

Ruth Nettles

080731-TP

From: Ann Bassett [abassett@lawfla.com]
Sent: Friday, September 18, 2009 2:52 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 080731-TP
Attachments: 2009-09-18, 080731, Comcast's Request for Official Recognition.pdf

The person responsible for this filing is:

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Docket No. 080731-TP - Petition of Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone for Arbitration of an Interconnection Agreement with Quincy Telephone Company d/b/a TDS Telecom Pursuant to Section 252 of the Federal Communications Act of 1934, as amended, and Sections 120.57(1), 120.80(13), 364.012, 364.15, 364.16, 364.161 and 364.162, F.S., and Rule 28-106.201, F.A.C.

This is being filed on behalf of Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone

Total Number of Pages is 81

Comcast Phone's Request for Official Recognition

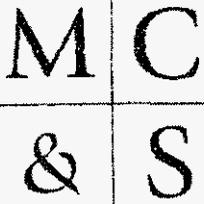
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September 18, 2009

VIA ELECTRONIC FILING

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
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Tallahassee, Florida 32399-0850

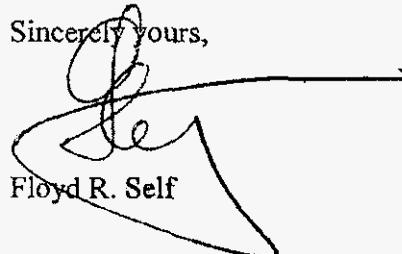
Re: Docket No. 080731-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast") is Comcast Phone's Request for Official Recognition in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

FRS/amb
Enclosures

cc: Sam Cullari, Esq.
Parties of Record

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF FLORIDA**

Petition of Comcast Phone of Florida, LLC For)
Arbitration of Rates, Terms and Conditions of) DOCKET NO. 080731
Interconnection with Quincy Telephone Company,) Filed: September 18, 2009
Inc. d/b/a TDS Telecom Pursuant to)
Communications Act of 1934, as Amended.)

**COMCAST PHONE'S NOTICE OF SUPPLEMENTAL AUTHORITY &
REQUEST FOR OFFICIAL RECOGNITION**

Comcast Phone of Florida, LLC ("Comcast") hereby submits this notice of supplemental authority and request official recognition of recent decisions from the Washington Utilities and Transportation Commission ("WUTC"),¹ the New Hampshire Public Utilities Commission ("NH PUC"),² and the Indiana Utility Regulation Commission ("IURC"),³ each of which were issued after Comcast's Request for Official Recognition was filed with the Commission on July 7, 2009. All three decisions involved arbitrations between affiliates of Comcast and TDS that arose from the same interconnection negotiations and involve substantially the same facts and legal issues as before the Commission in this proceeding. Each case was decided in Comcast's favor. Copies of each are attached.

Comcast submitted its Request for Official Recognition in this proceeding on July 7, 2009 ("Request"). Soon after, on July 20, 2009, the Washington arbitrator issued a

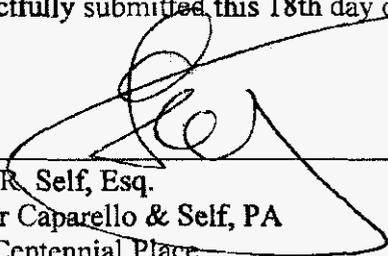
¹ *Comcast Phone of Washington, LLC*, Arbitrator's Report and Decision, Order No. 05, Docket UT-083055, slip op. at 36 (Wash. UTC, July 20, 2009).

² *Comcast Phone of New Hampshire, Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS*, Final Order, Docket No. 08-162, slip op. at 21 (NH PUC, Aug. 13, 2009).

³ *Petition of Comcast Phone of Central Indiana, LLC*, Final Order, Cause No. 43621-INT-01, slip op. at 16 (IURC, Sept. 3, 2009).

favorable decision, which has since been affirmed by the WUTC.⁴ Less than a month later, on August 13, 2009, the NH PUC issued a Final Order finding that “Comcast Digital Phone is a telecommunications carrier in the state of New Hampshire entitled to interconnection with TDS Telecom pursuant to Section 251 of the Telecommunications Act.” These decisions were cited in Comcast Phone’s Post-Hearing Brief (at 3). On September 3, 2009, the IURC issued its favorable decision. Citing to the New Hampshire Order, the IURC concluded that “Comcast Phone is a telecommunication carrier entitled to interconnection under the Act.”

Respectfully submitted, this 18th day of September, 2009.



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⁴ *Comcast Phone of Washington, LLC*, Order Approving Interconnection Agreement, Order No. 06, Docket UT-083055 (Wash. UTC Sep. 8, 2009).

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-162

COMCAST PHONE OF NEW HAMPSHIRE D/B/A COMCAST DIGITAL PHONE

Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS

Final Order

ORDER NO. 25,005

August 13, 2009

APPEARANCES: Mintz Levin Cohn Ferris Glovsky & Popeo by Paul D. Abbott, Esq. and Davis, Wright, & Tremaine by Michael C. Sloan, Esq. on behalf of Comcast Phone of New Hampshire; Devine, Millimet & Branch by Frederick J. Coolbroth, Esq. on behalf of Kearsarge Telephone Co., Wilton Telephone Co., and Merrimack County Telephone Co. d/b/a TDS Telecom; Stephen Eckberg of the New Hampshire Office of Consumer Advocate on behalf of residential ratepayers; and Robert Hunt, Esq. of the Public Utilities Commission on behalf of Staff.

I. PROCEDURAL HISTORY

On December 15, 2008, Comcast Phone of New Hampshire, LLC, d/b/a Comcast Digital Phone (Comcast Phone) filed with the New Hampshire Public Utilities Commission (Commission) a petition for arbitration of rates, terms and conditions of interconnection with Kearsarge Telephone Company (KTC), Merrimack County Telephone Company (MCT), and Wilton Telephone Company (WTC), each doing business as TDS Telecom (collectively, TDS). Comcast Phone's petition was filed pursuant to section 252(b) of the Communications Act of 1934, as amended in 1996 (Telecom Act), 47 U.S.C. § 252(b), and N.H. Code of Admin. R. Puc rules 101, 103, and 203, and was supported by concurrently-filed testimony of Beth Choroser, the Senior Director of Regulatory Compliance for Comcast Cable Communications, LLC.

On January 9, 2009, TDS filed an answer to Comcast Phone's petition (TDS Response) together with prefiled testimony of Douglas Duncan Meredith, Director - Economics and Policy, of John Staurulakis, Inc. (JSI), a telecommunications consulting firm headquartered in Greenbelt, Maryland.

The single issue presented for arbitration before the Commission was TDS's proposed inclusion of a provision in the interconnection agreement that the agreement become effective "only if: (1) the Commission has determined in an arbitration or other appropriate proceeding that COMCAST is a telecommunications carrier in the state of [New Hampshire] entitled to interconnection with TDS TELECOM pursuant to Section 251 of the Act and that the services COMCAST will be providing by way of the interconnection are telecommunications services." Comcast Phone Petition, Exh. C at 14. The disputed clause, upon which the agreement as a whole is contingent, sought a Commission determination regarding Comcast Phone's qualification as a telecommunications carrier to interconnect with an incumbent local exchange carrier (ILEC) under section 251 of the Telecom Act.

On January 28, 2009, the Commission issued an Order of Notice scheduling a prehearing conference for February 6, 2009. On February 5, 2009, the Office of Consumer Advocate (OCA) filed a letter expressing its intent to participate in this docket on behalf of residential utility consumers pursuant to RSA 363:28, II. There were no motions to intervene.

During the prehearing conference, the Commission appointed F. Anne Ross, General Counsel, to act as the hearing examiner for purposes of resolving any discovery disputes. Also discussed at the prehearing conference was the possibility of the Commission deciding this docket based on briefs filed by the parties, without a hearing. Staff filed a report of the technical session on February 18, 2009, and proposed a procedural schedule agreed upon by the parties

and Staff. The Commission approved the procedural schedule on March 11, 2009. On March 26, 2009, Comcast Phone and TDS filed a joint notice of agreement on a proposed briefing schedule and, on April 1, 2009, the Commission approved the briefing schedule to govern the remainder of the proceeding.

In order to streamline the proceeding, Comcast Phone and TDS developed agreed-upon facts, and filed their stipulated facts on April 6, 2009. Initial briefs were filed by TDS and Comcast Phone on April 20 and 21, 2009; reply briefs were filed by TDS and Comcast Phone on May 15 and 18; and sur-reply briefs were filed by TDS and Comcast Phone on May 22 and 26.

II. STIPULATED FACTS

1. Comcast Phone was certified by the Commission in Order No. 23,088, DE 98-208 (NH PUC Dec. 15, 1998) with authority to provide telecommunications services in the service territory of Northern New England Telephone Operations LLC, d/b/a FairPoint Communications - NNE ("FairPoint").¹ That authority was extended to cover the service territories of the TDS Companies in Order No. 24,938 issued by the Commission on February 6, 2009. KTC and MCT have filed a motion for rehearing with respect to that Order.

2. Comcast Phone is a 100% indirectly owned subsidiary of Comcast Corporation.

3. In April of 2008, Comcast Phone requested interconnection with the TDS Companies. In the period between April and July 2008, Comcast Phone's affiliates in five other states requested interconnection with TDS affiliates in those five states.

4. Comcast Phone affiliates currently have interconnection agreements with the TDS Companies' affiliates in Vermont (effective May 1, 2008), Tennessee (effective May 1, 2006), Indiana (effective October 1, 2006) and the Parties executed an agreement for Michigan on April 2, 2009.

5. Comcast Phone files with the Commission and posts on its web site (Comcast.com) an Exchange Rate Schedule that includes the following service offerings: Single Line Business Service, Schools and Libraries Network Service, and an Access Service Guide for interexchange carriers. (Currently effective copies of both schedules are attached to the Stipulated Facts as Exhibits 1 and 2 respectively.)

¹ Order No. 23,088 authorized MediaOne Telecommunications of New Hampshire, Inc. to provide service in the Bell Atlantic service territory. By letter dated April 17, 2001, MediaOne Telecommunications of New Hampshire, Inc. notified the Commission of a name change to AT&T Broadband Phone of New Hampshire, LLC, which in February 2003 changed its name to Comcast Phone of New Hampshire, LLC d/b/a Comcast Digital Phone.

6. Comcast Phone offers Local Interconnection Service ("LIS") in New Hampshire to interconnected Voice over Internet Protocol ("VoIP") providers. The terms and conditions of the LIS offering are available for public inspection on the Comcast Phone web site (Comcast.com). (A copy of the current LIS service guide is attached to the Stipulated Facts as Exhibit 3.)

7. Comcast Phone averages approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills ("CABS bills") each month for terminating traffic.

8. Comcast Phone's affiliate, Comcast IP Phone II, LLC ("Comcast IP"), provides retail, interconnected VoIP service as that term is defined by the Federal Communications Commission (see 47 C.F.R. § 9.3) to residential and business end user customers in New Hampshire. The service is marketed to the public under the brand names "Comcast Digital Voice" ("CDV") and Comcast Business Class Digital Voice ("BCDV"). Comcast IP is not registered as a telecommunications company with the Commission. Comcast IP is a 100% indirectly-owned subsidiary of Comcast Corporation.

9. Comcast Phone provides LIS service to Comcast IP pursuant to an agreement, which includes an amendment. A copy of that agreement, including the amendment, is attached to the Stipulated Facts as Exhibit C-4 (the "C" designation is to denote the document is to be treated as confidential pursuant to the protective order issued in this Docket).

10. Comcast IP is currently the only customer receiving LIS service from Comcast Phone in the state of New Hampshire.

11. Comcast Phone does not currently provide Schools and Libraries service to any customers in New Hampshire.

12. Comcast Phone is not currently providing Single Line Business Service to any customers in New Hampshire.

13. Comcast Phone previously offered a retail, circuit switched telephone service offering in the FairPoint service territory in New Hampshire, which was marketed to the public under the brand-name Comcast Digital Phone ("CDP"). Comcast Phone discontinued CDP on or about May 15, 2008, but retained its authority to provide other telecommunications services in the state.

14. CDV customers access the service using the "last mile" broadband facilities provided by Comcast Phone's local franchise cable television operating affiliate.

15. In New Hampshire, Comcast Phone currently has a Commission-approved interconnection agreement with FairPoint as Verizon New England Inc.'s successor in interest.

16. Pursuant to this interconnection arrangement, Comcast Phone exchanges locally-rated traffic with FairPoint, and this agreement requires the payment of reciprocal compensation for the transport and termination of locally rated traffic.

17. Comcast Phone seeks an interconnection agreement with the TDS Companies pursuant to Section 251 of the *Communications Act of 1934, as amended*. With this interconnection agreement in place, Comcast Phone would offer its LIS service to Comcast IP so that Comcast IP may offer CDV to end user customers in the TDS Companies' service territories. Specifically, the interconnection agreement would make it possible for CDV end-users to place calls to the TDS Companies' end-users within the TDS Companies' local calling areas, and *vice versa*.

18. An affiliate of Comcast Phone offers cable television service in the TDS Companies' service territory.

III. POSITIONS OF THE PARTIES

A. Comcast Phone

Comcast Phone stated that it seeks an interconnection agreement with the TDS entities pursuant to Section 251 of the Federal Communications Act and the Commission's practices and procedures. Comcast Phone stated that it has been authorized by the Commission to, and does offer and provide, telecommunications services in New Hampshire. Comcast Phone asserted that it has substantially similar agreements with FairPoint-NH and with TDS affiliates in Vermont, Tennessee, and Indiana; agreements that are, in turn, substantially similar to agreements that its affiliates have in 38 other states around the country with more than 150 other incumbent carriers for the purposes of exchanging traffic. According to Comcast Phone, it exchanges millions of minutes of telecommunications services traffic with these carriers, pays and receives access charges for the termination of toll traffic and pays and receives reciprocal compensation for local traffic where appropriate. Comcast Phone stated that it pays into universal service and 911 funds, pays regulatory surcharges, and complies with all other obligations of telecommunications carriers where applicable.

Comcast Phone asserts that TDS's suggestion that it is not a telecommunications carrier

entitled to interconnection is unsupported Comcast Phone maintained that every day that it is denied an interconnection agreement and the opportunity to serve customers is another day that an incumbent carrier maintains its monopoly status and extracts monopoly rents from captive customers. Comcast Phone claimed it is entitled to interconnection because it is a telecommunications carrier under §251(a) of the Telecom Act, and is entitled to certain rights under §251(b). It pointed out that §153 (44) of the Telecom Act defines a “telecommunications carrier” broadly to include “any” provider that furnishes “telecommunications.” It alleged that telecommunications is the transport of information as directed by the customer for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used, pursuant to 47 U.S.C. § 153(43).

Comcast Phone asserted that it has four separate telecommunications service offerings, which it makes available to the public pursuant to service schedules filed with the Commission or posted on its website. While not all members of the public are eligible to purchase its offerings, Comcast Phone observed that is not the legal standard. Comcast Phone contended that, in order to be a common carrier, a carrier need only serve indiscriminately the clientele that it is suited to serve and to whom it offers services, citing *Consolidated Comm of Fort Bend Co. v. Utility Commission of Texas*, Memorandum Opinion and Order, 497 F Supp 2d 836 at 843 (W.D. Tex 2007). Although a carrier may not make individualized decisions in particular cases about whom and whom not to serve, according to Comcast Phone, that does not mean that the particular services offered must actually be available to the entire public. Relying on *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 525 F.2d 630, 640-42 (D.C.Cir.1976) (“*NARUC I*”) Comcast Phone cited *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 533 F.2d 601, 608-10 (D.C.Cir.1976) (“*NARUC II*”) Comcast averred that a specialized carrier whose service is of

possible use to only a fraction of the population may nonetheless be a common carrier if it holds itself out to serve indifferently all potential users. Comcast Phone stated that, based on an FCC order in *Fiber Technologies Networks, LL.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 para. 20 (2007), a service provider may be deemed a common carrier even where it is not yet actually supplying service to any customers in a particular area, and can be a common carrier even if it intends to serve only a single customer. It also claimed it is a common carrier because it has chosen to be one. (Comcast Phone Brief, p.7.)

Comcast Phone maintained that it also qualifies as a LEC by virtue of its exchange access service offerings to interexchange carriers (IXCs). Stip. at 5&7.² According to Comcast Phone, it currently provides exchange access service when it receives an incoming toll call and then switches it to its LIS customers – for example, Comcast IP - for delivery to the end user. Comcast Phone purported to offer the same service to interexchange carriers seeking to route calls to its retail Schools and Libraries customers and reported it has approximately 25 exchange access customers in New Hampshire in a typical month. It cited Order No. 24,938 (Feb. 6, 2009), Docket No. DT 08-013, indicating that the Commission determined that Comcast offers exchange access or telephone exchange services and thus qualifies as a local exchange telecommunications carrier.

Comcast Phone stated that at least a dozen different authorities have found that its offerings satisfy the common carrier test and entitle it to Section 251 (a)-(b) interconnection and related rights, including the public utility boards of Michigan, Vermont, Ohio, New York, and six other states, as well as the FCC in *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

² IXCs provide long distance service within or between states. To complete long distance calls, the IXC must rely on – and pay – the local exchange carrier that provides the end user with access to the public switched telephone network.

Comcast Phone alleged that TDS's real complaint is that Comcast Phone serves interconnected Voice over Internet Protocol (VoIP) service providers through its local interconnection service. To rebut TDS, Comcast Phone cited eight state decisions affirming CLEC interconnection rights for CLECs providing wholesale service to interconnected VoIP providers. Comcast Phone claimed that such rulings are in keeping with the FCC's determination that CLECs like Comcast Phone that provide wholesale telecommunications services to interconnected VoIP service providers are entitled to interconnect and exchange traffic with ILECs when providing services, pursuant to sections 251(a) and (b) of the Telecom Act. It argued that such CLECs have these rights regardless of the classification of interconnected VoIP as either an information service or a telecommunications service.³ Comcast Phone stated that the FCC expressly ruled in *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) that it is critical to treat those who provide wholesale services to VoIP providers as telecommunications carriers, in part, because that treatment is necessary to advance the Commission's goals in promoting facilities-based competition as well as broadband deployment.

Comcast Phone urged that this Commission determine that it is a telecommunications carrier in the state of New Hampshire entitled to interconnection with TDS pursuant to Section 251 of the Telecom Act, determine that the services Comcast Phone will be providing by way of the interconnection are telecommunications services, and order that TDS enter into an interconnection agreement with Comcast Phone.

³ The question of whether fixed interconnected Voice over Internet Protocol is a telecommunications service or information service is not at issue and will not be decided in this docket.

