BEFORE THE WASHINGTON
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-083056
	)	
	)	
	)	

MOTION OF COMCAST PHONE OF WASHINGTON, LLC, FOR LEAVE TO REPLY TO WITA/TDS RESPONSE AND PROPOSED REPLY

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ATTORNEYS FOR COMCAST PHONE OF WASHINGTON, LLC

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MOTION FOR LEAVE TO REPLY AND REPLY

1. Comcast Phone of Washington, LLC ("Comcast") respectfully requests the opportunity to reply to the Response of the Washington Independent Telecommunications Association ("WITA") and Lewis River Telephone Company d/b/a TDS Telecom ("TDS") (collectively "Petitioners") to the Commission's Notice of Opportunity to File Comments on Petition for Declaratory Ruling ("Notice"). The Notice does not address the filing of a reply to the Petitioners' Response, but Comcast seeks to provide such a reply in order to correct certain mischaracterizations of fact and law. Comcast's proposed reply is provided below.

2. Comcast filed an Answer to the Petition, supported by the affidavit of Beth Choroser, in which Comcast stated that it is a necessary party whose rights might, and in fact would, be substantially prejudiced by entry of a declaratory order and that Comcast does not consent to a determination of the issues presented by the Petition through a declaratory order proceeding under RCW 34.05.240. Comcast requested that the Commission dismiss the Petition, and interested parties other than the Petitioners supported Comcast's position.

3. The Petitioners concede that Comcast is a necessary party. Response ¶ 6. Petitioners, however, contend that Comcast has no rights that would be affected – or at least that Comcast's asserted rights are questionable – and argue "that unless someone can demonstrate that it has a right, then simply asserting that there is a right is insufficient." *Id.* ¶ 15. This, of course, is a hopelessly circular argument that, if accepted, would clearly expand the Commission's jurisdiction to adjudicate declaratory ruling proceedings well beyond what the legislature intended. Moreover, whatever the merits of the Petitioners' construction of the statute may be in the abstract, the argument is inapplicable here because it relies on a false factual premise.

4. WITA and TDS state that "Comcast claims the traffic it wants to send to TDS is 'information service'" traffic. *Id.* ¶ 10. But Comcast has never made, and unequivocally denies, such a claim. Comcast is registered as a competitively classified telecommunications company, and Comcast offers telecommunications services, including Local Interconnection Service to interconnected voice over Internet protocol ("VoIP") service providers. Choroser Affidavit ¶ 3. While Comcast has taken the position that interconnected VoIP service is an information service, *Comcast does not provide such service.* To the contrary, Comcast provides the service that permits interconnected VoIP service providers to provide *their* customers with access to the public switched telephone network ("PSTN"). The Federal Communications Commission ("FCC") has unambiguously concluded that the PSTN interconnection service that Comcast provides is a telecommunications service,[1] as this Commission implicitly has, as well, by taking the action Commission Staff recommended in Docket No. UT-072024.[2]

5. Comcast, therefore, currently is a telecommunications carrier as that term is used in Section 251 of the federal Telecommunications Act of 1996 ("Act") and as such, Comcast has the existing right to interconnect with other telecommunications carriers, including TDS and other WITA members. The Commission has repeatedly recognized this right and Comcast's status by approving Section 251 interconnection agreements between Comcast and seven incumbent local exchange carriers ("ILECs") in Washington. *See* Choroser Affidavit ¶ 3. Accordingly, this is not a situation in which Comcast is merely asserting an unsubstantiated

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[1] *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*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

[2] *See* Docket No. UT-072024, Staff Open Meeting Memo at 2 (Nov. 7, 2007) (recommending that the Commission permit Comcast to discontinue its "Digital Phone" service, noting that Comcast "is registered as a CLEC in Washington and will continue to operate as a carrier, providing certain services to" its affiliate).

right, as WITA and TDS contend. Rather, this is a case in which the Petitioners seek to eliminate Comcast's existing and well-recognized interconnection rights under federal and state law. Such rights are unquestionably within the contemplation of the legislature's use of the term "rights" in RCW 34.05.240(7). Thus, there is no question that Comcast has rights that are implicated by the Petition. Accordingly, under the statute, Comcast may decline to have its rights adjudicated in a declaratory ruling proceeding.

