

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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In the Matter of the Petition of	)	
	)	
WASHINGTON INDEPENDENT	)	Docket No. UT-083056
TELECOMMUNICATIONS ASSOCIATION	)	
and LEWIS RIVER TELEPHONE	)	COMMENTS OF VERIZON
COMPANY d/b/a TDS TELECOM	)	
	)	
For Declaratory Ruling	)	

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Pursuant to the “Notice of Opportunity to File Comments on Petition for Declaratory Ruling” issued in the above-referenced docket on December 1, 2008, Verizon Northwest Inc., MCI Communications Services Inc. d/b/a Verizon Business Services and Bell Atlantic Communications Inc. d/b/a Verizon Long Distance (collectively “Verizon”) hereby file comments on the petition of the Washington Independent Telecommunications Association (“WITA”) and Lewis River Telephone Company d/b/a TDS Telecom (“TDS”) for a declaratory ruling (“WITA Petition”). In light of the Answer to the WITA Petition filed by Comcast Phone of Washington, LLC (“Comcast”) on November 17, 2008 (“Comcast Answer”), the Commission must reject the petition and close the docket under RCW 34.05.240(7) and WAC 480-07-930(3).

The WITA Petition requests that the Commission declare that: (i) Comcast is not acting as a telecommunications carrier for purposes of its VoIP service and thus is not entitled to interconnect with TDS under Section 251 of the Communications Act of 1934 (the “Act”) or, alternatively (ii) Comcast is a telecommunications carrier and that its VoIP service constitutes a “telecommunications service” subject to regulation as a telecommunications company offering

telecommunications within Washington. WITA Petition at 3. Under Washington law, 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.” RCW 34.05.240(7). The Comcast Answer, which follows the relevant procedures set forth in WAC 480-07-930(3), explains why Comcast is a necessary party, how its rights might be substantially prejudiced by a declaratory order as requested in the WITA Petition, and specifies that it does not consent to having the matter determined through a declaratory order proceeding. Thus, the WITA Petition must be dismissed.

WITA attempts to obfuscate the issue through a tortured reading of the statute. Apparently conceding as it must that Comcast is a “necessary party” under any conceivable definition of the phrase, WITA claims that Comcast will “not be substantially prejudiced” by the entry of a declaratory order. WITA Petition at 24. WITA’s rationale is that if Comcast does not prevail on the merits on its entitlement to an interconnection agreement, it will not be prejudiced by a declaratory order specifying as much. *Id.* In other words, WITA’s view is that if it is possible that a necessary party might lose on the merits of the issue presented in the declaratory ruling petition, that party would not be “prejudiced” by an adverse ruling. Of course, that possibility exists in virtually every case, so such an interpretation would render impossible the ability of a necessary party to refuse to consent to a declaratory order proceeding. A statutory provision, such as the one allowing a necessary party to refuse to consent to a declaratory order proceeding, may not be interpreted in such a way as to be rendered meaningless. *See Cmty. Telecable v. City of Seattle*, 164 Wn.2d 35, 43 (2008), 186 P.3d 1032, 1036 (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Thus, WITA’s suggested interpretation of RCW 34.05.240(7) is invalid.

WITA's reasoning also would violate the Commission precedent of making a simple inquiry into whether a necessary party consents to having the matter heard as a declaratory order proceeding. *See, e.g.*, Order Dismissing Petition for Declaratory Order, *In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. for Declaratory Order Regarding Responsibilities of the Designated Toll Carrier*, Docket No. UT-961012 (October 30, 1996) ("UT-961012 Order"); Order Declining to Enter Declaratory Order, *In re the Petition of Washington Independent Telephone Association For a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-020667 (August 19, 2002) ("UT-020667 Order").<sup>1</sup> In these decisions, the Commission focused on whether the opposing party "has *stated* its role as a necessary party whose rights would be substantially prejudiced by entry of a declaratory order on these facts, and has indicated it will not consent in writing to determination of this matter by declaratory order." UT-961012 Order at 7 and UT-020667 Order at 12 (emphasis added). Indeed, that is why the Commission's rule on declaratory orders (WAC 480-07-930) specifies the filing of an assertion by the opposing party who does not consent to a declaratory order proceeding that its rights "*might be* substantially prejudiced," backed up by a sworn affidavit showing the "*potential* for substantial prejudice." WAC 480-07-930(3) (emphasis added). Thus, once a necessary party has followed the procedure set forth in WAC 480-07-930(3), that is the end of the inquiry and the petition must be dismissed.

An example of the simple standard the Commission uses to determine whether a declaratory order proceeding may be maintained involved Washington Natural Gas. In that case,

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<sup>1</sup> Similar precedent is followed by other state agencies. *See, e.g.*, Before the Shorelines Hearings Board, SHB No. 03-006 (March 18, 2003) (citing RCW 34.05.240(7), "Based on the refusal of two necessary parties to this action to consent to this Board's entry of a declaratory order, the Board enters the following Order: The Petition for Declaratory Ruling, filed by the Noreens, is dismissed.").

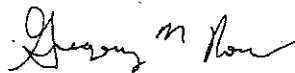
the Commission found that when it “is possible that the company’s rights could be prejudiced within the apparent meaning of RCW 34.05.240(7),” the consent of Washington Natural Gas was a “condition to proceeding further.” Notice of Petition for Declaratory Order, *In the Matter of the Petition of the Partnership for Equitable Rates for Commercial Customers for a Declaratory Order*, Docket No. UG-940326 (March 9, 1994). In the order, the Commission even went so far as to announce *in advance* that if consent was not received by Washington Natural Gas, then no responses by other parties “need be made” as the request would be denied. *Id.* at 2.

Thus, because of the refusal of a necessary party to have the matter heard through a declaratory order proceeding, the WITA Petition must be denied under RCW 34.05.240(7) and WAC 480-07-930(3). That is not to say that the threshold issue presented in the WITA Petition will go unaddressed: that issue, whether Comcast is entitled to an interconnection agreement with WITA member TDS Telecom, is already before the Commission in Docket No. UT 083055. That docket is an arbitration proceeding, which is the appropriate venue through which the Commission should consider interconnection agreement obligations and rights of Comcast and TDS under Section 251 of the Act. Moreover, contrary to the presentation of issues in the WITA Petition, the question of whether the Comcast entity at issue is a telecommunications carrier entitled to an interconnection agreement is to be answered without regard to the classification of any VoIP traffic that the entity may deliver over that interconnection arrangement. *See 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, DA 07-709, 22 FCC Red 3513 (March 1, 2007) at ¶ 15. Accordingly, the only issue in the WITA Petition that warrants resolution (whether Comcast is entitled to an interconnection

agreement with TDS) is already pending before the Commission and will be resolved under the timeframe specified in the Act.

For all the reasons set forth here and in the Comcast Answer, the Commission must dismiss the WITA Petition under RCW 34.05.240(7) and WAC 480-07-930(3).

Respectfully submitted on December 12, 2008.



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