B. TDS Companies

TDS stated that, pursuant to 47 U.S.C. § 251(a), its duty to execute an interconnection agreement with Comcast Phone is conditioned on Comcast Phone's status as a telecommunications carrier as defined by the Telecom Act. TDS argued that a review of Comcast Phone's services and an analysis of legal precedent on this subject (including cases that Comcast Phone relied on in its Petition) clearly establish that Comcast Phone is not a telecommunications carrier. TDS stated that Comcast Phone has not demonstrated that it qualifies as a telecommunications carrier under the Telecom Act. It proffered that the terms "telecommunications carrier" and "common carrier" are interchangeable; and asserted that the FCC held that in passing the Telecommunications Act of 1996 Congress intended to clarify that "telecommunications services" are "common carrier services." Furthermore, according to TDS, an appeals court upheld a statement by the FCC that the term "telecommunications carrier" means essentially the same as common carrier citing *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C.Cir.1999)). TDS asserted that there is a considerable amount of authority on the subject of "common carriers" that can be referenced to support the conclusion that Comcast Phone is not a telecommunications carrier. TDS claimed that a number of decisions have held that a key feature of common carriage is that the service provider undertakes to provide service indifferently to all potential customers, whereas a non-common carrier make[s] individualized decisions, in particular cases, whether and on what terms to deal with customers. In short, according to TDS, the widespread, general solicitation of customers from the general population, i.e., the indiscriminate offering of service on generally applicable terms, constitutes common carriage. Additionally, TDS contended, citing *NARUC II* and subsequent FCC orders, that courts

have described, and the FCC has accepted, several factors that would preclude status as a common carrier, including: 1) establishment of medium-to long-term contractual relations; 2) a relatively stable clientele, with terminations and new clients the exception rather than the rule; 3) methods of operation that may be highly individualized and comprise grounds for accepting or rejecting an applicant; and 4) an operator that would desire and expect to negotiate with and select future clients on a highly individualized basis.

TDS alleged that Comcast Phone does not have the characteristics of a telecommunications carrier based on the services it will offer: Single Line Business Service, Schools and Libraries Network Service, LIS and exchange access service. TDS claimed that since Comcast did not request language in the interconnection agreement regarding resale or switched access, that Single Line Business Service and exchange access should not be considered service offerings. TDS argued that Comcast Phone has had the authority and the means to offer Single Line Business Service and Schools and Libraries Network Service for some time in the FairPoint footprint, a much richer potential market, but the fact that it had not obtained any customers is a clear indication that these services are not true offerings, but merely ink on paper; a sham to establish Comcast Phone's bona fides as a telecommunications carrier.

TDS maintained that this leaves only local interconnection service to consider, and that Comcast Phone is not a telecommunications carrier for LIS. According to TDS, this service offering is not widely and indiscriminately marketed and Comcast Phone has one customer in New Hampshire for its LIS service. TDS also contended the potential market for LIS is one customer – Comcast IP. Thus, TDS argued that it can hardly be said that Comcast Phone actively solicits customers on a widespread, general and indiscriminate basis. Furthermore, TDS asserts, the Comcast Phone LIS offering adheres closely to the other common law factors that are

indicative of a non-common carrier. First, TDS claimed that LIS is only offered on a long term basis; purchasers of LIS must commit to an initial term of three years, with harsh penalties for breaching that term length. In addition to enforcing a lengthy term, TDS asserted that the provisions also ensure a relatively stable clientele, with terminations the exception rather than the rule. TDS stated that another aspect of this stability is that new clients are also the exception rather than the rule. It asserted that Comcast Phone has not identified any entities which made bona fide inquiries to purchase the service, nor the substance of any discussions regarding the service.

TDS argued that, as a practical matter, LIS is only available to Comcast Phone affiliates who provide unregulated voice service to customers in the State of New Hampshire. TDS pointed out that providers of traditional landline service and providers of nomadic VoIP service cannot purchase services under the LIS Guide. The only providers who can purchase services under the LIS Guide, as TDS puts it, are those whose facilities consist of an IP-based broadband network. TDS indicated that the network must employ a Cable Modem Termination System, that it must use network-based call signaling devices specified by Cable Television Laboratories, Inc., and that only traffic in time division multiplex protocol will be accepted and delivered. Consequently, TDS claimed, Comcast Phone has created a situation in which it negotiates with and selects future clients on a highly individualized basis, i.e., that the only customer who can use LIS to reach an end user's premise, other than Comcast Phone's affiliate, is a cable television provider who overbuilds the facilities of Comcast Phone's affiliated provider of IP-based voice service. TDS hypothesized that the situation would rarely, if ever, exist since the recurring and non-recurring charges for LIS are determined by Comcast Phone on an individual case basis in

response to a bona fide request. In addition, TDS theorized that an unaffiliated customer would most likely not agree to conditions that significantly favored Comcast Phone.

TDS asserted that Comcast Phone has not established that it is offering a telecommunications service. Even assuming for the sake of argument that LIS is a telecommunications service, according to TDS, Comcast Phone is providing no other telecommunications service in its own right, separate and distinct from LIS provided to its affiliates. TDS maintained that it has never disputed that Comcast Phone is offering a wholesale service. The issue, stated TDS, is whether Comcast Phone is a telecommunications carrier.

TDS maintained that there is no doctrine of self-certification for common carriers and that an operator is a common carrier instead on the basis of what it does, not what it says. TDS argued that Comcast Phone has not, therefore, met the burden of proof that it qualifies as a telecommunications carrier under the Telecom Act. It urged that the decisions in *Time Warner* and *Brighthouse* cited by Comcast Phone do not apply.

TDS denied that it has waived its rights to claim or assert that Comcast Phone does not qualify as a telecommunications carrier under the Act and denied that it has acknowledged Comcast Phone to be a telecommunications carrier under the Act. According to TDS, from the beginning of negotiations with Comcast Phone, it has been understood that neither party waived any rights on account of having negotiated unrelated interconnection agreements. TDS asserted that Comcast Phone has been on notice for some time that its status as a telecommunications carrier was an issue. TDS stated that it had no choice but to accept Comcast Phone's initial representations on faith, given that FCC rules require ILECs to negotiate the terms of an interconnection agreement before a prospective carrier has even obtained state certification. TDS urged the Commission to carefully examine the actual business models of putative CLECs,

warning of the potential for corporations to establish CLEC affiliates solely to reduce their own internal telephone costs as “profoundly disturbing.”

TDS concluded that it is well within its rights under the Telecom Act to insist that only those who have assumed the obligations of legitimate telecommunications carriers can obtain rights under Section 251. It contended that nothing bars TDS from questioning Comcast Phone’s status as a telecommunications carrier or whether Comcast Phone provides telecommunications services as defined under the Telecom Act.

IV. COMMISSION ANALYSIS

A. Burden of Proof

Comcast Phone is the petitioner seeking relief in this docket. Pursuant to Puc 203.25, Comcast bears the burden of proving the truth of any fact or proposition by a preponderance of the evidence. In addition, we may take administrative notice of certain facts pursuant to Puc 203.27. Finally, in this case specific facts have been agreed upon, and certain exhibits admitted as evidence, by agreement of the parties.

B. Statutory Standards for Interconnection with Telecommunications Carriers

The Telecom Act established a framework of rights and obligations for telecommunications carriers in order to promote competition for local exchange service. Under the Telecom Act, telecommunications carriers, including both ILECs (TDS) and CLECs (Comcast Phone) have the obligation to interconnect either directly or indirectly with the facilities and equipment of all other carriers. *See* 47 U.S.C. § 251 (a). Local exchange carriers, including ILECs and CLECs also have duties to allow resale of services, to port telephone numbers to other carriers, to provide dialing parity, to afford access to rights of ways and to establish reciprocal compensation arrangements for the transport and termination of

telecommunications. *See* 47 U.S.C. § 251 (b). ILECs generally have additional duties, including among others, providing competitors with access to certain unbundled network elements (UNEs) and allowing competitors to collocate within ILEC facilities for the purpose of interconnection. *See* 47 U.S.C. § 251 (c). Certain rural ILECs, like the TDS Companies, are exempt from 251 (c) obligations, including UNEs and collocation, until their exemption from these requirements is terminated. *See* 47 U.S.C. § 251 (f).

In addition to allowing the development of competition for local exchange services, the Telecom Act prohibits states from taking any actions that create barriers to competitive entry into the telecommunications markets. “No State or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253 (a).

C. Interconnection with Telecommunication Carriers

Because each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, Comcast Phone’s right to interconnect with the facilities and equipment of TDS is contingent upon Comcast Phone’s status as a telecommunications carrier.⁴ Although Comcast Phone argued that TDS had waived its right to challenge Comcast Phone’s status as a telecommunications carrier, we find no support for this argument in the record and we decline to find any such waiver. We therefore proceed with our analysis as to whether Comcast Phone is a telecommunications carrier.

The term “telecommunications carrier” is defined in 47 U.S.C. § 153 (44) as “any provider of telecommunications services” and further states that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in

⁴ There is no dispute that TDS is a telecommunications carrier.

providing telecommunications services.” The term “telecommunications service” is defined in Section 153 (46) as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

The Federal Communications Commission (FCC) has interpreted the term “telecommunications service” to mean telecommunications provided on a common carrier basis, and its interpretation has been explicitly accepted by both the District of Columbia Circuit Court of Appeals, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C.Cir.1999), and the United States District Court, District of New Hampshire, *The Destek Group, Inc., d/b/a The Destek Networking Group v. Verizon New England, Inc., d/b/a Verizon New Hampshire, et al* (2001 WL 873067 (D.N.H.)).

To determine whether Comcast Phone is a telecommunications carrier, we must therefore determine whether it is offering telecommunications on a common carrier basis for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.

D. Common Carrier Status

The term “common carrier” is defined in 47 U.S.C. § 153 (10), in relevant part, as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio.” The federal courts have established a two-prong test to determine whether a particular company is a common carrier and the Federal Communications Commission has accepted this test. See *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 533 F.2d 601, 608-10 (D.C.Cir.1976) (“*NARUC I*”); *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 525 F.2d 630, 640-42 (D.C.Cir.1976) (“*NARUC I*”); *In re Cable & Wireless, PLC*, FCC 97-204, 1997 WL 339269, at ¶¶ 13-17 (applying the test set forth in *NARUC I*); see also *FCC v. Midwest Video*

Corp., 440 U.S. 689, 701, 701 n. 10 (1979) (citing *NARUC I*). The first prong requires an evaluation of whether the company holds itself out indifferently to the public. *NARUC I*, at 641. The second prong requires a determination as to whether the company is legally compelled to do so. *Id.* at 642. If either prong of the test proves true, the company is a common carrier.

1. Offering Services Indifferently to the Public

The first prong of the test in determining common carrier status was established in the *NARUC II* decision. The “primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently” *NARUC II.*, at 608 (internal quotations omitted). “[A] specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.” *Id.*⁵ The primary issue in finding common carriage is whether the carrier offers “indiscriminate services to whatever public its service may legally and practically be of use.” *United States Telecom Ass’n*, 295 F.3d at 1334 (quoting *NARUC I*, at 642).

Factors to consider in determining whether a carrier is offering services indiscriminately to its public include:

- a. Whether the services necessarily require medium to long-term contractual relations;
- b. Whether the carrier’s clientele is likely to remain relatively stable;
- c. Whether terminations and new clients are the exception rather than the rule; and
- d. Whether the carrier is likely to negotiate with and select customers on a highly individualized basis. *See NARUC I*, 525 F.2d at 643.

Additionally, “[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.” *NARUC I*, at 644.

⁵ In the context of telecommunications, a further prerequisite to common carrier status is “that the system be such that customers transmit intelligence of their own choosing.” *NARUC II.*, at 609 (internal quotations omitted) There is no dispute that this prerequisite has been satisfied; the services being offered by Comcast Phone are such that customers would transmit intelligence of their own choosing.

Comcast Phone offers four services to the public including exchange access service, Schools and Libraries Network Service, Business Local Service and Local Interconnection Service (LIS). Upon review of the stipulated facts, we find that Comcast Phone is offering Exchange Access Services, Single Line Business Service and the Schools and Libraries Network Service services indiscriminately to the public. Because we find that Comcast Phone is entitled to interconnection based on these services alone, we do not reach the issue of whether Comcast Phone is offering Local Interconnection Service on a common carrier basis.

Comcast Phone averages approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills each month for terminating traffic. Pursuant to 47 U.S.C. § 153(16), the term "exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services." Comcast Phone files with the Commission and posts on its website an Exchange Rate Schedule that includes an Access Service Guide for interexchange carriers. Stip. at Exh. 2. Nothing in the Exchange Rate Schedule or the Access Service Guide requires a medium-to-long-term contractual relationship with prospective customers, nor does any provision therein suggest that clientele will remain stable, that terminations and new clients are the exception rather than the rule, or that selection of customers is highly individualized. Indeed, IXCs purchase exchange access services from a particular LEC on a telephone call by telephone call basis, dictated by the changing patterns of their own customers.

One of the services Comcast Phone purportedly seeks to sell through interconnection with TDS's facilities would provide schools and libraries that are located in the exchanges now served by TDS's Public Switched Telephone Network with an option that does not now exist. Presently, TDS is the only wireline telecommunications carrier providing such service in its

territory. Upon interconnection with TDS, Comcast Phone would be able to provide these prospective school and library customers with a local loop connection from the customer to Comcast Phone's network facilities and with a connection from Comcast Phone's network facilities to TDS's network facilities. Any outgoing transmissions from schools and libraries that subscribed to Comcast Phone's service could then reach end users through the same route.

TDS has not identified any evidence that Comcast Phone will offer such service only to certain schools or libraries within each exchange, nor has any reason for such a limitation been made apparent. The eligible user public for this service includes all of the schools and libraries in the TDS territory. In other words, the nature of the Schools and Libraries Network Service that Comcast Phone plans to offer provides a reason to expect an indifferent holding out to the eligible user public; the public to which its services may be legally and practically of use. The same analysis holds true for the Business Line Service offering.

TDS argues that, because there is no reference in the draft interconnection agreement it negotiated with Comcast Phone to resale service or to exchange access service, these services are not subject to consideration in this matter. We reject TDS's argument. There is no requirement that such an interconnection agreement refer to particular services to be offered by Comcast, in order for such services to be evaluated to determine common carrier status. Furthermore, Comcast could purchase retail service from TDS' existing retail tariff for resale. Likewise, TDS has a tariff in place for exchange access service, alleviating the need to include it in an interconnection agreement.

TDS also asserts that Comcast Phone has had the authority and the means to offer the same services for some time in another ILEC's territory in New Hampshire and has not done so. TDS argues that this is a clear indication that these services are not true offerings and are a sham

to establish Comcast Phone's bona fides as a telecommunications carrier. On the other hand, TDS asserts that even if Comcast Phone were offering services on a true common carrier basis in other parts of New Hampshire, it would have no bearing on this arbitration since a carrier can be a common carrier with respect to some of its activities and not with respect to others. Because we have determined that Comcast Phone's Exchange Access, Schools and Libraries and Single Line Business services are or would be offered on a common carrier basis in TDS territory, we need not consider what Comcast Phone has done in other territories with regard to these services.⁶

2. Legal Compulsion to Offer Services Indifferently to the Public

The alternative prong of the test in determining common carrier status established in *NARUC II*, is whether the carrier is legally compelled to offer services indifferently to the public. Comcast Phone is not only offering to provide telecommunications services indifferently to the public in TDS's territory, it is legally compelled to offer those services indiscriminately by virtue of its status as an authorized New Hampshire CLEC. Puc 430.02(a) requires all CLECs to comply with the provisions of Puc 430 through 449. Pursuant to Puc 402.11 a CLEC is a "telecommunications carrier...authorized by the commission....to provide telecommunications service *to the public* in a particular area which an ILEC was authorized to serve...." (emphasis added) Given the services that Comcast Phone holds out as those it intends to offer in TDS's territory, it will be subject to this mandate for every service it offers. In other words, Comcast Phone has no choice but to offer its services indiscriminately to similarly situated customers in

⁶ We note, however, that TDS stipulated that Comcast Phone averages approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills each month for terminating traffic. Given the reference to carrier access bills, we infer that those customers are wholesale customers. Whether a telecommunications service is offered on a retail or wholesale basis is not determinative as to whether it is offered on a common carrier basis. *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007)

TDS's territory as long as it seeks to retain the authority to offer local exchange services therein. *See* Puc 431.01(a).

With regard to TDS's argument that a company should not be deemed a common carrier merely by virtue of being an authorized CLEC due to the potential for "profoundly disturbing" consequences, we are aware of no evidence that companies are forming affiliates to apply for CLEC status for questionable purposes in New Hampshire under the current application process. We will continue to examine each CLEC application and request for arbitration of interconnection according to our rules and applicable law.

TDS also argued, in essence, that Comcast Phone has no intention of offering any services to customers in TDS territory except to the extent necessary to allow Comcast Phone to permit its affiliate, Comcast IP, to provide Voice over Internet Protocol service. TDS deems this situation to be unfair because, at this time, such services are not subject to the regulations that govern ILECs. TDS, however, cites no legal authority explicitly prohibiting such an arrangement, and we find none. So long as Comcast Phone continues to be a telecommunications carrier, offering telecommunications on a common carrier basis, it has a right to interconnection with TDS, pursuant to 47 U.S.C. § 251(a), and may, therefore, permit its affiliate to provide Voice over Internet Protocol services to customers in TDS's territory. In fact, the introduction of such potentially competitive services in TDS territory is consistent with the overarching policy of reducing barriers to competition in ILEC territories. *See Sprint Communications Company, L.P. v. Nebraska Public Service Commission, et al*, 2007 WL 2682181 (D.Neb.)

Nothing in this Order should be construed, however, to suggest that Comcast Phone's status as a common carrier is immune to future challenge. Comcast Phone's actions in TDS's

service territory over time may demonstrate that, although Comcast Phone initially offered certain services indiscriminately to the public, it ceased to do so subsequent to interconnection. In other words, the offering and provisioning of services post-interconnection, or absence thereof, could affect Comcast Phone's status as a common carrier and thus its right to interconnection in the future.

Based upon the foregoing, it is hereby

ORDERED, that Comcast Digital Phone is a telecommunications carrier in the state of New Hampshire entitled to interconnection with TDS Telecom pursuant to Section 251 of the Telecommunications Act; and it is

FURTHER ORDERED, that the interconnection agreement as agreed to by TDS Telecom and Comcast Digital Phone is approved.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of August, 2009.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner

Attested by:


Debra A. Howland
Executive Director & Secretary

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for)	DOCKET UT-083055
Arbitration of an Interconnection)	
Agreement Between)	
)	ORDER 05
COMCAST PHONE OF)	
WASHINGTON, LLC)	
)	ARBITRATOR'S REPORT AND
and)	DECISION
)	
LEWIS RIVER TELEPHONE)	
COMPANY, D/B/A TDS TELECOM)	
)	
Pursuant to 47 U.S.C. Section 252(b))	
)	
.....)	

