BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of COMCAST PHONE OF WASHINGTON, LLC Application for Mitigation of Penalties or for Stay	Docket Nos. UT-031459 and UT-031626 (consolidated) QWEST CORPORATION'S MOTION FOR SUMMARY DETERMINATION
In the Matter of COMCAST PHONE OF WASHINGTON, LLC Petition for an Interpretive and Policy Statement or Declaratory Ruling	

1 Qwest Corporation ("Qwest"), by and through its undersigned attorneys, hereby moves for summary determination in this matter. This motion is made pursuant to WAC 480-09-426(2), WAC 480-07-380(2) (effective January 2004) and Order No. 2 in this consolidated proceeding.[1]

I. INTRODUCTION

2 Effective July 1, 2003, all Class A telecommunications companies are required to submit service quality performance reports pursuant to WAC 480-120-439. Comcast does not believe it, as a CLEC, is subject to WAC 480-120-439. It, thus, has not complied with the rule. On September

[1] *Order No. 2 Prehearing Conference Order, at ¶ 10.*

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12, 2003, the Commission issued a Penalty Assessment against Comcast based on its noncompliance. On September 30, 2003, Comcast filed an application for mitigation of the penalty (Docket No. UT-031459).[2] On October 2, 2003, Comcast filed a petition for an interpretive and policy statement or a declaratory ruling on the issue of whether the rule applies to CLECs (Docket No. UT-031626).[3]

3 On October 24, 2003, the Commission consolidated the two proceedings into the instant adjudicative proceeding and denied Comcast's request for an interpretive and policy statement. At the November 17, 2003 prehearing conference, Qwest successfully intervened as a party based on its substantial interest in the outcome of the proceeding.[4] Qwest agrees with Commission Staff that the Commission's service quality performance reporting rule applies equally to sizeable CLECs as it does to sizeable ILECs. As a matter of law and a matter of policy, the Commission should enter an order confirming this interpretation and rejecting Comcast's unsupportable interpretation.[5]

II. RELIEF REQUESTED

4 Qwest requests that the Commission grant Qwest's motion for summary determination and hold, as a matter of law and public policy, that Comcast is a Class A company, as that term is defined under WAC 480-120-021, and subject to the reporting requirements for Class A companies set forth in WAC 480-120-439.

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[2] *Application for Mitigation of Penalties or for Stay Pending Resolution of Petition for Interpretive and Policy Statement or Declaratory Order, Docket No. UT-031459.*

[3] *Petition for an Interpretive and Policy Statement or a Declaratory Ruling that WAC 480-120-439 Does Not Apply to Comcast Phone of Washington, LLC, or an Order Granting Exemptions from Reporting Regulations, Docket No. UT-031626 ("Petition for Interpretive and Policy Statement").*

[4] In Order No. 2, ALJ Moss noted the following. "Qwest asserts in its petition that 'parity of regulation requires that all Class A companies be subject to the same level of regulation with regard to service quality requirements.' Given that Qwest is subject to WAC 480-120-439, its interest in protecting its view of regulatory parity establishes its substantial interest in the proceeding." *Order No. 2, at ¶ 7.*

[5] Qwest takes no position on Comcast's request for mitigation or on the appropriate level of penalty, if any, that should be imposed on Comcast. From Qwest's perspective, what is critical is that Class A CLECs (including Comcast) begin immediately to comply with their regulatory obligations in order for parity of regulation to take hold in Washington.

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III. DISCUSSION

A. Summary determination is appropriate given that there are no genuine issues of material fact for the Commission to resolve.

5 A motion for summary determination (modeled after one that would be made in Superior Court pursuant to CR 56) is appropriate when the pleadings filed in the proceeding, along with any properly admissible evidentiary support, reveal that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law. *WAC 480-09-426(2); WAC 480-07-380(2) (effective January 2004); CR 56(c).* The Commission may decide this case on a paper record, and without the need for testimony, given that there are no issues of material fact. Comcast does not deny that it has more than two percent of the state's access lines, and admits that it has not complied with WAC 480-120-439, a rule Comcast believes does not apply to it. As a result, summary determination is appropriate.

