECs that serve more than two percent of the access lines in Washington. A change to that definition would require a change to the rule. A rulemaking proceeding is the better way to involve all companies that would be affected by the rule and its application.

⁵ In the Matter of the Petition of Qwest Corporation Petitioner, Seeking Exemption from the Provisions of WAC 480-120-439(4) Relating to Installation or Activation of Basic Service and Requesting Alternative Form of Reporting, Docket UT-030704, Order No. 01, Order Granting Exemption From Rule and Approving Alternative Form of Reporting (Sept. 10, 2003).

III. CONCLUSION

38 For the reasons stated above, the Commission should not mitigate the penalty against Comcast Phone. If any party wishes to change the plain language of WAC 480-120-439 and WAC 480-120-021, it should request that the Commission initiate a rulemaking proceeding.

Dated: December 5, 2003.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

SHANNON E. SMITH
Assistant Attorney General
Counsel for Commission Staff