1 *Synopsis. In this Order, the Arbitrator recommends granting Comcast Phone's motion for summary determination and denying TDS' motion, finding as a matter of law that Comcast Phone is a telecommunications carrier under the Act entitled to negotiate and arbitrate an interconnection agreement with TDS. The Arbitrator recommends the Commission condition approval of an interconnection agreement between the parties on Comcast Phone making publicly available its agreement with Comcast IP. The Arbitrator further denies TDS' motion for summary determination, finding that Comcast Phone will be providing telecommunications service, not information service, traffic through its interconnection with TDS.*

I. BACKGROUND

A. Nature of Proceeding

2 Docket UT-083055 involves a petition by Comcast Phone of Washington, LLC (Comcast Phone) for arbitration of an interconnection agreement filed with Lewis River Telephone Company, d/b/a TDS Telecom (TDS) pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996.¹

¹ 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996).

B. Appearances

- 3 Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, and Michael C. Sloan, Davis Wright Tremaine LLP, Washington, D.C., represents Comcast Phone. Richard Finnigan, Attorney, Olympia, Washington, represents TDS.

C. Procedural History

- 4 Comcast Phone filed a petition with the Washington Utilities and Transportation Commission (Commission) for arbitration of an interconnection agreement with TDS on November 3, 2008. On November 17, 2008, the Commission entered Order 01, appointing an arbitrator and scheduling a prehearing conference.
- 5 The Commission held a prehearing conference in this matter on December 1, 2008, in Olympia, Washington, before Arbitrator and Administrative Law Judge Ann E. Rendahl. On December 3, 2008, Judge Rendahl entered Order 02, a prehearing conference order establishing a procedural schedule, and Order 03, a protective order.
- 6 On December 10, 2008, the Commission held a discovery conference to resolve discovery disputes between the parties. Judge Rendahl resolved the discovery disputes during the conference, making an oral decision on the record. Judge Rendahl requested information from both parties during the conference in the form of bench requests.
- 7 On December 15, 2008, Comcast Phone filed responses to Bench Request Nos. 1 through 4. On December 16, 2008, TDS filed a response to Bench Request No. 2.
- 8 On December 26, 2008, the Arbitrator entered Order 04, granting the parties' joint motion to modify the procedural schedule to allow the parties to continue their discovery efforts. On January 7 and February 3, 2009, the Arbitrator further modified the procedural schedule at the parties' request.

- 9 On April 2, 2009, the parties filed a set of joint Stipulated Facts, together with five exhibits.² On May 5, 2009, the parties filed cross motions for summary determination, and on May 28, 2009, filed responses to the motions.
- 10 On June 8, 2009, counsel for Comcast Phone filed a letter with the Commission to correct a portion of TDS' response. On June 10, 2009, counsel for TDS responded, requesting that Comcast Phone's letter be stricken.

D. Resolution of Disputes

- 11 This decision is limited to the disputed issues presented for arbitration and is subject to Commission approval. *47 U.S.C. §§ 252(e), 252(b)(4)*. Unlike other arbitrations, in which the parties primarily dispute contract language, the primary issues in this proceeding are questions of law, specifically:
- Whether Comcast Phone is a telecommunications carrier entitled to interconnection, and related rights, with TDS under Section 251 of the Telecommunications Act of 1996 (Act); and
 - Whether Comcast Phone is entitled to interconnection with TDS under Section 251 if it delivers to TDS only information service.

This decision also addresses TDS' request to strike Comcast's letter.

- 12 This decision is issued in compliance with the procedural requirements of the Act, and resolves all issues that the parties submitted to the Commission for arbitration. The parties are directed to resolve all other existing issues consistent with this decision. In Section II. F.1., this Order requires parties to file a complete interconnection agreement with the Commission by **August 19, 2009**. At the conclusion of this Report, the Arbitrator addresses procedures for review to be

² The parties attached the following exhibits to the Stipulated Facts: Exhibit 1 – Washington Universal Service Fund Administration Agreement between Comcast Phone and the Washington Exchange Carrier Association; Exhibit 2 – Comcast Phone's service guide for its Schools and Libraries Network Service; Exhibit 3 – Comcast Phone's service guide for exchange Access Service to interexchange carriers; Exhibit 4 – Local Interconnection Service to qualifying interconnected Voice over Internet Protocol service providers; and Exhibit 5 – Agreement and Amendment between Comcast Phone and Comcast IP Phone II, LLC.

followed prior to entry of a Commission order approving an interconnection agreement between the parties.

II. MEMORANDUM

A. The Commission's Duty under the Telecommunications Act of 1996

- 13 Two central goals of the Act are the nondiscriminatory treatment of carriers and the promotion of competition. The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between incumbent local exchange companies (ILECs) and competitive local exchange companies (CLECs), which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act.³ Each interconnection agreement must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part.⁴ The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251 and 252 and RCW 80.36.610.

B. Standards for Arbitration

- 14 The Act provides that in arbitrating interconnection agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Federal Communication Commission (FCC) under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementing the terms and conditions by the parties to the agreement.⁵

³ 47 U.S.C. § 251(c)(1).

⁴ 47 U.S.C. § 252(d)

⁵ 47 U.S.C. § 252(e).

C. Background and Stipulated Facts

- 15 Lewis River Telephone Company, d/b/a TDS Telecom (TDS) is an ILEC operating in Washington under Section 251(h) of the Act, and providing local exchange telecommunications service to the public for compensation.⁶
- 16 Comcast Phone is registered with the Commission as a competitively classified telecommunications company.⁷ Comcast Phone is a subsidiary of Comcast Corporation, a multi-system cable broadband operator, which has deployed broadband networks in Washington and around the United States.⁸ Comcast Phone asserts that it offers competitive telecommunications services to retail and wholesale customers, while other Comcast affiliates provide high-speed Internet access services, Voice over Internet Protocol (VoIP) services, and video programming using common network plant.⁹
- 17 An affiliate of Comcast Phone offers cable television service in the TDS area. That affiliate is the only cable service provider in the TDS service area.¹⁰
- 18 Between April and July 2008, Comcast affiliates in five other states requested interconnection with nine other affiliates of TDS in those five states.¹¹ In May of 2008, Comcast Phone requested interconnection with TDS in Washington.
- 19 In Washington, Comcast Phone currently has Commission-approved interconnection agreements with the following ILECs: Qwest Corporation (Qwest) (approved February 6, 2004); CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., and CenturyTel of Cowiche, Inc. (collectively "CenturyTel") (incorporated into and approved in a single agreement on October 12, 2005); United Telephone Company of the Northwest d/b/a Embarq (Embarq) (approved on February 25, 2006); Verizon

⁶ See Petition for Arbitration, ¶ 7; *see also* Answer to Petition, ¶ 10.

⁷ Stipulated Facts, ¶¶ 1, 5.

⁸ Comcast Phone Motion, ¶ 3.

⁹ *Id.*

¹⁰ Stipulated Facts, ¶ 16.

¹¹ *Id.*, ¶ 3.

Northwest Inc. (Verizon) (approved on January 8, 2003); and YCOM networks, Inc., d/b/a FairPoint Communications (YCOM) (approved on April 22, 2008). Comcast Phone exchanges locally-rated traffic with Qwest, CenturyTel, Embarq, Verizon and YCOM under these agreements.¹²

- 20 Comcast Phone affiliates currently have interconnection agreements with TDS affiliates in Vermont (effective May 1, 2008), Tennessee (effective May 1, 2006), and Indiana (Effective October 1, 2006).¹³
- 21 Until recently, Comcast Phone offered a retail, circuit-switched telephone service offering in Washington, marketed under the brand-name Comcast Digital Phone (CDP). Comcast Phone notified the Commission and the FCC that it would no longer provide this service in Washington state after November 28, 2009, but retained its authority to provide other telecommunications services in the state.¹⁴
- 22 Comcast Phone currently offers the following services in Washington: (1) Schools and Libraries Network Service (Schools and Libraries); (2) exchange Access Service to interexchange carriers; and (3) Local Interconnection Service (LIS) to qualified interconnected Voice over Internet Protocol (VoIP) service providers.¹⁵ Comcast Phone maintains service guides for these services on its web site, rather than filing tariffs or price lists for the services.¹⁶
- 23 Comcast Phone does not currently provide Schools and Libraries service to any customers in Washington.
- 24 Comcast Phone has executed a Washington Universal Service Fund (USF) Administration Agreement with the Washington Exchange Carrier Association (WECA), filed with the Commission on June 9, 2008. Comcast Phone has remitted

¹² *Id.*, ¶¶ 13-14.

¹³ *Id.*, ¶ 4.

¹⁴ *See Id.*, ¶ 11; Comcast Phone Response to Bench Request No. 4.

¹⁵ Stipulated Facts, ¶ 5

¹⁶ *Id.*

USF surcharges to WECA under the agreement for terminating intrastate switched access services.¹⁷

- 25 Comcast sends carrier access bills to an average of 12 to 18 carrier customers each month for terminating interexchange traffic.
- 26 Comcast Phone's affiliate, Comcast IP Phone II, LLC (Comcast IP) provides retail, interconnected VoIP service, as that term is defined by the FCC in 47 C.F.R. § 9.3, to end users in Washington. This service is marketed to the public under the brand name Comcast Digital Voice (CDV). Comcast IP is not registered as a telecommunications company with the Commission.¹⁸
- 27 CDV customers access the service using the "last mile" facilities provided by Comcast Phone's cable television operative affiliate.¹⁹
- 28 Comcast Phone provides LIS service to Comcast IP under an agreement, which includes an amendment. The agreement has been filed with the Commission as confidential subject to the protective order in this proceeding.²⁰
- 29 Comcast IP is currently the only customer receiving LIS service from Comcast Phone in Washington.²¹
- 30 If the Commission approves an interconnection agreement between Comcast Phone and TDS, Comcast Phone would offer its LIS service to Comcast IP so that Comcast IP may offer CDV to end user customers in the TDS serving area, allowing CDV end users to place calls to TDS end users within TDS local calling areas, and *vice versa*.²²

¹⁷ *Id.*, ¶ 2.

¹⁸ *Id.*, ¶ 7.

¹⁹ *Id.*, ¶ 12.

²⁰ *Id.*, ¶ 8.

²¹ *Id.*, ¶ 9.

²² *Id.*, ¶ 15.

D. Issues, Discussion, and Decisions

1. Standard for Summary Determination

- 31 The Commission's rules allow parties to move for summary determination of one or more issues in a case if the pleadings, together with any properly admissible evidentiary support, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.²³ Further, the rule allows the Commission to consider the applicable standards from Civil Rule 56.
- 32 The parties have identified all of the relevant material facts in this arbitration through the Stipulated Facts and other statements of fact in the record. The parties have filed motions for summary determination to resolve the legal issues at the heart of their dispute. As no party has raised any genuine issue with regard to any material fact, it is proper to resolve the disputed issues as a matter of law, based on the agreed facts.

2. Comcast Phone Correction Letter

- 33 After both parties filed responses to motions for summary determination, Comcast Phone filed a letter seeking to correct a portion of TDS' reply brief, asserting its intention to "foster compliance with [Rules of Professional Conduct] RPC 3.3 and ensure the record in the proceeding is accurate."²⁴ In its letter, Comcast Phone asserts that TDS mischaracterized an error in a decision by a Michigan Public Service Commission arbitrator by stating that it "underscores the confusion in the Michigan Decision."²⁵ Comcast Phone argues that the Michigan Public Service Commission recognized the error and corrected it in its final order, stating that the arbitrator's statement is not necessary to and forms no basis of the Michigan Commission's decision.²⁶
- 34 TDS objects to Comcast Phone's letter and requests the Commission strike the letter. TDS argues that the discussion in TDS' brief was intended to demonstrate the

²³ WAC 480-07-380(2).

²⁴ June 8, 2008, letter to David W. Danner from Gregory J. Kopta, Davis Wright Tremaine.

²⁵ *Id.*, quoting TDS Reply Brief at 5-6, ¶ 13.

²⁶ *Id.*

Michigan arbitrator's confusion over a letter from the FCC to Comcast, and the incorrect reference to the letter as a private letter ruling.²⁷ TDS argues in turn that portions of Comcast Phone's reply brief could be seen as mischaracterizing the law, also in violation of RPC 3.3.²⁸ TDS recommends the parties' briefs speak for themselves.

35 ***Discussion and Decision.*** Both Comcast Phone's June 8 letter and TDS' June 10 response are stricken and are not considered in the Arbitrator's decision of the issues in this matter.

36 RPC 3.3 requires candor towards the tribunal, specifically that lawyers advise the tribunal of any false statements of material fact or law.²⁹ In this case, both parties address the Michigan arbitrator's decision and the Michigan Commission's final order in their briefs, and express argument about how the decisions apply to the facts and law in this arbitration. A review of both parties' briefs demonstrates zealous representation by counsel for both parties, but no apparent violation of RPC 3.3. The issues were fully briefed by both parties and nothing in the parties' letters further aids the Arbitrator in resolving the issues in this proceeding.

37 Further, Comcast Phone's letter can be seen as an unauthorized reply to TDS' response to Comcast's motion for summary determination. The Arbitrator did not establish an opportunity for filing replies in this proceeding, and parties may not file replies without Commission authorization.³⁰ Comcast did not seek permission to file a reply to TDS's response, as required by rule.

²⁷ June 10, 2009, letter to David W. Danner from Richard A. Finnigan, Law Office of Richard A. Finnigan, at 2.

²⁸ *Id.*

²⁹ RPC 3.3 requires, in relevant part, that "(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

or

(4) offer evidence that the lawyer knows to be false.

³⁰ WAC 480-07-370(1)(d).

38 Comcast Phone's June 8 letter and TDS' June 10 letter in reply are stricken.

3. Comcast Phone's Status as a Telecommunications Carrier

39 The primary issue for decision is whether Comcast Phone is a "telecommunications carrier" under the Act entitled to interconnect with TDS.

(a) Statutes and Case Law Addressing Common Carrier Status

40 Section 251(a)(1) of the Act provides that "Each telecommunications carrier has the duty ... to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Section 251(b) imposes several mutual and reciprocal obligations on all local exchange carriers, including the duty to provide number portability, dialing parity and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."³¹

41 Telecommunications carriers are defined under the Act as "any provider of telecommunications services."³² The definition further provides that "A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services ..."³³

42 Telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."³⁴

43 Finally, telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."³⁵

³¹ 47 U.S.C. §§ 251(b)(2), (3) and (5).

³² 47 U.S.C. § 153(44).

³³ *Id.*

³⁴ 47 U.S.C. § 153(46).

³⁵ 47 U.S.C. § 153(43).

- 44 The parties concur that whether a provider is providing telecommunications services under the Act, i.e., offering services directly to the public, is based on the definition of a common carrier in case law.³⁶ The parties differ, however, on whether Comcast Phone meets the requirements for common carrier status, and hence status as a telecommunications carrier. The parties rely on the same cases, federal and state, as support for their respective positions. The cases are briefly discussed below.
- 45 The D.C. Circuit Court of Appeals has established the test for common carriage in a number of cases. A pair of cases, referred to as *NARUC I*³⁷ and *NARUC II*,³⁸ found that the key factor in distinguishing common carriage from private carriage is “the quasi-public character of the activity involved,” specifically “that the carrier ‘undertakes to carry for all people indifferently’.”³⁹ The second factor in determining common carrier status is whether the carrier allows customers to “transmit intelligence of their own design and choosing.”⁴⁰ More recently, the court found that the definition of “telecommunications services” in the Act recognizes the distinction between common and private carriers set forth in *NARUC I* and *II*.⁴¹
- 46 The court elaborated on what it means to hold oneself out to provide service:

This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status.⁴²

³⁶ Comcast Phone Motion, ¶ 10, citing *Virgin Islands Telephone v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); TDS Motion, ¶ 11.

³⁷ *National Association of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) [*NARUC I*].

³⁸ *National Association of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) [*NARUC II*].

³⁹ *NARUC I* at 641; *NARUC II* at 608.

⁴⁰ *NARUC II* at 609, quoting *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966); *Frontier Broadcasting Co. v. FCC*, 24 F.C.C. 251, 254 (1958).

⁴¹ *Virgin Islands Telephone*, 198 F.3d at 926.

⁴² *NARUC II* at 608; see also *NARUC I* at 641.

The court set limits on this test, cautioning that “a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”⁴³

- 47 Finally, the court found that “since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”⁴⁴ The court has found service contracts for special services, such a dark fiber, established on an individual case basis (ICB), to be “individually tailored arrangements ... that were not like the indiscriminate offering of service on generally applicable terms that is the trademark of common carrier service.”⁴⁵ Particularly, the court found:

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case “whether and on what terms to serve” and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.⁴⁶

- 48 The FCC has also weighed in on the issue of common carrier status. The FCC has determined that “a carrier that offers to provide telecommunications on a common carrier basis, regardless of whether the carrier has actually supplied such service to a customer in the past” would qualify as a “telecommunications carrier” under the Act.⁴⁷ In the same case, the FCC found that service to one customer where the carrier intends to serve other future customers does not disqualify an entity from serving as a telecommunications carrier.⁴⁸

⁴³ *NARUC I* at 641; *NARUC II* at 608-9.

⁴⁴ *NARUC II* at 608.

⁴⁵ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

⁴⁶ *Southwestern Bell* at 1481, citing *NARUC I* at 608-9 and *NARUC II* at 643.

⁴⁷ *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum and Order, 22 FCC Rcd 3392, ¶ 20 (2007).

⁴⁸ *Id.*, ¶ 21.

49 In determining whether wholesale telecommunications providers, including those that provide wholesale service to VoIP providers, may interconnect with ILECs, the FCC has determined that the definition of “telecommunications service” in the Act does not distinguish between whether the services are provided at retail or wholesale, but upon whether the services are offered for a fee “directly to the public, or to such classes of users as to be effectively available directly to the public,” i.e., whether the services are offered by a common carrier.⁴⁹ The FCC clarified its decision, stating that:

[T]he rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.⁵⁰

Recognizing that states have primary jurisdiction over local exchange and intrastate long distance services, the FCC expressly left determination about whether a carrier offers a telecommunications service to a state commission’s assessment of the facts before it in an arbitration or other proceeding.⁵¹

50 In interpreting provisions of the Act governing customer proprietary information, the FCC states that whether a carrier is a common carrier is determined on a case-by-case basis, dependent on the specific facts.⁵² In *Bright House*, the FCC gave significant weight to the fact that a carrier has self-certified as a common carrier, i.e., that it does and will operate as a common carrier and will serve all similarly situated customers equally.⁵³ The FCC considered obtaining authority from the state in which it operates and entering into publicly-available interconnection agreements, filed with and approved by the relevant state commission as “prima facie” evidence of the status of a

⁴⁹ *Petition of Time Warner Cable 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, ¶ 12 (2007) [*Time Warner*].

