BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Washington Independent Telecommunications Association and Lewis River Telephone Company, d/b/a TDS Telecom Petition for Declaratory Ruling	DOCKET NO. UT-085056

RESPONSE OF THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION AND LEWIS RIVER TELEPHONE COMPANY D/B/A TDS TELECOM

1. This Response of the Washington Independent Telecommunications Association ("WITA") and Lewis River Telephone Company, d/b/a TDS Telecom ("TDS") is filed pursuant to the Notice of Opportunity to File Comments on Petition for Declaratory Ruling ("Notice") issued December 1, 2008.

I. PROCEDURAL BACKGROUND

2. This docket was initiated by a Petition for Declaratory Ruling filed by WITA and TDS (the "Petition"). As described in the Notice, the Petition requests the following:

> ...determine whether TDS is required to negotiate terms of interconnection pursuant to Section 251 of the Telecommunications Act of 1996, as amended with Comcast Phone of Washington, LLC (Comcast) for the provision of fixed location VoIP services by Comcast or an affiliate of Comcast, or in the alternative determine whether or not Comcast is acting as a Telecommunications Carrier offering Telecommunications Services and whether Comcast VoIP service is subject to state regulation for those services as a telecommunications company offering telecommunications within the state of Washington.[1]

3. Comcast Phone of Washington, LLC ("Comcast") filed an Answer to the Petition and stated in that Answer that it considered itself a necessary party and did not consent to determination of the issues in the Petition by declaratory order. Under RCW 34.05.240(7), an agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party if that party does not consent in writing to the determination of the matter by declaratory order proceeding.

4. Thus, at the pre-hearing conference held on December 1, 2008, it was determined that this was a threshold issue that needed to be addressed. The Commission gave interested persons the opportunity to file comments by December 12, 2008, on the threshold issues of whether there are any necessary parties to the proceeding, whether they object in writing to deciding issues in a declaratory order proceeding and whether entry of a declaratory order would substantially

[1] Notice at p. 1.

prejudice the rights of a necessary party. WITA and TDS were given the opportunity to file a response by December 29, 2008.

5. As it noted at the pre-hearing conference, Comcast stood by its Answer and did not file additional statements or comments. Comments were filed by the following entities: (1) WeBTEC; (2) 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"); (3) Broadband Communication Association of Washington ("BCAW"); and (4) Sprint Communications Company, L.P. ("Sprint"). For convenience, these four parties will be collectively referred to as the Other Parties.

6. The Other Parties joined with Comcast in arguing that the Petition should be dismissed based upon RCW 34.05.240(7). It is not clear whether any of the Other Parties constitute a necessary party. For example, Sprint stated that it might be a necessary party, but only in certain conditions.[2] And, WeBTEC made the facially overbroad statement that virtually anybody having anything to do with telecommunications in the state of Washington was a necessary party.[3] None of the Other Parties provided any supporting declaration or specific facts as to why they might be a necessary party or how their rights might be substantially prejudiced. Therefore, this Response will consider only Comcast as a potential necessary party under the statute.

II. APPLICATION OF RCW 34.05.240

7. RCW 34.05.240(7) states as follows:

> An agency may not enter a declaratory ruling 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.

Thus, there are four elements that are required to trigger RCW 34.05.240:

[2] WeBTEC Comments at ¶ 8.
[3] Comments of Sprint at ¶ 8.

(1) A person that is a necessary party;

(2) That person has rights;

(3) There would be substantial prejudice to the rights; and

(4) The person does not consent in writing to determination by declaratory order proceeding.

Comcast has stated that it is a necessary party and that it does not consent to the use of a declaratory order proceeding. WITA and TDS agree that Comcast is a necessary party. Thus, two of the four elements are satisfied.

8. The real question is whether Comcast has rights and whether the declaratory order proceeding would cause substantial prejudice to those rights.

A. A "Right" Does Not Exist Under RCW 34.05.240(7) Merely Because a Right is Asserted.

9. The question of whether Comcast has a "right" as that term is used in the statute is vexing. WITA and TDS were unable to find any case that would shed a light on what was meant by inclusion of the term "right" in RCW 34.05.240(7). Thus, we are left to ponder what the Legislature intended.

10. The Other Parties essentially argue that, of course, Comcast has a right. That right is to interconnect pursuant to Section 251.[4] However, that is the core issue. Comcast claims the traffic it wants to send to TDS is an "information service." However, a carrier may not interconnect under Section 251 solely for information service traffic. 47 C.F.R. § 51.100. It is not clear whether Comcast has the right to interconnect under Section 251 or not. On the surface, it appears that the asserted right does not exist because Comcast admits it intends to deliver only information service traffic.

[4] See, e.g, Comments of BCAW at p. 2.

11. The Other Parties' essential argument is that if Comcast does not have a "right" as effected by the statute, it would render the statute meaningless.[5] However, that conclusion does not necessarily follow logically. The argument advanced by Comcast and the Other Parties is that a person has a right under RCW 34.05.240(7) if the person claims a right, whether the right exists or not.