B. Comcast and other sizeable CLECs are subject to WAC 480-120-439 as a matter of law.

6 The rule at issue in this case – WAC 480-120-439 – is not the least bit ambiguous. It plainly applies to all "Class A companies" and requires all Class A companies to file monthly reports on missed appointments, installation or activation of basic service, trouble reports, switching, trunk blocking, repairs and business office and repair answering performance. *WAC 480-120-439(1), (3), (4), (6)-(10).*[6] The rule does not alter the definition of "Class A company" provided in WAC 480-120-021 and does not explicitly or implicitly exempt CLECs or competitively-classified companies. WAC 480-120-021 provides in relevant part:

> **WAC 480-120-021. Definitions.** The definitions in this section apply throughout the chapter except where there is an alternative definition in

[6] The rule also provides Class A companies such as Comcast the opportunity to seek from the Commission an alternative measurement or reporting format for any of the required reports. *WAC 480-120-439(12)*. Qwest, for example, has sought and received relief under subsection (12) allowing it to meet its obligation under subsection (4) ("Installation or activation of basic service report"). *See Order No. 1 Order Granting Exemption from Rule and Approving Alternative Form of Reporting, Docket No. UT-030704.*

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> a specific section, or where the context clearly requires otherwise * * *
> **"Class A company"** means a local exchange company with two percent or more of the access lines within the state of Washington.

7 Comcast admits (or at least does not contest) that it has more than two percent of the access lines in Washington. *Tr 22:4-8*. It also does not challenge that it is a "local exchange company," as that term is defined under WAC 480-120-021.[7] There is simply no doubt that, under the plain meaning of the Commission's rules, Comcast is a Class A company and thus subject to the reporting requirements specified in WAC 480-120-439.

8 Qwest reserves its response to Comcast's and the intervenor CLECs' arguments for its reply brief due on December 23, 2003. That said, Qwest observes that Comcast has heretofore offered no argument grounded in the language of the subject rules that the Commission intended to restrict to ILECs or otherwise alter (for purposes of WAC 480-120-439) the definition of "Class A company" set forth for use in all of Chapter 480-120. Instead, Comcast turns the regulatory scheme on its head by stating that the Commission's silence in WAC 480-120-021 about whether CLECs can be Class A companies indicates the Commission's intent to exempt CLECs.[8] Specifically, Comcast argues that, had the Commission intended the definition of "Class A company" to apply to a CLEC, it could have and should have expressly stated so in the rule or in the order adopting the amendment to the rule. Comcast's interpretation and analysis is strained. The Commission quite clearly expressed its intent by stating that all *local exchange companies* with two percent or more of the access lines in Washington are "Class A" companies. *WAC 480-120-021*. Had the Commission intended to exempt CLECs, it could have very easily done so by adding the word "incumbent" before "local exchange company" in the definition of "Class A company." It did not do so. The language is plain and straightforward. Comcast, which admits to having more than two percent of the access lines in

[7] A "local exchange company" is defined under WAC 480-120-021 as "a company providing local exchange telecommunications service."

[8] *Petition for Interpretive and Policy Statement, at 3-4*.

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the state, is a Class A company and is subject to the service quality performing requirements at issue in this case.

9 Comcast's interpretation of WAC 480-120-021 and -439 is also at odds with the Commission's intent, as expressed in General Order R-507.[9] In that order, the Commission repeatedly stated its intent to extend service quality standards to CLECs, as requested by the incumbent LECs.[10] There is nothing in General Order R-507 supporting Comcast's assertion that the Commission intended to exempt CLECs from the service quality performance reporting requirements of WAC 480-120-439.

10 Furthermore, the Commission adopted amended Chapter 480-120 in its current form over the objections by competitors that service quality standards should not apply to them. Comcast has asserted that no CLECs objected to WAC 480-120-439 during the rulemaking process because "CLECs reasonably believed that the Commission did not intend this rule to cover them."[11] Comcast is incorrect. During the long rulemaking, at least two companies (Sprint and WorldCom) complained in written comments that the Commission's proposed service quality rules should not reach CLECs due to the administrative burden associated with compliance.[12] Sprint criticized the reach of proposed WAC 480-120-535 (the precursor proposed rule ultimately codified as WAC 480-120-439) for being excessively burdensome and costly to implement. Sprint urged the Commission, at a minimum, to exempt competitive providers from the rule.[13]

11 WorldCom echoed Sprint's comments, stating generally about quality of service standards that "[t]he result of additional regulatory burdens on new entrants is increased costs in order to administer and

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9 *General Order No. R-507 Order Amending, Adopting and Repealing Rules Permanently, In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telephone Companies, Docket No. UT-990146 ("General Order R-507").*

10 *See General Order R-507, at 26-27 (re WAC 480-120-105), 28 (re WAC 480-120-112).*