⁵⁰ *Time Warner*, ¶ 14.

⁵¹ *Id.*

⁵² *In the Matter of Bright House Networks, LLC v. Verizon California, Inc.*, 23 FCC Rcd 10704 ¶ 38 (2008) [*Bright House*], *aff’d*, *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

⁵³ *Bright House*, ¶ 39.

carrier as a telecommunications carrier.⁵⁴ Further, the FCC found that whether a carrier was serving only its affiliate or lacked a tariff or website posting of the service did not disqualify the carrier from being a telecommunications carrier, as there was no “evidence that the carrier was unwilling to provide telecommunications services to unaffiliated entities on a nondiscriminatory basis.”⁵⁵ The FCC limited its decision to the specific facts in the case, and stated that a decision that a carrier is a “telecommunications carrier” under Section 222(b) of the Act may not apply or be relevant to a carrier’s status under other provisions of the Act.⁵⁶

- 51 The state commission decisions that the parties discuss and on which they rely address facts and questions of law highly similar to the ones presented in this arbitration. Decisions from the Michigan Public Service Commission and Vermont Public Service Board address the exact question presented in this case, in arbitrations between Comcast and TDS affiliates in those states. Decisions from Iowa and Washington reflect similar questions in arbitrations involving Sprint Communications, LP (Sprint) and ILECs operating in those states.
- 52 As in this case, Comcast Phone of Michigan, LLC, and Comcast Phone of Vermont, LLC, filed petitions for arbitration of interconnection agreements with TDS affiliates in Michigan and Vermont, respectively. In both cases, the state commissions found the Comcast companies to be “telecommunications companies” under the Act, and entitled to interconnection with TDS.
- 53 The Michigan arbitrator determined that Comcast stood ready to provide exchange and exchange access service under its LIS tariff on a wholesale basis to affiliated and unaffiliated VoIP service providers.⁵⁷ The arbitrator noted that TDS read too much

⁵⁴ *Id.*

⁵⁵ *Id.*, ¶ 40.

⁵⁶ *Id.*, ¶ 41.

⁵⁷ *In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms, and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone, Case No. U-15725, In the Matter of the Petition of Comcast Phone of Michigan, LLC, for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with TDS Telecommunications Corporation of Michigan, Case No. U-15730, Notice of Decision of*

into Comcast's decision to cease providing regulated local exchange and toll service in Michigan in September 2007.⁵⁸ The Michigan arbitrator found that the *Time Warner* decision supports ruling in favor of Comcast as the decision specifically addresses and supports any CLEC "offering to provide interconnected VoIP service providers with wholesale transmission of information across their respective networks are entitled to interconnect and exchange traffic with ILECs" under the Act.⁵⁹ Moreover, the Michigan arbitrator also found that a decision that Comcast has the right to interconnect with TDS is consistent with two of the expressed goals of the Act – promoting facilities-based competition and speeding the deployment of broadband service.⁶⁰

54 In a footnote, the Michigan arbitrator interprets a letter from the FCC as a private letter ruling that explicitly supports finding that Comcast's VoIP service is a telecommunications service.⁶¹ Based on this understanding, the arbitrator rejected TDS' argument that Comcast is providing information services traffic, not telecommunications, and thereby has no right to interconnection.

55 The Michigan Commission adopted its arbitrator's decision, finding the fact that Comcast has a valid license from the Commission to provide local exchange service is dispositive of whether it is a telecommunications carrier with rights to negotiate or arbitrate an interconnection agreement.⁶² After objection by Comcast, the

Arbitration Panel, Michigan Public Service Commission at 20 (Jan. 28, 2009) [*Michigan Arbitration Decision*].

⁵⁸ *Id.*

⁵⁹ *Id.* at 21.

⁶⁰ *Id.*

⁶¹ *Id.* at 20, n.6.

⁶² *In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms, and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone, Case No. U-15725, In the Matter of the Petition of Comcast Phone of Michigan, LLC, for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with TDS Telecommunications Corporation of Michigan, Case No. U-15730, Order, Michigan Public Service Commission at 2, 5 (Mar. 5, 2009) [Michigan Decision].*

Commission determined that the footnote referring to the FCC's letter formed no part of the Commission's decision.⁶³

56 In Vermont, the hearing officer for the Public Service Board determined that Comcast is a wholesale telecommunications carrier eligible for interconnection under Section 251 of the Act, but imposed one condition – that Comcast reveal all prices, terms, and conditions related to the wholesale local interconnection services Comcast provides to its affiliate.⁶⁴ The Vermont hearing officer relied on the FCC's *Bright House* decision to find that Comcast's holding a Certificate of Public Good under Vermont law and its offer to provide LIS service to all eligible customers "make it difficult not to conclude that Comcast Phone is a telecommunications carrier for purposes of Section 251 of the Act."⁶⁵ However, the Vermont hearing officer determined that due to the confidential nature of Comcast's arrangements with its affiliate, "there is little basis for determining whether an offer by Comcast Phone to another party provides unjustly discriminatory service or whether Comcast held itself out 'indifferently [to] all potential users'."⁶⁶

57 In its final order, the Vermont Board adopted the hearing officer's conclusions. Specifically, the Board found that the hearing officer correctly applied the test for common carriage in *NARUC I* and *II*, and concluded that Comcast is a telecommunications carrier.⁶⁷ The Board found that Comcast holds authority to provide telecommunications service from the Board, provides telecommunications services under two previously approved interconnection agreements, and has shown its willingness to serve as a common carrier.⁶⁸ The Board also rejected Vermont Telephone Company, Inc.'s (VTel's) claims of unjust discrimination, finding that

⁶³ *Id.* at 5.

⁶⁴ *Petitions of Vermont Telephone Company, Inc. ("VTel"), and Comcast Phone of Vermont, LLC, d/b/a Comcast Digital Phone ("Comcast") for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws*, Docket No. 7469, Vermont Public Service Board, Order at 14-15, 18 (Feb. 2, 2009) [*Vermont Decision*].

⁶⁵ *Vermont Decision*, at 18.

⁶⁶ *Id.*

⁶⁷ *Id.* at 75.

⁶⁸ *Id.*

Comcast has not restricted service to its affiliates, and “may still constitute a common carrier even if there are only a limited number of non-affiliated providers who can use the service.”⁶⁹ Further, the Board asserted that imposing the condition on Comcast to reveal its terms, conditions and rates will alleviate VTel’s concerns about unjust discrimination.⁷⁰

- 58 In an Iowa proceeding, Sprint partnered with a local cable company to provide wholesale telecommunications services to a cable company, which would then provide the services at retail to customers using its last-mile facilities. Sprint sought interconnection with various local exchange carriers in Iowa to provide service under its business arrangement with the cable company. The ILECs refused to interconnect with Sprint, asserting that Sprint was not the proper party to the agreement, and was not a common carrier as it tailored contracts to each individual customer.⁷¹
- 59 While the Iowa Utilities Board initially found Sprint would not offer its services as a common carrier, on remand from the district court, the Board determined that Sprint met the definition of a common carrier, finding that Sprint offered its services indiscriminately to a class of users that were “capable of offering their own last-mile facilities.”⁷²
- 60 The Eighth Circuit Court of Appeals upheld the Iowa Utilities Board’s decision that Sprint was a telecommunications carrier entitled to interconnection. Following the D.C. Circuit’s decision in *Verizon California*, the court found that Sprint has self-certified as a common carrier, has made public its intent to act as a common carrier and has entered into a public interconnection agreement.⁷³ The court found that Sprint’s individually negotiated contract with the cable company did not outweigh evidence of common carriage, recognizing that Sprint’s contracts with last-mile

⁶⁹ *Id.* at 76.

⁷⁰ *Id.*

⁷¹ *Iowa Tel. Servs., Inc. v. Iowa Utils. Bd.*, 563 F. 3d 743, 747 (8th Cir, 2009) [*Iowa*].

⁷² *Iowa*, 563 F. 3d at 748, quoting *Sprint Comm. Co., L.P. v. Ace Comm. Group, et al.*, Docket No. ARB-05-2, at 14, Order on Rehearing, 2005 WL 3624405 (Iowa Utils. Bd, Nov. 28, 2005).

⁷³ *Iowa*, 563 F. 3d at 749.

providers will vary depending on the services the provider chooses and that the contracts may be confidential.⁷⁴

- 61 In a virtually identical proceeding before this Commission, a Washington arbitrator determined that Sprint was a telecommunications carrier under the Act, eligible to interconnect with Whidbey Telephone Company (Whidbey) to provide wholesale services to a local cable company offering retail telecommunications services.⁷⁵ Based on evidence presented in the case, the Washington arbitrator determined that Sprint, through its arrangement with the cable company, intended to hold itself out to serve subscribers within the cable company's service area, and thus qualified as a "telecommunications carrier" under the Act.⁷⁶

(b) Comcast Phone's Position

- 62 Comcast Phone argues that it qualifies as a telecommunications carrier under the Act because it has been authorized by the Commission to provide telecommunications service in Washington as a competitively classified local exchange carrier, and because it offers and provides telecommunications services in Washington.⁷⁷ Comcast Phone argues that TDS's efforts to exclude Comcast Phone from its service territory are anticompetitive.⁷⁸
- 63 Comcast Phone argues that a preponderance of decisions by the FCC, the D.C Circuit Court of Appeals, and a number of state commissions, including Washington, support its position that all that is required to meet the standards for common carriage, and thus status as a telecommunications carrier under the Act, are state authority to provide telecommunications service and offering and providing telecommunications

⁷⁴ *Id.* at 750.

⁷⁵ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Company L.P. with Whidbey Telephone Company Pursuant to 47 U.S.C. Section 252(b)*, Docket UT-073031, Order 04 – Order Determining Threshold Issues (Wash. Utils. & Transp. Comm'n, Jan. 24, 2008) [*Sprint-Whidbey*].

⁷⁶ *Sprint-Whidbey*, ¶¶ 25-29.

⁷⁷ Comcast Phone Motion, ¶¶ 2, 12.

⁷⁸ *Id.*, ¶ 2.

services.⁷⁹ Comcast Phone asserts that TDS misconstrues the FCC's *Bright House* decision and mischaracterizes the facts in that case. Comcast claims that *Bright House* remains applicable to this case, even though the decision applied to a dispute under Section 222 of the Act, not Section 251.⁸⁰ Further, Comcast Phone asserts that the FCC found that Comcast-affiliated competitive providers, not their VoIP provider customers, had obtained certificates of public convenience and necessity from the states in which they operated.⁸¹

64 Comcast Phone seeks interconnection with TDS to provide interconnection to the public switched telephone network (PSTN) for VoIP customers.⁸² Although TDS argues that the FCC's *Time Warner* decision does not apply in this case, Comcast Phone asserts that while Sprint's status as a telecommunications carrier was not at issue, the question of Sprint's right to interconnection to provide wholesale PSTN interconnection was at issue. Further, Comcast Phone asserts that a number of states have addressed the issue of a carrier's status as a telecommunications carrier and its offering of telecommunications services in providing PSTN interconnection, finding the carrier qualifies as a telecommunications carrier in its own right.⁸³

65 Comcast Phone asserts that both Washington and federal law require telecommunications carriers to serve the public in ways that private carriers are not, including the duty to provide service upon request, and are subject to enforcement by regulators and claims for damages in the courts if they do not.⁸⁴ Comcast Phone states that it has subjected itself to oversight by the Commission. Relying on the recent Michigan decision, Comcast Phone argues that its current registration in Washington as a competitively classified telecommunications company should be dispositive of whether it is a telecommunications company entitled to

⁷⁹ *Id.*, ¶¶ 9, 14.

⁸⁰ Comcast Phone Response, ¶ 39.

⁸¹ *Id.*, ¶ 40.

⁸² *Id.*, ¶ 32.

⁸³ *Id.*, ¶¶ 33-36.

⁸⁴ Comcast Phone Motion, ¶ 28.

interconnection.⁸⁵ Comcast Phone also relies on the Vermont Board's decision as dispositive of the issues in this case.⁸⁶

- 66 In response to TDS' argument that LIS and other Comcast Phone services cannot be considered telecommunications services because the company discontinued service in Washington in November 2007, Comcast Phone asserts that it "discontinued circuit-switched local voice telephone service, but ... retained ... [its] state certification and continued to provide other telecommunications services."⁸⁷ Comcast Phone argues that its filing with the FCC has no bearing on the services it currently provides, and cites the Michigan commission's decision as support.⁸⁸
- 67 Comcast Phone asserts that to meet the common law test for common carriage, "a carrier must hold itself out to serve all potential users of its service indiscriminately and allow customers to transmit information of their choosing."⁸⁹ Comcast Phone argues that a carrier may be a common carrier, even if it does not serve all members of the public,⁹⁰ if it is not actually providing service to a customer, or if it intends to serve only one customer.⁹¹ Comcast Phone asserts that "common carriers routinely offer service packages that 'are based on contractual negotiations with a single customer and specifically designed to meet the needs of only that customer'."⁹² Further, Comcast Phone claims that it is a common carrier because it has chosen to be one.⁹³
- 68 Comcast Phone asserts that it offers three separate telecommunications services to the public through service schedules posted on its website: Exchange Access, Schools and Libraries Network Service, and Local Interconnection Service (LIS) for providers

⁸⁵ *Id.*, ¶¶ 9, 18.

⁸⁶ *Id.*, ¶ 23.

⁸⁷ Comcast Phone Response, ¶ 22.

⁸⁸ *Id.*

⁸⁹ Comcast Phone Motion, ¶ 11, citing *NARUC I*, 525 F. 2d at 642.

⁹⁰ *Id.*, ¶ 13, citing *NARUC II*, 533 F.2d at 608.

⁹¹ *Id.*, ¶ 13, citing *Fiber Technologies Networks*, , 22 FCC Rcd. 332, ¶ 20.

⁹² *Id.*, ¶ 13.

⁹³ *Id.*, citing *Southwestern Bell*, 19 F.3d at 1481.

of interconnected VoIP.⁹⁴ Comcast Phone asserts that it offers the capability to make local calls through its Schools and Libraries Service and LIS, and facilitates the origination and termination of locally-rated telecommunications services traffic through its Commission approved interconnection and reciprocal compensation agreements with seven ILECs in Washington.⁹⁵

69 In response to TDS's assertion that LIS is so limited that no customer other than Comcast Phone's affiliate could use it, Comcast Phone states that under its service guide, LIS is available to any qualified, facilities-based interconnected VoIP service provider in Washington capable of offering their own last-mile facilities.⁹⁶ Comcast Phone argues that a common carrier's offerings may serve a particular class of users. Comcast Phone notes that the Eighth Circuit recently affirmed the decision of the Iowa Utilities Board that Sprint was a common carrier as it offered a similar wholesale interconnection service to "that class [of potential customers] consisting of entities capable of offering their own last-mile facilities."⁹⁷ Comcast Phone also claims that there is no requirement that a carrier have a certain number of customers before it can gain status as a common carrier.⁹⁸ Comcast Phone responds to TDS' concerns about the three-year term and early termination provisions in the LIS guide, asserting that TDS's response here conflicts with arguments made in New Hampshire, and that whether the term is too short or too long depends on the facts of the particular contract.⁹⁹ The company also claims that early termination provisions are common in filed tariff offerings.¹⁰⁰

70 Comcast Phone refutes TDS's argument that the LIS offering appears to be private carriage. Comcast Phone argues that its confidential agreement with Comcast IP to provide LIS service does not undermine its common carrier status. Comcast Phone

⁹⁴ *Id.*, ¶ 12; *see also* Stipulated Facts, ¶ 5 and Exhibits 2-4.

⁹⁵ *Id.*, ¶ 15; *see also* Stipulated Facts, ¶¶ 2, 6 and Exhibit 1.

⁹⁶ Comcast Phone Response, ¶¶ 6-7.

⁹⁷ *Id.*, ¶¶ 7-9, quoting Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Util. Bd. Nov. 28, 2005); *see also* *Iowa*, 563 F. 3d at 750, n.6.

⁹⁸ *Id.*, ¶ 10.

⁹⁹ *Id.*, ¶¶ 15-16.

¹⁰⁰ *Id.*, ¶¶ 18-19.

asserts that there is no requirement that a carrier publicize its rates and contracts to be considered a common carrier.¹⁰¹ Further, the company notes that carriers routinely offer services on an individual case basis (ICB), and because every potential customer's network will be different, every contract might well be different.¹⁰² Comcast Phone notes that TDS's tariffs filed with the Commission offer services on an ICB basis, including local transport services.¹⁰³ Further, Comcast notes that the provision allowing Comcast Phone to unilaterally change rates during the term of the contract is of no import, as a different customer could negotiate a different agreement and the customer could seek Commission intervention if the company seeks to impose unreasonable terms or conditions.¹⁰⁴

- 71 In addition to LIS, Comcast Phone claims it offers exchange Access Service to a number of interexchange carriers: After receiving an incoming call, Comcast Phone routes the call to its LIS customers for delivery to the end user, using telephone exchange facilities to help terminate a toll call.¹⁰⁵ Comcast offers this same service to interexchange carriers in conjunction with its Schools and Libraries Service offering.¹⁰⁶ Comcast Phone averages 12 to 18 interexchange customers for its exchange Access Service per month in Washington.¹⁰⁷ Further, Comcast Phone has an agreement with WECA that defines Comcast Phone as a Local Exchange Carrier.¹⁰⁸ Comcast Phone asserts it has paid a substantial amount in exchange access surcharges to the Washington Universal Service Fund under the agreement.¹⁰⁹
- 72 While TDS claims that Comcast Phone's exchange Access Service is so unusual as to not be truly a telecommunications service because it provides only a terminating switched access service, Comcast Phone asserts that TDS' claim is false, as the

¹⁰¹ *Id.*, ¶ 14, citing *Iowa*, 563 F.3d at 749.

¹⁰² *Id.*, ¶ 12.

¹⁰³ *Id.*, ¶ 13.

¹⁰⁴ *Id.*, ¶ 20.

¹⁰⁵ Comcast Phone Motion, ¶ 16.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, ¶ 17; *see also* Stipulated Facts, ¶ 6.

¹⁰⁸ *Id.*; *see also* Stipulated Facts, ¶ 2, Exhibit 1.