12. This interconnection for information service traffic issue is a question that is being argued before the Federal Communications Commission ("FCC"). As noted in recent comments to the FCC by several providers of VoIP service:

> The classification of IP/PSTN service as an information service would also place important carrier rights at risk. As carriers continue to migrate their networks to IP, they would no longer be providing "telecommunications service" under the proposed definition in the comprehensive draft orders. A competitor is eligible for certain of the bedrock Section 251(c) rights...only to the extent that the competitor is providing a telecommunications service. See 47 U.S.C. §§ 251(c)(3)(6). If basic voice service, provided via IP, were classified as an information service, there is a substantial risk that competitors will be deemed to not qualify for these critical inputs.[6]

13. Unfortunately, there is no indication when the FCC may opine on the subject. The fact is that Comcast is requesting interconnection here and now in the state of Washington. While WITA and TDS acknowledge that the question as it relates to Lewis River Telephone Company can be resolved in the pending arbitration, that does not resolve the overall question. Since an arbitration decision is technically not binding on other companies that are not parties to the arbitration, this is an open question that will need to be answered time and time again. Therefore, a declaratory ruling petition is the appropriate process.

14. For this proceeding, the question is whether the mere assertion of the ability to

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[5] See, e.g., Comments of Verizon at p. 2..

[6] Comments of TW Telecom Inc., One Communications Corp. and CBeyond Inc. submitted in Dockets CC 96-45, et al. dated November 26, 2008, at p. 13.

interconnect is a "right" under RCW 34.05.240(7). As noted above, the Other Parties have argued that mere assertion of a right is sufficient, pointing to the Commission's rule in WAC 480-07-930(3).[7] However, that argument still does not get at the heart of the issue. The heart of the issue is whether Comcast actually has a right that it may assert; not that it has a right if it simply alleges that it does.

15. It is the position of WITA and TDS that unless someone can demonstrate that it has a right, then simply asserting that there is a right is insufficient. Otherwise, the statute for declaratory orders is rendered meaningless. Under the argument advanced by Comcast and the Other Parties, anyone could assert that the subject of any petition for declaratory ruling will substantially prejudice a "right," simply because they assert a right exists and the Commission would never be able to proceed.

16. By way of illustration, assume that a cable company asserts a right to demand collocation from every rural telephone company in the state of Washington. Under the theory advanced by Comcast and the Other Parties, the rural telephone companies could not seek a declaratory ruling that such a right does not exist absent removal of their rural exemption. The cable company could simply assert "I have a right and you can't declare otherwise." This makes the only avenue available expensive and time-consuming one company at a time litigation. That does not appear to be a logical conclusion.

B. Comcast Has Not and Cannot Demonstrate Substantial Prejudice.

17. The fourth element of RCW 34.05.240(7) is whether there will be substantial prejudice to a right. For this discussion, WITA and TDS will assume, *arguendo*, that the mere assertion that a right exists is sufficient to establish that right for purposes of the continued analysis of RCW

[7] See, e.g., Comments of Verizon at p.3..

34.05.240(7). What is the harm to Comcast from going through a proceeding to affirm whether the asserted right exists? It is only the cost of the proceeding itself. That cannot constitute substantial prejudice or there would be no declaratory ruling statute. An obvious outcome of the declaratory ruling process is that it may be determined that the asserted right does not exist. If Comcast does not have a right to interconnect under Section 251 for information service traffic, as it asserts it does, then there is no substantial prejudice to the declaration of the fact that the right does not exist. There is no substantial prejudice when there is no right.

18. On the other hand, if there is a right to interconnect as Comcast argues, the only harm to Comcast in the Commission following the declaratory order process is that there is some delay. However, that delay is quite short. Does a brief delay constitute substantial prejudice? Under Washington law, it appears that a short delay does not constitute substantial prejudice.

19. In the case of Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 191 P.3d 866 (2008), the Supreme Court considered whether tendering subrogation of a claim under an insurance policy after trial was completed as to other insurers obligations was not substantial prejudice. 164 Wn.2d at 426-430. The Court concluded that substantial prejudice must be shown by specific facts and mere delay, in and of itself, would not constitute substantial prejudice.

20. In another case, the Court held that bringing a challenge to an election eight months after the election and after the state agency involved stated that it would rely on the results of the election and in fact did rely on the results of the election and entered into an agreement, did constitute substantial prejudice. State Ex Rel Peninsula Neighborhood Assoc. v. Dep't of Transportation, 142 Wn.2d 328, 12 P.2d 134 (2000). This should be contrasted against this case. Comcast has made no showing that the brief delay for the declaratory order process would cause it sufficient harm to constitute substantial prejudice.

21. Comcast has nowhere shown or demonstrated in any factual way that a brief delay in entering into an agreement with TDS will cause will rise to the level of substantial prejudice. In fact, the delay can be eliminated completely by establishing a schedule for this docket that coincides with the planned end date for the arbitration between Comcast and TDS.

III. CONCLUSION

22. For the reasons set forth above, WITA and TDS respectfully request the Commission to deny Comcast's Motion to Dismiss and move this matter forward under the Petition.

Respectfully submitted this 29th day of December, 2008.

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