6. The Petitioners' contention that Comcast will not suffer "substantial prejudice" is equally mistaken. The Petitioners contend that the only harm that could arise from this proceeding is "the cost of the proceeding itself" and any attendant delay in determining whether Comcast has the right it asserts. Response ¶¶ 17-18. Comcast, however, is not asserting some theoretical right for which delay and litigation costs would be the only substantial harm. Rather, Comcast claims a tangible right to interconnection for the exchange of telecommunications traffic that Comcast has been exercising in Washington for years. Comcast, its interconnected VoIP affiliate, and hundreds of thousands of customers would be directly and adversely impacted if that right were eliminated. Choroser Affidavit ¶¶ 6-7.

7. The delay associated with litigating this case is not part of Comcast's substantial prejudice claim. Thus, the two cases on which WITA and TDS rely in support of their position are simply not relevant. But even if delay was a basis for Comcast's "substantial prejudice" claim, those cases would still not advance the Petitioners' position. As an initial matter, neither case involved RCW 35.05.240(7), the statutory provision at issue here. In *Mutual of Enumclaw*, the court held that delay in tendering defense to an insurance company, standing alone, is not sufficient to demonstrate substantial prejudice as a matter of law, but "to show prejudice, the insurer must prove that an insured's breach of notice provision had an identifiable and material

detrimental effect on its ability to defend its interests."[3] Even if "substantial prejudice" in the context of tendering insurance defense were comparable to the legislature's use of that term in RCW 34.05.240(7) – which WITA and TDS have not shown – Comcast has more than adequately demonstrated "an identifiable and material detrimental effect on its ability" to provide service in Washington that would, not just might, result if the Commission were to issue the requested declaratory order, thus satisfying the standard set by the *Mutual of Enumclaw* decision. *Peninsula Neighborhood*, the other case WITA and TDS cite, involved a dispute over an agreement for construction of a second Tacoma Narrows bridge in which the court concluded that a challenge to an agency rule and an advisory election was barred by the doctrine of laches because the plaintiffs waited too long to bring suit, resulting in "substantial prejudice and disadvantage to the defendant."[4] No such circumstances are presented in this case.

8. Not only is the legal authority WITA and TDS cite inapplicable, but the Petitioners do not even mention, much less address, the Commission's prior interpretation of RCW 34.05.240(7), including the standards the Commission used to determine whether to proceed with WITA's prior petition for a declaratory order on VNXX issues. In that case, the Commission declined to enter a declaratory order because Level 3 was a necessary party and claimed that substantial prejudice would result because the requested declaratory order "would affect the exchange of traffic and intercarrier compensation arrangements between Level 3 and WITA's member companies."[5]

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[3] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 430, 191 P.3d 866 (2008).

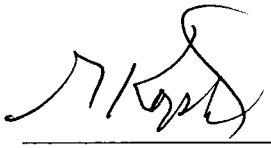
[4] *State ex rel. Peninsula Neighborhood Ass'n v. Department of Transportation*, 142 Wn.2d 328, 340, 12 P.3d 134 (2000).

[5] *In re Petition of WITA for a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-020667, Order Declining to Enter Declaratory Order ¶¶ 13 & 19 (Aug. 19, 2002).

9. Similarly here, the declaratory order WITA and TDS request would affect Comcast's ability to interconnect and exchange traffic, not just with TDS and other WITA members – five of whom have existing Commission-approved Section 251 interconnection agreements with Comcast – but with all other telecommunications carriers in Washington. Comcast interconnects and exchanges traffic with all major (and some smaller) ILECs today, as well as with numerous interexchange carriers. WITA and TDS have not refuted, and cannot plausibly dispute, Comcast's uncontested evidence that elimination of Comcast's legal rights to interconnect with all of these carriers would result in substantial prejudice to Comcast.

10. WHEREFORE, Comcast respectfully requests that the Commission permit Comcast to reply to the Petitioners' Response, accept the reply that Comcast has provided, and dismiss the Petition.

Respectfully submitted:



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