¹⁰⁹ *Id.*; *see also* Stipulated Facts Exhibit 1.

company provides both terminating and originating switched access service.¹¹⁰ Comcast Phone also states that it is the carrier providing local telecommunications service, not Comcast IP, contrary to TDS's claims: Comcast Phone provides the switched Access Service to interexchange carriers seeking to terminate calls to Comcast IP's VoIP subscribers, similar to how other carriers provide service to the VoIP customers they serve.¹¹¹ Comcast Phone also explains that TDS misinterprets a diagram in its Access Service guide, stating that the diagram is intended to show the elements of service that Comcast Phone will charge interexchange customers, not how the company routes traffic to and from actual customers.¹¹²

- 73 In response to TDS's argument that there is no evidence in the record that Comcast Phone is offering the Schools and Library Service in Washington, Comcast Phone states that the terms and conditions for the service are maintained on its web site, and the service guide is an exhibit to the Stipulated Facts in this case.¹¹³ Comcast Phone also defends its claim that the service is a telecommunications service: The high-speed data service that uses point-to-point T-1 circuits to interconnect Local Area Networks is the same as what has been regulated by the Commission and the FCC as a "special access" service for years.¹¹⁴ The service also provides connectivity to the public switched telephone network.¹¹⁵
- 74 Comcast Phone claims that if the Commission has any doubts about its status as a telecommunications carrier, it should give the benefit of the doubt to Comcast Phone based on policy reasons: a narrow reading would impair competition and would fail to promote facilities based competition as well as broadband deployment.¹¹⁶

¹¹⁰ Comcast Phone Response, ¶¶ 28-29.

¹¹¹ *Id.*, ¶ 29.

¹¹² *Id.*, ¶ 30.

¹¹³ *Id.*, ¶ 25.

¹¹⁴ *Id.*, ¶¶ 26-27.

¹¹⁵ *Id.*, ¶ 27.

¹¹⁶ Comcast Phone Motion, ¶ 27.

(c) TDS's Position

- 75 TDS asserts that Comcast Phone cannot establish that it qualifies as a telecommunications carrier that offers telecommunications services in its own right, and thus is not entitled to Section 251 interconnection with TDS for the exchange of telecommunications service traffic. Further, TDS argues that even if the Commission determines that Comcast Phone is a telecommunications carrier, it is not entitled to interconnection as none of the traffic Comcast Phone intends to deliver to TDS is classified as telecommunications service traffic.¹¹⁷
- 76 TDS asserts that it is appropriate to question Comcast Phone's common carrier status, as Comcast IP seeks all the rights of a telecommunications carrier, such as local number portability through interconnection, without having any of the responsibilities for treatment of end-users.¹¹⁸ Further, TDS claims that by deliberately splitting the corporate functions of Comcast Phone and Comcast IP, the company avoids the consumer protections and light handed regulation of a CLEC for the provision of end user services.¹¹⁹
- 77 TDS asserts that "it is the widespread, general solicitation of customers from the general population ... that constitutes common carriage."¹²⁰ TDS further asserts that several factors preclude a carrier's status as a common carrier, including "1) a relatively stable clientele, with terminations and new clients the exception rather than the rule, 2) methods of operation that may be highly individualized and comprise grounds for accepting or rejecting an applicant, and 3) an operator that would desire and expect to negotiate with and select future clients on a highly individualized basis."¹²¹

¹¹⁷ TDS Motion, ¶ 2.

¹¹⁸ TDS Motion, ¶ 2; TDS Reply, ¶ 37.

¹¹⁹ TDS Motion, ¶ 63; *see also* TDS Reply, ¶¶ 37, 39.

¹²⁰ TDS Motion, ¶ 21.

¹²¹ *Id.*

- 78 TDS argues that simply because Comcast Phone has been issued a certificate by the Washington Commission does not establish that it is a common carrier.¹²² TDS argues that Comcast Phone's reliance on *Bright House* is not correct, as self-certification was but one factor in the determination of common carriage.¹²³ TDS argues that self-certification, by itself, is insufficient to meet the test for common carriage, and rejects Comcast's argument that it is a common carrier because it has chosen to be one.¹²⁴ TDS claims that an entity is a common carrier by virtue of what it does, not what it declares itself to be.¹²⁵
- 79 TDS argues that the FCC's *Bright House* and *Time Warner* decisions do not apply to this arbitration.¹²⁶ TDS asserts that *Bright House* did not decide whether a carrier was a common carrier for Section 251 purposes, but concerned a question about whether one carrier may use the proprietary information of another carrier without violating restrictions in Section 222 for the use of customer proprietary network information.¹²⁷ TDS notes that the FCC clearly limited the application of its decision to Section 222.¹²⁸ TDS further claims that the facts in the case do not support Comcast's position in this docket, as the FCC found that both VoIP providers had authority from the states in which they operated and the Verizon had entered into interconnection agreements with the VoIP providers.¹²⁹ TDS asserts that the Michigan and Vermont decisions relied on *Bright House* in error.¹³⁰
- 80 Similarly, TDS claims that *Time Warner* does not support a finding that Comcast Phone is a common carrier: The FCC determined that "the rights of telecommunications carriers to Section 251 interconnection are limited 'to those

¹²² TDS Reply, ¶ 16.

¹²³ *Id.*, ¶¶ 17-18; 22.

¹²⁴ TDS Motion, ¶¶ 58-59; TDS Reply, ¶¶ 17-18, 22.

¹²⁵ TDS Motion, ¶ 58, quoting *U.S. v. California*, 297 U.S. 175, 181, 56 S.Ct. 421, 80 L.Ed. 567 (1936); TDS Reply, ¶¶ 22-23, citing *NARUC I* at 644 and *Southwestern Bell* at 1481.

¹²⁶ TDS Motion, ¶ 38.

¹²⁷ *Id.*, ¶ 39; *see also* TDS Reply, ¶ 19.

¹²⁸ TDS Motion, ¶ 39.

¹²⁹ *Id.*, ¶ 40.

¹³⁰ TDS Reply, ¶ 20.

carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”¹³¹ In addition, TDs asserts the FCC requires “that the telecommunications carrier also be ‘offering telecommunications services through the same arrangements’ as it seeks for interconnection.”¹³² Further, the FCC stated that state commissions must determine on the facts before them whether a carrier offers telecommunications services,¹³³ and determined that Section 251 interconnection is available only to those telecommunications carrier who “seek interconnection in their own right.”¹³⁴

- 81 TDs argues that Comcast Phone cannot be providing telecommunications services through LIS or Access Service, as it sought and was granted permission to discontinue offering telecommunications service in Washington after November 28, 2007, specifically “local exchange and interexchange telephone service.”¹³⁵ TDs asserts that there is little value to its authority to operate in Washington, and that perhaps it should be revoked.¹³⁶
- 82 TDs questions whether Comcast Phone’s LIS offering is sufficient to demonstrate common carriage. TDs argues that “the LIS service is an extremely limited offering and, as a practical matter, only a Comcast affiliate would purchase the LIS service.”¹³⁷ TDs asserts that LIS is available only to providers of retail interconnected VoIP service, not nomadic VoIP. A customer must have particular facilities to use the service: “an IP-based, broadband network that uses a Cable Modem Termination System (CMTS) employing the Network-based Call Signaling specified by Cable Television Laboratories, Inc. (CableLabs®).”¹³⁸ TDs also objects to the pricing for

¹³¹ TDs Motion, ¶ 41, quoting *Time Warner*, ¶ 14, n.39.

¹³² *Id.*, ¶ 41, citing *Time Warner*, n.39, quoting 47 C.F.R. § 51.100(b).

¹³³ *Id.*, ¶ 43, citing *Time Warner*, ¶ 14.

¹³⁴ *Id.*, ¶ 44, quoting *Time Warner*, ¶ 16.

¹³⁵ TDs Motion, ¶ 37, citing Comcast Phone’s Response to Bench Request 4; TDs Reply, ¶ 21.

¹³⁶ TDs Reply, ¶ 21.

¹³⁷ TDs Motion, ¶¶ 22, 34; TDs Reply, ¶ 2.

¹³⁸ TDs Motion, ¶ 23, quoting Exhibit 4, at 2, Section 3.A.

LIS, asserting that prices are only provided on a case-by-case basis through a bona fide request, and that the entire agreement with Comcast IP is confidential.¹³⁹

- 83 TDS further objects to the three year term of service as too short, and provides no “evergreen” provisions as there are in interconnection agreements to allow it to continue until replaced by another agreement or termination.¹⁴⁰ Further TDS objects to the fact that prices and terms may be varied under the contract, that there is a one hundred percent termination liability, and that it appears a customer must use Comcast Phone for long distance service.¹⁴¹
- 84 Given these facts, TDS claims that LIS service sounds like contract or private carriage, i.e., making “individualized decisions in particular case whether and on what terms to serve.”¹⁴² TDS asserts that while components of the LIS service may be consistent with common carriage, looking at the service as a whole, the service does not meet the test in *NARUC I* and *NARUC II* of a carrier holding itself out indiscriminately to serve the public.¹⁴³ Further, TDS argues that the LIS offering is not being provided through the same arrangement that is sought with TDS; it requires specialized equipment that has nothing to do with the delivery of traffic to TDS.¹⁴⁴
- 85 Similarly, TDS finds fault with the Schools and Libraries Service. TDS claims that there is no evidence that Comcast Phone is offering the service in Washington, that posting the service on the web site is not sufficient to offer or solicit for the service, and that Comcast Phone is not providing the service to any customers in Washington.¹⁴⁵ TDS claims that very little of the service has to do with providing a telecommunications service. The service is described as a high-speed data service, point-to-point service, and as Channelized Exchange Service, i.e., “the functional

¹³⁹ *Id.*, ¶ 24-25, citing Exhibit 4 at 1, Section 1.B.

¹⁴⁰ *Id.*, ¶ 28.

¹⁴¹ *Id.*, ¶¶ 29-33.

¹⁴² *Id.*, ¶¶ 24-26, quoting *NARUC I* at 641.

¹⁴³ *Id.*, ¶ 35.

¹⁴⁴ *Id.*, ¶ 36.

¹⁴⁵ *Id.*, ¶ 45; TDS Reply, ¶ 3.

equivalent of twenty-four voice grade facilities.”¹⁴⁶ TDS asserts that this describes provisioning a school or library’s internal communications network, not a telecommunications service, and calling through the PSTN that is accomplished through case-by-case rates and bona fide requests, similar to LIS.¹⁴⁷ Further as Comcast Phone has discontinued its local exchange and interexchange services, TDS argues that Comcast Phone must be providing the service through VoIP, which Comcast Phone has described as an information service.”¹⁴⁸

- 86 TDS also claims that Comcast Phone’s Access Service does not support a conclusion that Comcast Phone is a common carrier. TDS asserts that Comcast Phone’s Access Service is unusual, as it only bills interexchange carriers for terminating access.¹⁴⁹ TDS argues that most access service is for service to both origination and termination directions, and provided by the entity providing local service, in this case Comcast IP, not the intervening entity, Comcast Phone.¹⁵⁰ TDS questions whether Comcast Phone actually provides access service, and asserts that the offering has to do with providing service so that CDV users may place calls to TDS end-users within the TDS local calling areas, not local interconnection with TDS.¹⁵¹ Specifically, TDS argues that the interconnection Comcast Phone seeks is for local traffic that would use different facilities than the access service facilities for interexchange carriers to reach Comcast IP, *i.e.*, the Access Service has nothing to do with the arrangements between Comcast Phone and TDS for which Comcast Phone seeks interconnection, contrary to the requirements in *Time Warner*.¹⁵²
- 87 In response to Comcast Phone’s arguments that interconnection will “bring the benefits of competition and lower cost innovative communication service to Washington’s consumers in TDS’ service territory,” TDS asserts that there is nothing that prevents Comcast IP from providing those services to its cable customers in its

¹⁴⁶ TDS Motion, ¶¶ 46-49.

¹⁴⁷ *Id.*, ¶¶ 46-48.

¹⁴⁸ *Id.*, ¶¶ 46-49, 51.

¹⁴⁹ *Id.*, ¶¶ 52-53.

¹⁵⁰ *Id.*, ¶ 53.

¹⁵¹ *Id.*, ¶ 56.

¹⁵² *Id.*, ¶¶ 56-57; *see also* TDS Reply, ¶¶ 31-33.

service territory.¹⁵³ TDS argues the Commission should not be lulled into feeling good about Comcast Phone's policy arguments, as Comcast Phone and Comcast IP are simply seeking the benefits of interconnection, such as number portability, through an artificial distinction of using two entities to provide the service.¹⁵⁴

88 ***Discussion and Decision.*** The primary issue in dispute is whether Comcast Phone is a telecommunications carrier entitled to negotiate or arbitrate an interconnection agreement with TDS under Section 251 of the Act. As the definitions of a telecommunications carrier and of telecommunications service derive from the common law standard for common carriage, the first issue for resolution is whether Comcast Phone is a common carrier. The federal cases and FCC decisions discussed above require that whether an entity qualifies as a common carrier depends on the specific facts at hand. *NARUC I* and *II* require first that the carrier "undertakes to carry for all people indifferently,"¹⁵⁵ and second, that the carrier allows customers to "transmit intelligence of their own design and choosing."¹⁵⁶ There appears to be no dispute about this second prong of the test.

89 As Comcast Phone and TDS demonstrate in their pleadings, a carrier may be deemed a common carrier even if it is "a specialized carrier whose service is of possible use only to a fraction of the population ... [but] holds himself out to serve indifferently all potential users."¹⁵⁷ However, "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."¹⁵⁸ Further, a carrier may be a common carrier for some activities, but not others, may qualify as a common carrier if it merely holds itself out to provide service but has not yet supplied service, and where it serves only one customer.¹⁵⁹

¹⁵³ TDS Reply, ¶ 36.

¹⁵⁴ *Id.*, ¶ 37.

¹⁵⁵ *NARUC I* at 641; *NARUC II* at 608.

¹⁵⁶ *NARUC II* at 609, quoting *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966); *Frontier Broadcasting Co. v. FCC*, 24 F.C.C. 251, 254 (1958).

¹⁵⁷ *NARUC II* at 608; see also *NARUC I* at 641.

¹⁵⁸ *NARUC I* at 641; *NARUC II* at 608-9.

¹⁵⁹ *NARUC II* at 608; *Fiber Technologies*, 22 FCC Rcd 3392, ¶¶ 20-21.

- 90 Turning to the specific facts in this case, the first question is whether Comcast Phone holds authority to provide telecommunications service in Washington state. The parties agree that Comcast Phone is registered as a telecommunications company with the Commission.¹⁶⁰ TDS questions the validity of Comcast Phone's registration due to the company's filing with the FCC to discontinue "local exchange and interexchange telephone service" in Washington as of November 28, 2007. While this is true, Comcast Phone retains its registration in Washington, and this is not the proper proceeding to determine whether to revoke the registration. Until the Commission determines otherwise, Comcast Phone has a valid registration authorizing it to provide telecommunications services in Washington.
- 91 Comcast Phone, relying on *Bright House* and various state decisions, argues that its status as a registered competitively classified telecommunications carrier is dispositive of its common carrier status.¹⁶¹ While these cases are instructive, they do not determine the result in this case. Self certification by itself is not sufficient to demonstrate status as a common carrier. An entity must also show by its practice that it is a common carrier.¹⁶²
- 92 State certification is one way of demonstrating that a carrier is holding itself out to serve the public. Providing service to the public or a fraction of the public is another way to meet this standard, although, contrary to TDS's claim, a carrier need not actually provide service. Nor is it a requirement that a carrier pursue "widespread, general solicitation of customers from the general population" to qualify as a common carrier.¹⁶³ A carrier may meet the standard by publicly filing tariffs or maintaining offers of service on a website, i.e., holding itself out to provide service.¹⁶⁴
- 93 Comcast Phone offers several services through service guides on its web site. TDS argues that none of these services are telecommunications services, and that under the

¹⁶⁰ Stipulated Facts, ¶ 1.

¹⁶¹ Comcast Phone also claims that it is a common carrier because it chooses to be one, citing *Southwestern Bell*. A review of the case shows it does not support Comcast Phone's claim.

¹⁶² *NARUC II* at 608; see also *U.S. v. California*, 297 U.S. at 181.

¹⁶³ TDS makes this claim, citing *Southwestern Bell*. TDS Motion, ¶ 21. Nothing in that case requires such solicitation for classification as a common carrier.

¹⁶⁴ *Sprint-Whidbey*, ¶ 25.

FCC's requirements in *Time Warner*, Comcast Phone cannot be a telecommunications carrier if it does not provide telecommunications services. The Arbitrator disagrees.

- 94 Contrary to TDS' claims, Comcast Phone has provided evidence that it is offering its Schools and Libraries Service. The parties stipulated to the fact that Comcast Phone posts a service guide for the offering on its web site – which is notice to the public at large, as well as that portion of the public seeking this service. A copy of the service guide is attached as an exhibit to the parties' statement of stipulated facts. Further, TDS's claim that the service is not a telecommunications service fails. As Comcast notes, the service offered under its Schools and Libraries offering is similar to intrastate special access, which long has been a regulated telecommunication service. Comcast Phone also points out that the service provides connectivity to the public switched telecommunications network (PSTN), indicia of a telecommunications service.
- 95 Similarly, TDS's claims about Comcast Phone's Access Service fail. WECA recognizes Comcast Phone as a Local Exchange Carrier, and Comcast Phone pays exchange access surcharges to the Washington Universal Service Fund for services it provides under this offering. Despite TDS' assertions, Comcast Phone's Access Service is not unusual- while it currently may provide only terminating access, it also clearly offers originating access, and is used by, on average, 12 to 18 interexchange carrier customers per month. Further, although TDS claims that the service is information, not telecommunications, service, Comcast Phone correctly asserts that its Access Service is a telecommunications service – it is the carrier providing local telecommunications service, not Comcast IP.
- 96 TDS raises the most concerns with Comcast's LIS service offering, asserting that it looks more like private, not common carriage, and as with the Access Service offering, is more properly characterized as an information service. Comcast effectively counters TDS' claims. The terms of LIS service, a specialized service, are indeed available to a particular class of customers – qualified, facilities-based interconnected VoIP service providers capable of providing their own last-mile facilities. However, the terms are not limited to Comcast affiliates, and decisions to serve a particular customer are no more individualized than those of other specialized services, including those offered under TDS's own tariff. In a similar case, the Eighth Circuit found that Sprint's individually negotiated agreement with a cable company

for interconnected VoIP did not outweigh evidence of common carriage, recognizing that Sprint's contracts with last-mile providers will vary depending on the services the provider chooses and that the contracts may be confidential.¹⁶⁵ The fact that Comcast Phone currently has only one LIS customer, and that the customer is an affiliate of Comcast Phone, does not mean that the company does not qualify as a common carrier.