11 *Petition for Interpretive and Policy Statement, at 5.*

12 Excerpts from Sprint's and WorldCom's comments are attached as Exhibit A to this motion.

13 *Comments of Sprint Corporation, Docket Nos. UT-990146, UT-991301, UT-991922 (February 4, 2000), at 15.*

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maintain unproductive reporting functions, which ultimately leads carriers to turn its [sic] investment away from the Washington market."[14] WorldCom went on to specifically criticize proposed WAC 480-120-535 as unnecessary and burdensome.[15] WorldCom raised the same objection in subsequent comments, in which it stated bluntly with regard to proposed WAC 480-120-535, "[i]n regards to service quality performance reporting for CLECs, WCOM believes that CLEC's should not be held to the same reporting standards as the ILEC for the same reasons stated above. The imposition of such a requirement would impede competition, not enhance it."[16]

12 The Commission's adoption – over the objections of Sprint and WorldCom – of WAC 480-120-021 and -439 in their present forms evidences that the Commission intended that sizeable CLECs should be required to file service quality performance reports, as must other Class A companies.

C. Comcast and other sizeable CLECs should be subject to WAC 480-120-439 as a matter of public policy.

13 Parity of regulation requires that the Commission – as it expressly did at the request of the incumbent LECs in adopting its new service quality rules – hold that Comcast and other Class A companies (be they incumbents, independents or CLECs) comply with WAC 480-120-439. Qwest will not discuss in this motion whether the underlying reporting requirements set out in the rule are appropriate, workable or valuable relative to their associated burden. The Commission, after lengthy consideration and substantial input, has found that they are. Qwest simply urges the Commission to confirm its recognition that, in an increasingly competitive market, one group of sizeable carriers should not be administratively burdened more or less than another group of sizeable carriers. The reporting requirements set out in WAC 480-120-439 require substantial effort and expense by Qwest to comply with, and Qwest should not be saddled with such requirements if its large competitors are not. In effect, such a result would be anticompetitive and unfair to Qwest.

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14 *WorldCom's Comments on Technical Rules, Docket No. UT-990146 (June 7, 2000), at 1-2.*

15 *Id. at 4.*

16 *Letter from Joan Stout, WorldCom Manager Regulatory Compliance, Docket No. UT-990146, February 14, 2001, at 1.*

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14 Furthermore, it is obvious that the Commission's focus in adopting the new service quality standards and reporting requirements was to ensure that *consumers* receive high quality telecommunications services. Comcast's position leads to the illogical conclusion that the Commission favors Qwest's and Verizon's customers over Comcast's, in that it is only interested in ensuring high quality services for the incumbents' customers. Such a conclusion is at odds with the Commission's intent in adopting the rules and contrary to public policy. To the extent it is necessary to regulate service quality, more Washington consumers than just Qwest's and Verizon's customers should realize the benefit of those regulations.

15 As WorldCom did in its rulemaking comments, Comcast stresses that service quality standards, if applied to competitive carriers, discourage competition. Qwest disagrees with the CLECs' premise and with their implication that favoring CLECs is the highest and only purpose to be served by the Commission. First, Qwest notes that the CLECs' premise (that parity of regulation will discourage or retard competition) is false, since the guarantee of high service quality would likely encourage consumers to migrate from Qwest to a smaller provider. Second, Qwest notes that the Commission is under no obligation to make the promotion of CLEC competition its only policy goal. While it is certainly true that the Telecommunications Act of 1996 required significant market-opening actions by the ILECs – actions this Commission and the FCC have found Qwest to have taken in Washington – the Act does not require or even encourage state commissions to unfairly favor CLECs at every turn. Indeed, the Washington legislature has prescribed that the Commission's duty is to regulate in the public interest the rates, services, facilities and practices of *all persons engaging within this state* in the business of supplying telecommunications service to the public for compensation. *RCW 80.01.040(3)*. The CLECs' interpretation of the Commission's rules stems from a far narrower and self-serving view of the Commission's purposes. This state's laws, as well as principles of regulatory parity, require that the Commission adopt a broader view and find that CLECs, along with ILECs, can be Class A companies and are subject to service quality performance reporting obligations under

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WAC 480-120-439.

IV. CONCLUSION

16 Based on the foregoing, Qwest respectfully requests the Commission to grant its motion for summary determination and hold that Comcast, and any other CLEC with more than two percent of the state's access lines, be deemed a "Class A" company under WAC 480-120-021 and subject to the requirements of Class A companies as set forth under WAC 480-120-439.

RESPECTFULLY SUBMITTED this 5th day of December, 2003.

QWEST

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