- 97 Finally, we take note that Comcast Phone currently exchanges locally-rated traffic pursuant to five negotiated interconnection agreements with ILECs in Washington that were approved by the Commission.¹⁶⁶
- 98 Having weighed the arguments proffered by both parties, and recognizing this is a very close decision, the arbitrator finds the balance of the facts in this proceeding weigh in favor of finding that Comcast Phone is a common carrier as a matter of law, and thus a telecommunications carrier under the Act.¹⁶⁷ Comcast Phone actively holds itself out to a portion of the public to provide Access Service, Schools and Libraries Services and Local Interconnection Service. As in a recent arbitration involving Sprint and Whidbey Telephone, the key determinant is evidence of an entity holding itself out to serve indiscriminately.¹⁶⁸ The evidence in this case supports such a finding.
- 99 As discussed above, and below, TDS's argument that Comcast Phone cannot be offering telecommunications service as it discontinued service in Washington is rejected. Comcast has demonstrated that it continues to provide telecommunications service in Washington. Similarly, despite the fact that Comcast Phone has agreed that the interconnected VoIP service would be an information service, it is Comcast IP, not Comcast Phone, that provides interconnected VoIP.¹⁶⁹ The Arbitrator finds that

¹⁶⁵ *Iowa*, 563 F.3d at 749.

¹⁶⁶ Stipulated Facts, ¶¶ 13-14.

¹⁶⁷ The parties do not dispute the facts, but disagree about how the facts in this case apply to the law. The Arbitrator does not find TDS's arguments about Comcast Phone's Schools and Libraries, Access Service and LIS services to be disputed facts, but as disputes about how the facts apply in the decision about whether Comcast Phone is a common carrier.

¹⁶⁸ *Sprint-Whidbey*, ¶ 25.

¹⁶⁹ See TR 56, ll. 2-15; TR 75, ll. 16-18.

Comcast Phone has reasonably and effectively demonstrated it is a common carrier providing telecommunications service in Washington.

100 The fact that Comcast Phone has designated its entire contract with Comcast IP to be confidential, however, does raise some concerns. Designating its contract as confidential makes it difficult to determine if an offer by Comcast Phone to another customer would result in unjust discrimination or whether the company holds itself out “indifferently [to] all potential users” as required by *NARUC II*.¹⁷⁰ Thus, the Arbitrator recommends the Commission require Comcast Phone, as a condition of approving an interconnection agreement between Comcast Phone and TDS, to file its agreement with Comcast IP, and amendment, with the Commission in this docket, and to post the agreement on its web site or other publicly available location, making public all the terms and conditions of the agreement. Making the agreement publicly available should alleviate some of TDS’s concerns about the agreement between Comcast Phone and Comcast IP.

101 After finding that Comcast Phone is a telecommunications carrier entitled to interconnection with TDS under Section 251, the Arbitrator recommends that the Commission grant Comcast Phone’s motion for summary determination and deny TDS’ motion on this issue.

4. Whether Comcast Phone may interconnect using only information service

102 In its *Time Warner* decision, the FCC determined that “the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”¹⁷¹ In addition, the FCC requires that the carrier must be “offering telecommunications services through the same arrangement” for which it requests interconnection.¹⁷² TDS raises the question whether Comcast Phone can meet this requirement, asserting that none of the traffic

¹⁷⁰ *NARUC II* at 608.

¹⁷¹ *Time Warner*, ¶ 14, n.39.

¹⁷² *Id.*, ¶ 14, n.39, quoting 47 C.F.R. § 51.100(b).

that Comcast Phone intends to deliver to TDS is classified as telecommunications service traffic.¹⁷³ TDS concludes that Comcast Phone is not eligible for interconnection with TDS under Section 251.

- 103 TDS asserts as a resolved fact that Comcast Phone and Comcast IP assert that the service offered by Comcast IP is an information service.¹⁷⁴ TDS concludes that all of the traffic delivered to TDS by Comcast Phone for interconnection would be information service traffic, and that by its admission, Comcast Phone will not be providing telecommunications service to TDS.¹⁷⁵ TDS argues that under FCC rules, Comcast Phone may not seek to interconnect for the delivery of only information traffic.¹⁷⁶
- 104 TDS argues that Comcast Phone ignores the “same arrangement” requirement of *Time Warner*, and that Comcast fails to demonstrate that Comcast IP’s information service is transformed into telecommunications service traffic under Comcast Phones’ Access and LIS service offerings.¹⁷⁷
- 105 Comcast Phone argues that CLECs have the right to interconnect and exchange traffic with ILECs when providing services under Section 251, regardless of the classification of interconnected VoIP as either an information service or a telecommunications service.¹⁷⁸ Comcast Phone argues that TDS misconstrues the FCC’s finding in *Time Warner*. The FCC explained that its existing rules allow a carrier to exchange information service traffic through the same arrangement as it exchanges telecommunications traffic, such that “the fact that a telecommunications carriers is also providing non-telecommunications service is not dispositive of its rights.”¹⁷⁹

¹⁷³ TDS Motion, ¶ 2; TDS Reply, ¶¶ 33, 35.

¹⁷⁴ TDS Motion, ¶ 60, citing TR 56, ll.2-15; TR 75, ll. 16-18.

¹⁷⁵ *Id.*, ¶¶ 60-61.

¹⁷⁶ *Id.*, ¶ 62; TDS Reply, ¶ 5.

¹⁷⁷ TDS Reply, ¶ 38.

¹⁷⁸ Comcast Phone Motion, ¶ 24, citing *Time Warner*, ¶¶ 15-16; Comcast Phone Response, ¶ 37.

¹⁷⁹ Comcast Phone Reply, ¶ 37, quoting *Time Warner*, ¶ 14, n.39.

- 106 Comcast Phone argues that the FCC's statements are not applicable here, as Comcast Phone does not seek to exchange information service traffic with TDS.¹⁸⁰ Further, Comcast Phone states that regardless of whether the interconnected VoIP service provided to end-users is considered an information or telecommunications service, the wholesale PSTN interconnection that Comcast Phone provides to its interconnected VoIP service provider customers is a telecommunications service.¹⁸¹
- 107 Comcast Phone also claims that there is no truth to TDS' claim that Comcast Phone is not seeking interconnection in its own right to provide its services. Comcast Phone argues that the arrangement is functionally comparable to the arrangement the Commission approved in the arbitration between Sprint and Whidbey Telephone.¹⁸² Comcast Phone asserts that it will be providing telecommunications through the same arrangement for which it seeks interconnection.¹⁸³
- 108 ***Discussion and Decision.*** While there is no dispute that the Comcast entities have stated that the interconnection VoIP service is information service, the question before the Commission is whether this fact bars Comcast Phone from interconnecting with TDS under Section 251. It is indisputable the FCC has determined that "The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251."¹⁸⁴ In this case, it is Comcast IP, not Comcast Phone that will be providing the interconnected VoIP service. Accordingly, the arbitrator finds the classification of the service Comcast IP provides to retail consumers is irrelevant for purposes of the question of whether Comcast Phone is a telecommunications carrier entitled to interconnection under Section 251. Michigan and Vermont have reached similar decisions on similar facts.¹⁸⁵ Further, however Comcast IP may describe its service, the FCC has yet to determine the regulatory

¹⁸⁰ *Id.*, ¶ 37.

¹⁸¹ Comcast Phone Reply, ¶ 37.

¹⁸² *Id.*, ¶ 38.

¹⁸³ *Id.*

¹⁸⁴ *Time Warner*, ¶ 15.

¹⁸⁵ Michigan Arbitration Decision at 19; Vermont Board Decision at 76.

classification of interconnected VoIP and, as discussed above, this not dispositive to resolving Comcast Phone's right to interconnection.

109 In addition, Comcast Phone has demonstrated that it is providing telecommunications services, and will be providing telecommunications services through the same PSTN connection through which it seeks to provide interconnection, consistent with the FCC's requirements in *Time Warner*.

110 TDS' arguments on this issue are not supported by the facts in this proceeding. As a matter of law, TDS' motion for summary determination on this issue is denied.

E. Implementation Schedule

111 Pursuant to 47 U.S.C. § 252(c)(3), the Arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Act, applicable FCC Rules, and this Commission's orders.

F. Conclusion

112 The Arbitrator's resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). The parties are directed to submit an interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

113 Any party may petition for Commission review of this Arbitrator's Report and Decision by **August 19, 2009**. Any petition for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrator's Report and Decision should be modified. Replies to any petition for Commission review must be filed by **August 31, 2009**.

114 The parties must also file, by **August 31, 2009**, a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all

negotiated terms, all terms requested pursuant to Section 252(i), and all terms intended to fully implement arbitrated decisions. This filing will include the parties' request for approval, subject to any pending petitions for review.¹⁸⁶ The agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text.

- 115 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers, are consistent with the public interest, are consistent with the public convenience, and necessity, and satisfy applicable state law requirements, including relevant Commission orders.
- 116 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders. A party that petitions for review must provide alternative language for arbitrated terms that would be affected if the Commission grants the party's petition.
- 117 Any petition for review, any response, and any request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must be attached for the convenience of the Commission. The parties are not required to file a proposed form of order.
- 118 Any petition for review of this Arbitrator's Report and Decision and any response to a petition for review must be filed (**original and six (6) copies**) with the Commission's Executive Secretary and served as provided in WAC 480-07-145. Post-arbitration hearing filings and any accompanying materials must be served on the opposing party by delivery on the day of filing, unless jointly filed.

¹⁸⁶ If the parties agree that no petition for review will be filed, the parties may file their joint request for approval and complete interconnection agreement at any time after the date of this Report and Decision.

- 119 An electronic copy of all post-arbitration hearing filings must be provided by delivery to the Commission Secretary either via the Commission's Web Portal (www.wutc.wa.gov/e-filing) or by sending an e-mail to records@utc.wa.gov. Alternatively, Parties may furnish an electronic copy by delivering with each filing a CD or 3.5-inch, IBM-formatted, high-density diskette including the filed document(s), in MSWord file format (*i.e.*, <filename>.doc) and Adobe Acrobat file format (*i.e.*, <filename>.pdf), reflecting the pagination of the original. Attachments or exhibits to pleadings and briefs that do not pre-exist in an electronic format do not need to be converted.

2. Approval Procedure

- 120 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.
- 121 The Commission will endeavor to enter an order approving or rejecting the Agreement by **September 30, 2009**.¹⁸⁷ The Commission's order will include its findings and conclusions.

Dated at Olympia, Washington, and effective July 20, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Arbitrator and Administrative Law Judge

¹⁸⁷ As noted above, the parties have agreed to waive the statutory deadlines in 47 U.S.C. § 252(e)(4), but have requested prompt resolution of the petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail this 18th day of September, 2009.

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ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION


JDA
JLG


PETITION OF COMCAST PHONE OF) CENTRAL INDIANA LLC FOR) ARBITRATION OF AN) INTERCONNECTION AGREEMENT WITH) TRI-COUNTY TELEPHONE CO., INC. D/B/A) TDS TELECOM AND TIPTON TELEPHONE) COMPANY D/B/A TDS TELECOM) PURSUANT TO SECTION 252 OF THE) FEDERAL COMMUNICATIONS ACT OF) 1934, AS AMENDED, AND APPLICABLE) STATE LAWS)	CAUSE NO. 43621 INT 01 <u>FINAL ORDER</u> APPROVED: SEP 03 2009
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BY THE COMMISSION:

Larry S. Landis, Commissioner
Lorraine Hitz-Bradley, Administrative Law Judge

1. **Procedural History.** On December 18, 2008, Comcast Phone of Central Indiana, LLC, d/b/a Comcast Digital Phone ("Comcast Phone") filed a Petition for Arbitration in this Cause ("Petition") pursuant to 47 U.S.C. § 252(b)(1) of the federal Communications Act of 1934, as amended ("Act"), to establish an interconnection agreement with Tri-County Telephone Co., Inc. d/b/a TDS Telecom and Tipton Telephone Company d/b/a TDS Telecom (collectively, "TDS"). Sections 252(b) and (c) of the Act direct state commissions to arbitrate unresolved issues related to the obligations imposed on telecommunications carriers and local exchange carriers by Section 251 of the Act.

TDS timely responded. The parties agreed to forego a prehearing conference and submitted an *Agreed Upon Proposed Procedural Schedule*, which set the schedule and procedures for the taking of written and documentary discovery and the submission of pre-filed direct and rebuttal testimony. The Commission adopted the *Agreed Upon Proposed Procedural Schedule* by order dated March 11, 2009.

On March 6, 2009, TDS filed the direct testimony of Douglas Duncan Meredith, Director-Economics and Policy for John Staurulakis, Inc., who testified on behalf of TDS ("Meredith Direct"). Also on March 6, 2009, Comcast Phone filed the direct testimony of Beth Choroser, Executive Director of Regulatory Compliance for Comcast Cable Communications, LLC ("Choroser Direct"). On April 23, 2009, TDS filed the rebuttal testimony of Mr. Meredith ("Meredith Reply"), and Comcast Phone filed the reply testimony of Ms. Choroser ("Choroser Reply").

On April 30, 2009, the parties filed a *Joint Motion to Stipulate Public Hearing*, in which the parties stipulated to the authenticity and waived cross examination as to the direct and reply testimonies of Mr. Meredith and Ms. Choroser. On May 7, 2009, the Presiding Officers convened a hearing at which time counsel for Comcast Phone entered into the record Ms. Choroser's Direct Testimony (Comcast Phone Ex. 1), Ms. Choroser's Reply Testimony (Comcast Phone Ex. 2), Ms. Choroser's verification (Comcast Phone Ex. 3), and Comcast Phone's response to the Commission's docket entry (Comcast Phone Ex. 4). Counsel for TDS entered into the record Mr. Meredith's Direct Testimony (TDS Ex. 1), Mr. Meredith's Reply Testimony (TDS Ex. 2), Mr. Meredith's verification (TDS Ex. 3), and TDS' response to the Commission's docket entry (TDS Ex. 4). The parties subsequently filed their respective responses to the Commission's May 7, 2009 docket entry seeking additional information as Comcast Phone Ex. 5 and TDS Ex. 5.¹

On June 4, 2009 the Parties filed their Proposed Orders. On July 2, 2009, Comcast Phone submitted a *Notice of Recently Discovered Controlling Indiana Authority and Supplemental Authority*. On July 7, 2009, the Presiding Officers approved a new procedural schedule providing for the submission of Revised Proposed Orders, with Exceptions due on July 24, 2009. On August 12, 2009, Comcast Phone filed a *Supplemental Filing*, to which TDS responded with an *Objection* on August 14, 2009. On August 17, 2009, TDS filed its *Statement Concerning New Hampshire Order*. On August 18, 2009, the parties filed a *Joint Motion to Extend Time for a Commission Order*, which was granted via docket entry on August 18, 2009. On August 20, 2009, Comcast Phone filed its *Notice of Supplemental Authority*.

2. **Notice and Jurisdiction.** Comcast Phone and TDS are both "public utilities" within the meaning of Ind. Code § 8-1-2. TDS is an "incumbent local exchange carrier" under § 251(h) of the Act and Comcast Phone is a "requesting telecommunications carrier" within the meaning of § 252(a) of the Act. Pursuant to I.C. § 8-1-2.6-1.5(b)(2), this Commission has authority to arbitrate this dispute. The Commission has jurisdiction over TDS and Comcast Phone, as well as the subject matter of this Cause in the manner and to the extent provided by the laws of the State of Indiana and the Act.

3. **Identification of Unresolved Issues.** Pursuant to Section 252(b)(4)(A) of the Act, the Commission "shall limit its consideration" to the issue set forth in Comcast Phone's Petition and TDS' Response. The parties have identified the sole disputed issue as "whether Comcast Phone qualifies as a telecommunications carrier entitled to interconnection with TDS under Sections 251 and 252 of the Act." This dispute is reflected in the following disputed interconnection language:

¹ TDS filed a *Motion to Compel Discovery* on April 23, 2009. The Presiding Officers issued a docket entry on April 30, 2009 ordering Comcast Phone to respond to the outstanding discovery at issue. On May 4, 2009, TDS filed a *Withdrawal of Motion to Compel Discovery*. The responses by Comcast Phone were not offered as evidence in this Cause and were not filed with the Commission. TDS made references to Comcast's responses to discovery in its Proposed Order, but because the material at issue is not in the record of this proceeding, the Commission cannot consider it in reaching a decision in this Cause.

3. EFFECTIVE DATE

- 3.1 This Agreement becomes effective ("Effective Date") ~~only if (1) the Commission has determined in an arbitration or other appropriate proceeding that COMCAST is a telecommunications carrier in the state of (---) entitled to interconnection with TDS TELECOM pursuant to Section 251 of the Act and that the services COMCAST will be providing by way of the interconnection are telecommunications services (12) when executed by each Party and after approval by the Commission under Section 252(e) of the Act or (23) ...~~

TDS proposes including language shown in the strike-through included in the text above. Comcast Phone asserts that the language is unnecessary because it argues that the law and facts establish that Comcast is a telecommunications carrier entitled to interconnection under the Act.

4. **Statutory Standards.** The Act requires the Commission to "resolve each issue set forth in the petition and response, if any, by imposing appropriate conditions as required to implement subsection [§252(c)] upon the Parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section."²

We summarize the parties' positions on the disputed issue.

5. **Position of the Parties.**

a. **Comcast Phone Direct Case.** Through testimony submitted by Ms. Choroser, Comcast Phone asserts that it is a telecommunications carrier within the state of Indiana. Ms. Choroser testified that Comcast Phone (1) offers "various wholesale telecommunications services to the public, including both telephone exchange and exchange access service offerings," which it provides through (i) its Local Interconnection Service ("LIS"), offered to interconnected voice over Internet protocol ("VoIP") service providers, (ii) exchange access services offered to interexchange carriers ("IXCs"), and (iii) a Schools and Libraries service offered to qualifying schools and libraries, that includes both data networking and local exchange calling capabilities; (2) is authorized by the Commission to provide telecommunications services in Indiana, as reflected by the fact that it is a party to interconnection agreements with "nine other incumbent carriers in Indiana," including one between Comcast Phone and Communications Corporation of Indiana (a TDS affiliate).

Ms. Choroser stated that LIS provides "public switched telephone network (PSTN) interconnection" to interconnected VoIP service providers, which she describes as including the following:

two-way interconnection with the [PTSN] for exchange of voice traffic, and administration of numbering resources, local number portability, operator

² 47 U.S.C. § 252(b)(4)(C).

services, 911 emergency calling services, and directory listing and directory assistance services.

Ms. Choroser noted that LIS is a public offering "available to qualified providers of interconnected [VoIP] services." She stated that similarly situated Comcast Phone affiliates around the country also offer LIS, and several Comcast Phone affiliates have received inquires about the service. Ms. Choroser stated that no prospective customer has complained about the terms and conditions of the LIS offering or alleged that Comcast Phone has refused to consider a request for service.

Ms. Choroser stated that Comcast Phone "has approximately 35 exchange access service customers in Indiana who purchase either intrastate or interstate terminating access services," all pursuant to its existing state and federal tariffs. Moreover, she noted that Comcast Phone "pays terminating access charges to numerous other carriers, including TDS, in Indiana and elsewhere," and "makes and receives reciprocal compensation payments to other local exchange carriers pursuant to its Section 251 Interconnection Agreements in the state."

Ms. Choroser testified that the FCC has recognized that interconnected VoIP service providers require the assistance of LECs in order to serve their customers, and that the FCC has referred to this relationship as a "partnership." Further, the FCC ruled in *Time Warner* that CLECs who provide wholesale service to interconnected VoIP service providers (as Comcast Phone does by way of its LIS offering) have "full interconnection rights and obligations to provide PSTN connectivity to such providers."³

Ms. Choroser also cited the FCC's decision in *Bright House*, in which "the FCC found, and the D.C. Circuit Court of Appeals upheld, that Comcast's provision of its interconnection services to its interconnected VoIP affiliate qualifie[s] it as a telecommunications carrier under Section 222(b) of the Act."⁴ The D.C. Circuit affirmed *Bright House* and found that "any other voice services provider similarly situated to Comcast's interconnected VoIP provider affiliates could obtain LIS service from these Comcast CLECs, and Verizon had failed to provide any evidence to suggest that Comcast would turn away such customers." Ms. Choroser also referenced decisions from "[m]ore than one-half dozen states" involving Sprint's attempt to obtain interconnection so that it could provide PSTN interconnection services similar to Comcast Phone's LIS offering. Ms. Choroser stated that in all of these cases, Sprint's right to obtain Section 251 interconnection was affirmed.

Ms. Choroser argued that while *Bright House*, the D.C. Circuit's decision affirming *Bright House*, and the Sprint interconnection cases are not binding in this proceeding, she felt that they were correctly decided and that the Commission should reach the same result.

³ *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 F.C.C.R. 3513 (2007) ("Time Warner").

⁴ *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 F.C.C.R. 10704 (2008) ("Bright House"), *aff'd*, *Verizon California, Inc. v. F.C.C.*, 555 F.3d 270 (D.C. Cir. 2009).

b. **TDS Direct Case.** TDS offered the direct testimony of Douglas Duncan Meredith. Mr. Meredith stated Comcast Phone wanted to interconnect with TDS to enable another Comcast Corporation cable-based subsidiary to provide VoIP service over Comcast's existing cable facilities.

Mr. Meredith asserted that the FCC's decision in *Time Warner* stated that Section 251 interconnection was "limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection in their own right for the purpose of transmitting traffic to or from another service provider." Mr. Meredith asserted that the scope of its action "is limited to wholesale carriers that are acting as telecommunications carrier[s] for purposes of their interconnection request." Mr. Meredith stated even if Comcast Phone were considered to be a common carrier in the regional telecommunication carriers ("RTCs") service territories, the traffic proposed to be delivered by Comcast Phone to the RTCs through the Section 251 interconnection agreement is interconnected VoIP service traffic, which he stated has not been designated as telecommunications traffic by the FCC. Mr. Meredith testified that the failure to exchange telecommunications traffic through a Section 251 interconnection arrangement is not in compliance with FCC regulation 47 C.F.R. § 51.100 and does not meet a threshold requirement for Section 251 interconnection. Mr. Meredith opined that Comcast Phone's requested arrangement would overstep the limits the FCC placed on wholesale service providers in *Time Warner*. Mr. Meredith stated that access traffic does not qualify Comcast Phone for interconnection with TDS under § 51.100 because no access traffic would be exchanged through a Section 251 arrangement with Comcast Phone. Mr. Meredith noted that the TDS companies do not send or receive access traffic over Section 251 interconnection facilities.

Mr. Meredith described 47 C.F.R. § 51.100 as follows:

FCC regulation 47 C.F.R. § 51.100 establishes a telecommunications carrier's general duty pursuant to section 251 of the Act. Section 51.100(b) prescribes the type of interconnection access granted by one telecommunications carrier to another telecommunications carrier that has obtained interconnection pursuant to section 251. Specifically it states:

(b) A telecommunication carrier that has interconnected or gained access under Sections 251 (a)(1), 251 (c)(2), or 251 (c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Mr. Meredith explained how 47 C.F.R. § 51.100 applied to Comcast Phone. He stated this FCC regulation addresses the exchange of traffic between two carriers via an interconnection arrangement. Mr. Meredith said the carrier obtaining the interconnection must be transmitting telecommunications traffic pursuant to § 251(a)(1), 251(c)(2), or 251(c)(3) of the Act as an initial criterion for establishing the connection under § 51.100. He asserted that only after this initial criterion is established for telecommunications service traffic may a telecommunications carrier use the excess capacity of the same interconnection facility to exchange information services

traffic. Mr. Meredith asserted Comcast Phone may not obtain interconnection pursuant to Section 51.100 solely for non-telecommunications purposes. Mr. Meredith stated that in this case that addresses local interconnection, Comcast Phone must exchange telecommunications service traffic subject to Section 251 over the requested trunks and facilities before it can use the excess capacity in the same interconnection arrangement to exchange information services traffic. Mr. Meredith stated Comcast Phone is seeking to exchange VoIP traffic, which Comcast Phone does not claim as telecommunications traffic, over the interconnection facility.

Mr. Meredith also addressed the role of state commissions in interconnection matters. He asserted that in the *Time Warner* case, the FCC stated it would not review any state commission's evidentiary assessment as to whether "an entity had demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law." Mr. Meredith indicated the FCC's statements regarding state proceedings in *Time Warner* are important because they reinforce the role of the states to determine if a provider has Section 251 interconnection rights. He said this determination depends on whether Comcast Phone is seeking interconnection for the purpose of transmitting telecommunications traffic to or from the TDS companies. He also stated that the *Time Warner* decision indicates the FCC does not believe that self-certification is a sufficient determination of whether or not a provider is a common carrier for purposes of Section 251.

Mr. Meredith stated that Comcast Phone provided no evidence that it sought interconnection in its own right to transmit telecommunications traffic to or from the TDS Companies. Mr. Meredith said that based on the Petition and the information he had reviewed, his recommendation to the Commission was for the Commission to determine Comcast Phone was not eligible for Section 251 interconnection because it was not a common carrier in the TDS territories.

Mr. Meredith testified he has reviewed Comcast Phone's LIS tariff in Indiana, and has identified several facts supporting the conclusion the LIS was not being offered on a common carrier basis in the state. He stated that Comcast Phone is not a common carrier for purposes of its LIS Service because there were several aspects of the service that were characteristic of private service, not a common carrier offering. He said Comcast Phone made individualized decisions in some cases and cited *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), and *Southwestern Bell Telephone Company v. Federal Communications Commission*, 19 F.3d 1475 (D.C. Cir. 1994), as showing that carriers making individualized decisions were not common carriers.

He stated the LIS tariff was without specific provisions that would actually govern the terms and conditions of the service offering, and that the LIS tariff was a tool designed to camouflage the Comcast Phone relationship with its Comcast IP affiliates. He stated that LIS did not support common carriage status and did not support Section 251 interconnection. He testified that the LIS tariff was only available to a *bona fide* customer but the tariff did not define a "*bona fide*" request. He said charges for the LIS service were developed on a case-by-case basis subject to modification on one day notice. He contended that Comcast Corporation's retail subsidiaries were the only providers that would not be disadvantaged by increased rates or any termination penalty since it would be paid by one Comcast entity to another.

Mr. Meredith stated that Comcast Phone had no local telecommunications traffic to exchange with the Respondents in this proceeding. He said LIS service consists solely of VoIP traffic and that Schools and Libraries service is referred to as a point-to-point LAN service which does not generate any telecommunications traffic that is exchanged over the Section 251 interconnection arrangement. Mr. Meredith stated that Comcast Phone's wholesale offering was intended to be private carriage for Comcast IP's retail offerings. Mr. Meredith stated that if Comcast Phone is providing service on a common carrier basis in another area of Indiana it does not suggest or imply that it is a common carrier in the Respondent TDS Companies' service territories. Furthermore, he stated, there was no evidence showing Comcast Phone was seeking interconnection in its "own right" for the purpose of transmitting telecommunications traffic to or from the Respondents.

Mr. Meredith said that Comcast Phones' Schools and Libraries service did not qualify it as a common carrier because it is described as a "high-speed data service that uses point-to-point T-1 circuits for the interconnection of Local Area Networks (LANs) across the customer's physical locations." He testified these factual considerations suggest the Schools and Libraries service does not support its qualification as a common carrier for any service requiring Section 251 interconnection. Lastly, Mr. Meredith stated that Comcast Phones' exchange access service allows end user customers to make and receive calls from their selected interchange carrier ("IXC"). Mr. Meredith said that if Comcast Phone has no retail end user customers because of never offering retail local exchange service in Indiana, it cannot be a terminating switched access service provider. Mr. Meredith stated that ancillary services offered with Interconnected-VoIP service are not telecommunications service because the underlying service they support is, as claimed by Comcast Phone, not telecommunications service.

Mr. Meredith stated the FCC has concluded that there are some services or functions that are "incidental or adjunct to common carrier transmission service," including local number portability, central office space for collocation, and certain billing and collection services. Mr. Meredith asserted that according to the FCC these services "should be treated for regulatory purposes in the same manner as the transmission services underlying them...." He argued the FCC has indicated that these adjunct-to-basic services are vital to the provision of the telecommunications services. Mr. Meredith said that using this same policy directive, it follows that when the underlying retail service is not a telecommunications service and not a common carrier service, these adjunct-to-basic services supporting the provision of non-telecommunications services should be treated similarly as non-telecommunications services. Mr. Meredith said Comcast IP will be offering a retail Interconnected-VoIP service which is not a telecommunications service. Therefore, he concluded that since the underlying retail service is not a telecommunications service, Comcast Phone's provision of ancillary services incidental to this transmission of non-telecommunications traffic does not constitute telecommunications service. Mr. Meredith contended that the insertion of a wholesale provider in the middle does not change the status of the underlying service. Mr. Meredith stated that to have it otherwise would provide an opportunity for non-telecommunications providers to obtain the benefits afforded telecommunications carriers not currently allowed under federal regulations or policy.

Mr. Meredith stated the Commission should not consider interconnection agreements in other states. He also said that the existence of Comcast Phone interconnection agreements in other states does not automatically support Comcast Phone's claim of being recognized in those states for purposes of Section 251 interconnection with Respondents. Mr. Meredith recommended the Commission determine that Comcast Phone is not a common carrier in the Respondent TDS Indiana Companies service territories.

c. **Comcast Phone Reply.** In response to TDS' assertion that Comcast Phone is not seeking interconnection "in its own right," Ms. Choroser stated that Comcast Phone is not offering a VoIP product itself, but is seeking interconnection in its own right to offer wholesale telecommunications services. Ms. Choroser characterized Mr. Meredith's testimony as an "attempt to blur the distinction between the telecommunications services that Comcast [Phone] provides and the interconnected VoIP services that its affiliates offer" which "ignores the distinction between an end-user product and Comcast's wholesale telecommunications services."

Ms. Choroser contended that the classification of a service offered by Comcast Phone's customer, whether affiliated or not, is "irrelevant to Comcast [Phone]'s status as a telecommunications carrier and related Section 251 interconnection rights." What matters, Ms. Choroser argued, is that Comcast Phone offers "retail telecommunications services directly to end-users and wholesale telecommunications services to other providers." Ms. Choroser contended that *Time Warner* clarified that, in a wholesale interconnection services arrangement, the regulatory classification of the service provided to the ultimate end user – whether interconnected VoIP or another service – has no bearing on the wholesale service provider's Section 251 interconnection rights.

Ms. Choroser addressed Mr. Meredith's concerns about Comcast Phone's LIS offering. First, she testified that *bona fide* is a common contract term that requires no separate definition. Ms. Choroser opined that potential customers can determine whether they qualify for LIS based on the description of the service. Likewise, Ms. Choroser asserted that the reference to "applicable" state or federal law is not confusing and would not deter a potential customer. She also noted that the "draconian financial provisions" identified by Mr. Meredith are actually common contract terms; that the LIS tariff states on its face that the termination provision is not a penalty and will only be assessed when necessary for Comcast Phone to recover its costs; and that the FCC has held that early termination clauses are reasonable telecommunications contract terms.

In addition, Ms. Choroser stated that common carriers are not required to offer standardized contracts in all cases. Citing the Iowa Utilities Board order finding that Sprint had the right to interconnect to provide its PSTN interconnection service, Ms. Choroser noted that regulators have approved the common carrier status of contracts with individualized prices, because each contract may contain circumstances and bundles of services unique to each customer. Furthermore, she asserted that tariff offerings utilizing Individual Case Basis ("ICB") pricing are not only well accepted, but are the norm for offerings like LIS.

Ms. Choroser stated that the PSTN interconnection offered to interconnected VoIP service providers is a telecommunications service, and that there is no basis to Mr. Meredith's

claim that Comcast Phone will not be transmitting any telecommunications traffic. Ms. Choroser stated that Mr. Meredith had "inappropriately directed the Commission's attention to the end-user interconnected VoIP service provided by Comcast Phone's interconnected VoIP service provider affiliates ("Comcast IP")." Thus, Ms. Choroser argued that Mr. Meredith's Section 51.100 analysis would only be relevant if Comcast Phone planned to offer information services. Ms. Choroser stated that because Comcast Phone is offering wholesale telecommunications services (to interconnected VoIP service providers) via its interconnection agreement with TDS, Section 51.100 has no bearing on this case.

With respect to the contention that Comcast Phone may not "self-certify" as a common carrier, Ms. Choroser asserted that the "key factor in establishing 'telecommunications carrier' status is the entity's announced willingness to hold itself out as a common carrier." Ms. Choroser stated that the FCC used the phrase "self-certify" to describe a carrier's willing offer of telecommunications services to the public and the rights and obligations attendant thereto, including regulatory oversight. She argued that because Comcast Phone is certificated by the Commission, provides telecommunications services in Indiana pursuant to publicly available tariffs, and has declared its willingness to serve as a common carrier, "Comcast qualifies as a telecommunications carrier as a matter of law."

In response to Mr. Meredith's testimony dismissing the significance of Comcast Phone's other interconnection agreements in the state, and with other TDS entities, which Mr. Meredith claims were entered into at a time when TDS did not fully understand Comcast Phone's business model, Ms. Choroser noted out that Comcast Phone never offered a retail circuit switched telephone service in Indiana. Ms. Choroser stated that Comcast Phone's service offerings today are no different than those offered when Communications Corporation of Indiana, and the other nine ILECs in Indiana, executed their respective interconnection agreements with Comcast Phone.

d. TDS Reply. Mr. Meredith argued that even if Comcast Phone is considered a telecommunications carrier, it is not "automatically" eligible for Section 251 interconnection with TDS. Comcast Phone, Mr. Meredith contended, must deliver telecommunications traffic, as required in FCC regulation 47 C.F.R. § 51.100. Mr. Meredith contended that Ms. Choroser's testimony omits an "affirmative declaration" that Comcast Phone will deliver telecommunications traffic, and asserts that Comcast Phone "proposes to deliver its VoIP traffic."

With regard to Ms. Choroser's discussion of Comcast Phone's Schools and Libraries service, Mr. Meredith replied that this service is not eligible for interconnection because "Comcast Phone never describes this service as a telecommunications service," "Comcast Phone has never claimed there are any potential customers in [TDS'] service territories," and Comcast Phone has not provided any evidence of what its facility and system conditions are. Mr. Meredith repeated his assertion that Comcast Phone's wholesale and retail service offerings do not qualify Comcast Phone for interconnection.

Mr. Meredith also contended that Ms. Choroser had misinterpreted the FCC's *Time Warner* ruling. Mr. Meredith stated that Comcast Phone was not abiding by this decision because

it seeks to provide exclusively information services. He reiterated that the FCC placed limits on the applicability of interconnection for retail VoIP providers in *Time Warner* and *Bright House*.

Mr. Meredith rejected Ms. Choroser's reliance on the Michigan Public Service Commission's decision granting interconnection rights to Comcast Phone's Michigan affiliate because that decision was unique and therefore not relevant to this matter. Mr. Meredith stated that the Michigan commission did not permit the parties to conduct discovery, and that no testimony was offered in that proceeding. Mr. Meredith contended that the decision "focused inappropriately on Comcast Phone's carrier status when the issue is whether Comcast Phone is eligible for Section 251 interconnection under the regulations and policies of the FCC." Mr. Meredith also rebutted the relevance of the interconnection agreements between Comcast Phone and other TDS affiliates in Vermont and Indiana. He stated that those agreements were entered into voluntarily before it became clear to TDS how Comcast Phone and its affiliates were operating subsequent to their withdrawal of exchange service from the marketplace. He stated that at the time the agreement was executed, Comcast Phone had not executed a national policy to withdraw its exchange services.

6. **Commission Discussion and Findings** The Commission finds that Comcast Phone qualifies as a telecommunications carrier under 47 U.S.C. § 153(44) and is entitled to interconnection with TDS pursuant to Section 251 because (1) it has received authority from the Commission to provide telecommunications services in Indiana, and (2) it does, in fact, offer such services to the public. Further, Comcast Phone requires interconnection with TDS to exchange telecommunications traffic with TDS.

In reaching this conclusion, we follow Commission precedent in the *Sprint Order*⁵, a Section 252 arbitration between Sprint and several rural ILECs, in which we found that Sprint was a telecommunications carrier entitled to Section 251 interconnection so that it could provide "PSTN interconnection" services to MCC Telephony, a cable-affiliated provider of voice services. The Commission's *Sprint Order* is similar to those of other state commissions and in accord with the FCC's finding in *Bright House*, affirmed by the D.C. Circuit, that Comcast Phone qualifies as a telecommunications carrier by virtue of its LIS offering to interconnected VoIP service providers. Our decision is also in accord with the FCC's ruling in *Time Warner*, which provides that telecommunications carriers are entitled to Section 251(a)-(b) interconnection in order to provide wholesale services, including to interconnected VoIP service providers.

A. Comcast Phone is a Telecommunications Carrier. Many of the rights and duties that make local competition possible are available only to telecommunications carriers. Both Indiana and federal law require telecommunications carriers to serve the public in ways that

⁵ *In the Matter of Sprint Communications Co. L.P.'s Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Ligonier Telephone Company, Inc., Cause No. 43052-INT-01 (consolidated with 43053-INT-01 and 43055-INT-01) (Ind. Util. Regulatory Commission, Sept. 6, 2006) ("Sprint Order").*

private carriers need not, including the duty to provide service upon request. Comcast Phone's certificated status is thus the dispositive fact in this case. Comcast Phone is authorized to provide local exchange, interexchange and other telecommunications services in Indiana pursuant to the authority granted by this Commission in Cause No. 42593 (June 9, 2004).⁶ Pursuant to that authority, Comcast Phone qualifies as a competitive local exchange carrier ("CLEC") and is therefore a telecommunications carrier under the Act.

There are two basic requirements for an entity to be considered a telecommunications carrier. First, the carrier must hold itself out to serve all potential users indiscriminately and second, it must allow each customer to transmit information of the customer's choosing.⁷ Comcast Phone qualifies under both elements of this test.

The evidence shows that Comcast Phone offers three services in Indiana: LIS, Schools and Libraries, and exchange access services. These telecommunications services are all offered pursuant to its publicly available Indiana and federal tariffs. Thus, Comcast Phone satisfies the public "holding out" requirement. We find illustrative the decision of the New Hampshire Commission that Comcast Phone qualifies as a telecommunications carrier entitled to interconnection by virtue of its exchange access and school and libraries service offerings alone.⁸ Both involve the transmission of information of the customers' choosing and the services are offered pursuant to tariff. The schools and libraries service includes several telecommunications service components, including point-to-point transport, which is similar to certain types of "special access" telecommunications services that have been regulated by the states and the FCC. The service also includes local and long-distance calling capabilities which qualify as telecommunications services under the Act and are among the types of service which the Commission has given Comcast Phone the authority to provide. We concur with the New Hampshire Commission's findings, and find that Comcast Phone is entitled to interconnection as a consequence.

The LIS offering also qualifies as a telecommunications service. LIS provides a connection between a customer's facilities and the public switched telephone network. See, Comcast Phone Ex. 2, p. 2. Comcast Phone also transmits its customers' telecommunications traffic in the same format in which it is received, the TDM telecommunications format. *Id.*, p. 5.

⁶ The CTAs of Comcast Telecommunications, Inc. were transferred to Comcast Phone in Cause No. 42593. The authority granted Comcast Telecommunications in Cause Nos. 41810 and 41822 was for the provision of resold bundled local exchange, facilities-based local exchange switched and special access, dedicated private line and interexchange toll services on a statewide basis. Therefore, upon the transfer of the CTAs, Comcast Phone received authority to provide the same services.

⁷ Under 47 U.S.C. § 153(44), a "telecommunications carrier" is "any provider of telecommunications services," which, in turn, are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The Act further explains that, "[a] telecommunications carrier shall be treated as a common carrier" *Id.* § 153(44).

⁸ See, e.g., *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services, Order Granting Authority, Docket No. DT-08-013, Order No. 24,938 (Feb. 6, 2009).*

LIS is also offered pursuant to tariff, in which it is made available to any qualifying customer who requests the service.

The transmission requirement is also satisfied. The evidence shows that Comcast Phone is a party to approved Section 251 interconnection agreements between itself and eleven other incumbent carriers in Indiana, including one of TDS's other affiliates in the state, Communications Corporation of Indiana.⁹ Pursuant to those interconnection agreements, Comcast transmits and receives non-toll, locally rated traffic either on a "bill-and-keep" or on a reciprocal compensation payment basis. Comcast Phone also provides either intrastate or interstate terminating access service to approximately 35 customers in the state, and "pays terminating access charges to numerous other carriers, including TDS, in Indiana and elsewhere," for toll traffic originated by its customers. Comcast Phone requires interconnection with TDS so that its customers can communicate with TDS' customers, and vice versa. Moreover, interconnection with TDS is required so that third-party interexchange carriers can route their traffic to Comcast Phone's customers.¹⁰

Our finding is consistent with the FCC's determination in *Bright House* (affirmed by the D.C. Circuit):¹¹ i.e. that Comcast Phone is a telecommunications carrier. In so ruling, the FCC relied in large part on the fact that both Comcast and Bright House previously certified that they had operated, and would continue to operate, as common carriers serving all similarly situated customers equally.¹² As the FCC explained:

We give significant weight to these attestations because being deemed a "common carrier" (i.e., being deemed to be providing "telecommunications services") confers substantial responsibilities as well as privileges, and we do not believe these entities would make such a statement lightly. Further, supporting our conclusion are the public steps that [Comcast and Bright House] have taken, consistent with their undertaking to serve the public indifferently. Specifically, each . . . has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates. Moreover, each . . . has entered into a publicly-available interconnection agreement with Verizon, filed with and approved by the relevant state commission pursuant to Sections 251 and 252 of the Act. These facts, in combination, establish a prima facie case that

⁹ Ms. Choroser testified that Comcast Phone had nine interconnection agreements with ten incumbent carriers in Indiana, including Communications Corporation of Indiana (noting that the Commission approved a single interconnection agreement between Comcast Phone and both CenturyTel of Central Indiana, Inc. and CenturyTel of Odon, Inc.). However, Comcast Phone recently amended its interconnection agreement with Frontier Communications of Thorntown, LLC (Docket No. 42602-INT-08ND, Dec. 13, 2008) to include the service territory of Frontier Communications of Indiana, LLC. Thus, Comcast Phone now has nine interconnection agreements with eleven incumbent carriers in Indiana.

¹⁰ Section 51.3.1 of the draft interconnection agreement that the parties have negotiated but not yet signed (attached as an exhibit to Comcast Phone's petition), provides that the parties will exchange access traffic over interconnection facilities established pursuant to the agreement.

¹¹ *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

¹² See *Bright House*, 23 F.C.C.R. 10704 at ¶ 39.

[Comcast and Bright House] are indeed telecommunications carriers for purposes of Section 222 of the Act.¹³

TDS asserts that *Bright House* is inapplicable because it was decided under Section 222, not Section 251. TDS' argument ignores the normal rule of statutory construction and interpretation under which identical words used in different parts of the same statute are generally presumed to have the same meaning. The term "telecommunications carrier" is defined in 47 U.S.C. § 153(44), and that definition applies throughout the Act, which includes Section 251.

Moreover, the *Bright House* decision is in accord not only with our own *Sprint* decision, but also with the decisions of state regulatory commissions and courts across the nation.¹⁴ Each of these cases affirmed the telecommunications service status of the PSTN interconnection service offered by a CLEC like Comcast Phone and further affirmed a CLEC's interconnection rights under Section 251. Three cases, in Vermont, New Hampshire and Michigan, specifically involved Comcast Phone affiliates.¹⁵ While we recognize that these cases are not binding upon this Commission, we nonetheless find them persuasive authority and concur in their conclusions.

¹³ *Id.*

¹⁴ *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill. CC, July 15, 2005); *Sprint Comm. Co LP v ACE Comm. Group, et al*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Util. Bd., Nov 28, 2005) ("*Sprint Iowa Order*") *aff'd Iowa Telecomms. Servs., Inc. v Iowa Utils. Bd.*, 563 F.3d 743 (8th Cir. 2009); *In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone*, Order, Case No. U-15725, U-15730 (Mich. PSC, March 5, 2009) ("*Comcast-TDS Michigan Decision*"), *aff'g In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 Arbitration of Interconnection Rates, Terms and Conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone*, Decision of the Arbitrator, Case No. U-15725, U-15730 (Mich. PSC, Jan. 28, 2009); *Sprint Comm. Co. LP v. Nebraska Pub. Serv. Co.*, Case No. 4:05CV3260, 2007 WL 2682181 (D. Neb., Sept. 7, 2007), *rev'g Re Sprint Comm. Co LP*, Opinion and Findings, Appl. No. C-3429, 2005 WL 3824447 (Neb. PSC, Sept 13, 2005); *Comcast Phone of New Hampshire d/b/a Comcast Digital Phone Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS*, DT 08-162, Order No. 25,005 (N.H. P.U.C. Aug. 13, 2009); *Berkshire Tel Corp v. Sprint*, Case No. 05-CV-6502, 2006 WL 3095665 (WDNY, Oct. 30, 2006), *aff'g Sprint Comm. Co. LP*, Order Resolving Arbitration Issues, Cases 05-C-0170, -0183 (NY PSC, May 24, 2005) and Order Denying Rehearing, Cases 05-C-0170, -0183 (NY PSC, Aug 24, 2005); *Sprint Communications Company, L.P.*, Order Ruling on Objections and Requiring the Filing of a Composite Agreement, Docket No. P-294, Sub 30 (N. Carolina Utilities Comm'n Dec. 31, 2008), 2008 WL 5456090 (N.C.U.C.), *adopting in relevant part Sprint Communications Company, L.P., Recommended Arbitration Order*, Docket No. P-294, Sub 30 (N. Carolina Utilities Comm'n August 29, 2008) 2008 WL 4123656 (N.C.U.C.); *Re The Champaign Tel Co*, Case No. 04-1494-TP-UNC, *et al* (Ohio PUC, Apr. 13, 2005); *Sprint Comm. Co LP*, Order, App No. 310183F0002AMA, *et al*, 101 PaPUC 895, 2006 WL 3675279 (Pa PUC, Nov. 30, 2006); *Consolidated Comm. Of Fort Bend Co v Public Utility Commission of Texas*, Memorandum Opinion and Order, 497 F. Supp 2d 836 (W.D. Tex 2007), *aff'g Petition of Sprint Comm. Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006) ("*Sprint Texas PUC Order*"); *Petitions of Vermont Telephone Company, Inc. and Comcast Phone of Vermont, LLC d/b/a Comcast Digital Phone, for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws*, Final Order, Docket No. 7469 (Vt. PSB, Feb. 2, 2009); *Re Sprint Comm. Co. LP*, Order No. 4, Docket UT-073031, 2008 WL 227939 (WUTC, Jan. 24, 2008) ("*Sprint Washington Order*").

¹⁵ While TDS attacked the Michigan proceeding on the grounds that no testimony was offered in the proceeding, the arbitrator's decision explicitly references "extensive attachments and supporting testimony".

B. Comcast Phone's Customers and the Services They Provide Are Not Relevant to Comcast Phone's Telecommunications Carrier Status. TDS argues that LIS does not qualify as a telecommunications service because Comcast Phone's customers are interconnected VoIP service providers. However, as the FCC found in *Time Warner*, the "regulatory classification of the [interconnected VoIP] service provided to the ultimate end user has no bearing" on the interconnection rights of wholesale providers.¹⁶ We therefore reject the argument that the nature of traffic as it is originated or terminated has any bearing on telecommunications carriers' rights and obligations with respect to the exchange of that traffic on the PSTN.

Comcast Phone provides a telecommunications service to its affiliate(s) providing VoIP service, with whom it is interconnected, but it does not provide VoIP itself. In other words, while Comcast Phone's customers' traffic may be originated in IP format, that does not mean that Comcast Phone is seeking to exchange "VoIP traffic" with TDS. To the contrary, Comcast Phone's traffic is telecommunications traffic under the Act. The regulatory classification of the service that its customers provide does not affect the regulatory classification of the service that Comcast Phone provides.¹⁷

TDS cites 47 C.F.R. § 51.100 in support of its position. That regulation states in relevant part:

A telecommunication carrier that has interconnected or gained access under Sections 251 (a)(1), 251 (c)(2), or 251 (c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Comcast Phone provides telecommunications services. Therefore, we need not address the question of whether Comcast Phone is providing information services.

C. Comcast Phone Satisfies the Public "Holding Out" Requirement. TDS argues that LIS does not satisfy the "public holding out" requirement of the common carrier test because of the "restrictive" nature of the services they offer. We disagree. As we found three years ago in the *Sprint Order*,

[i]n order to determine whether an entity qualifies as a common carrier, we must first consider whether the carrier holds itself out to serve potential users

Comcast-TDS Michigan Decision, Decision of the Arbitrator, p.1 (Jan. 28, 2009), *supra* n. 13. In addition, TDS' argument does nothing to alter the Michigan Commission's conclusion.

¹⁶ *Time Warner Declaratory Ruling*, ¶ 15; see also *id.* ¶¶ 9, 16. Information services are provided via telecommunications, but they are mutually exclusive statutory categories, as the FCC has recognized. See also *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, 11 F.C.C.R. 21905, ¶ 103 (1997).

¹⁷ For example, dial-up ISP customers access the Internet over ordinary telephone lines. Internet access is an information service. But that does not transform the telecommunications service used to access that service into an information service.

indiscriminately. Second, we must consider whether the carrier alters the content of the users' transmissions. Because there is no dispute over whether Sprint is altering the content of the communications it carries, our decision turns on the question of whether Sprint's services are offered indiscriminately.

In this case, it is undisputed that Sprint is not directly serving MCC customers or end users. Instead, MCC will provide "last mile" services from the Sprint switch. Accordingly, such last mile providers are the class of users at issue in this case.¹⁸

There is a strong similarity between the services offered in the *Sprint* case and Comcast Phone's LIS offering. LIS is offered to a particular class of users, *i.e.*, retail interconnected VoIP service providers capable of offering their own last-mile facilities that want Comcast Phone's interconnection service. A prospective customer will be able to determine whether it is eligible to purchase LIS by examining the description of the service in the tariff. While there may be limited customer pool for these services, this does not prevent a finding that Comcast Phone is a telecommunications carrier. Comcast Phone is not required to expand the scope of its offering, nor must it secure a threshold number of customers before it can gain status as a common carrier. Such a requirement would effectively limit competition by creating an additional burden on carriers wishing to enter the market. All that is required is that it serve "indiscriminately ... the clientele [it is] ... suited to serve."¹⁹ As the D.C. Circuit held, "[a] specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users."²⁰ We therefore reject TDS' contention on this point.²¹

TDS also argues that the early termination and related provisions in LIS could be construed to limit Comcast Phone's willingness and ability to indiscriminately offer services to other potential customers. We do not accept this premise. Early termination clauses such as that found in LIS are frequent industry practice, and the FCC has found that early termination clauses are "typically found in fixed term contracts" and constitute an "accepted commercial practice, both inside and outside of the telecommunications industry."²² The presence of an early termination clause does not nullify Comcast Phone's willingness and ability to indiscriminately offer services to other potential customers.

¹⁸ *Id.*, at 9 (internal citations omitted).

¹⁹ *Consolidated Comms. of Fort Bend*, 497 F.Supp.2d at 845 (quotation omitted).

²⁰ *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

²¹ We find support in the findings of other state utility commissions that have examined this issue. The Iowa Utilities Board found that Sprint was a common carrier because it offered PSTN interconnection to "that class [of potential customers] consisting of entities capable of offering their own last-mile facilities."²¹ The Eighth Circuit upheld the *Sprint Iowa Order* and noted that it was "not troubled by the fact that Sprint serves only [one customer]. If a similarly situated last-mile provider were looking for the wholesale services Sprint provides, Sprint would be an obvious choice." *Iowa Telecomms. Servs.*, 563 F.3d at 750 n.6 (citing *Verizon Cal.*, 555 F.3d at 276).

²² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, ¶¶ 692, 698 (2003).

We make a similar finding regarding TDS' complaints about the ICB nature of the LIS offering. "[C]ommon carriers do not have to offer standardized contracts,"²³ and common carriers routinely offer service packages that "are based on contractual negotiations with a single customer and are specifically designed to meet the needs of only that customer."²⁴ Given that every potential customer's network may be different, every contract might have to be different, as well. Accordingly, it is not surprising that different contracts have "different pricing,"²⁵ as the Iowa Utility Board explained in its order which the Eighth Circuit recently affirmed:

[I]t should be no surprise that each contract has different provisions, including different prices. The fact is that the business of selling these wholesale services has not evolved into a standardized offering. Sprint is offering numerous different wholesale services and different last-mile providers will purchase different pieces to create their own distinct bundles. When each contract is for a different set of services, it should be no surprise that each contract has different pricing.²⁶

D. Conclusion. We find that Comcast Phone is a telecommunications carrier entitled to interconnection under the Act. In the words of the New Hampshire Commission,

So long as Comcast Phone continues to be a telecommunications carrier, offering telecommunications on a common carrier basis, it has a right to interconnection with TDS, pursuant to 47 U.S.C. § 251(a), and may, therefore, permit its affiliate to provide Voice over Internet Protocol services to customers in TDS' territory. In fact, the introduction of such potentially competitive services in TDS territory is consistent with the overarching policy of reducing barriers to competition in ILEC territories.²⁷

And for good measure, our Order also comports with the goal of encouraging competition as defined in HEA 1279. The parties shall therefore jointly execute and file their interconnection agreement (including all attachments, appendices, and exhibits) with the Commission for approval consistent with this finding.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION THAT:

1. The disputed issue between the parties is resolved in accordance with the findings and conclusions set forth herein. Comcast Phone is a telecommunications carrier entitled to interconnection under the Act.

²³ *Sprint Iowa Order* at 14-15.

²⁴ *MCI Telecomms. Corp.*, 917 F.2d at 34.

²⁵ *Id.*

²⁶ *Sprint Iowa Order* at 14-15.

²⁷ *Comcast Phone of New Hampshire d/b/a Comcast Digital Phone Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS*, DT 08-162, Order No. 25,005, at p. 20 (N.H. P.U.C. Aug. 13, 2009).

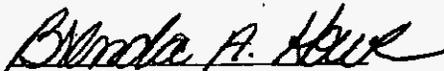
2. The parties shall jointly execute and file a single Interconnection Agreement (including all attachments, appendices, and exhibits) for the Commission's approval reflecting our resolution of the disputed issue in this Order. Such Interconnection Agreement shall be submitted to the Commission as set forth herein by the parties within thirty (30) calendar days following the issuance of this Order.

3. This Order shall be effective on and after the date of its approval.

HARDY, ATTERHOLT, GOLC, LANDIS, AND ZIEGNER CONCUR:

APPROVED: SEP 03 2009

I hereby certify that the above is a true and correct copy of the Order as approved.



Brenda A. Howe
Secretary to the Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail this 18st day of September, 2009.

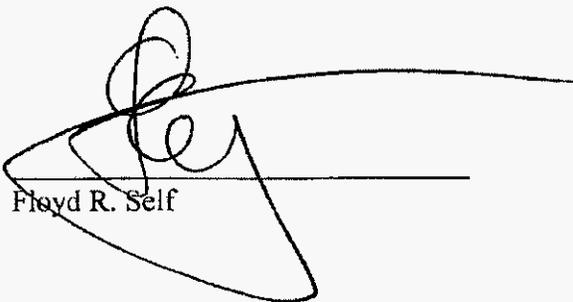
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