

State of Florida



## Public Service Commission

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**DATE:** November 17, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Analysis (King) *JK*  
Office of the General Counsel (Brooks, Murphy) *AT* *MB* *JD*

**RE:** Docket No. 080731-TP – Petition by 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.

**AGENDA:** 12/01/09 – Regular Agenda – Post Hearing Decision—Participation is Limited to Commissioners and Staff

**COMMISSIONERS ASSIGNED:** Carter, Argenziano, Skop

**PREHEARING OFFICER:** Argenziano

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCP\WP\080731.RCM.DOC

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### Case Background

On December 29, 2008, Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone (Comcast) filed its Petition to arbitrate an Interconnection Agreement negotiated with Quincy Telephone Company d/b/a TDS Telecom (TDS), pursuant to Section 252(b) of the

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Communications Act of 1934 (“the Act”), as amended<sup>1</sup> and Sections 120.57(1), 120.80(13), 364.012, 364.15, 364.16, 364.161, and 364.162, Florida Statutes, and Rule 28-106.201, Florida Administrative Code.

On January 22, 2009, TDS filed its Response to Comcast’s Petition for Arbitration. An evidentiary hearing was held July 13, 2009.

### Interconnection under Section 251

Interconnection under Section 251(a)(1) requires that all telecommunications carriers, including incumbent local exchange carriers (ILECs) “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” The parties disagree as to whether Comcast is a telecommunications carrier. Therefore, the initial consideration is whether Comcast meets the definition of a “telecommunications carrier.” The Act defines a “telecommunications carrier” as:

any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.<sup>2</sup>

Comcast contends that it is a telecommunications carrier entitled to interconnection because it provides telecommunications services on a common carrier basis.<sup>3</sup> TDS disagrees, arguing that Comcast does not offer telecommunications services in its own right and is not a common carrier eligible for interconnection with TDS.<sup>4</sup> Both parties rely on the NARUC common carrier test; a two-part test for determining common carrier status articulated by the U.S. Court of Appeals for the District of Columbia, and the FCC’s decision in In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exch. Carriers May Obtain Interconnection under Section 251 of the Comm. Act of 1934 as Amended to Provide Wholesale Telecommunications Telecommns. Sew. to VoIP Providers, Memorandum Opinion and Order, 22 F.C.C.R. 3513 (Mar. 1,2007) (“Time Warner”) to support their arguments.

### Arbitration under the Act

Part II of the Act sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act addresses interconnection between

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<sup>1</sup>Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq. (1996)).

<sup>2</sup>*Id.* §153(44).

<sup>3</sup>Comcast BR at 8.

<sup>4</sup>TDS BR at 2-3.

carriers.<sup>5</sup> Section 252 of the Act addresses the procedures for negotiation, arbitration and approval of agreements.<sup>6</sup>

Arbitration is available when parties are unable to reach a comprehensive negotiated agreement as contemplated by Section 252 of the Act. Once a competitive local exchange carrier (CLEC) submits a request for negotiation of an interconnection agreement, Section 252(b) permits either party to the negotiation to petition a state commission to “arbitrate any open issues” unresolved by voluntary negotiation.<sup>7</sup> Section 252(b)(4)(c) provides that the state commission is to resolve each issue set forth in the petition and any response by imposing the appropriate conditions as required.<sup>8</sup>

#### The Unresolved Issue between Comcast and TDS

Comcast and TDS participated in negotiations pursuant to Section 251 of the Act for the purposes of establishing an Interconnection Agreement. The parties were unable to execute an agreement. Therefore, pursuant to the process outlined in Section 252, Comcast and TDS filed a petition and response, respectively, to resolve one remaining issue; namely, whether TDS is required to offer interconnection to Comcast under Section 251 of the Act and/or Sections 364.16, 324.161, and 364.162, Florida Statutes.

The Commission is vested with jurisdiction over the subject matter by the provisions of Chapters 364 and 120, F.S.

#### Discussion of Issues

**Issue 1:** Is TDS required to offer interconnection to Comcast under Section 251 of the Telecommunications Act of 1996 and/or Sections 364.16, 324.161, and 364.162, Florida Statutes?

**Recommendation:** Yes. TDS is required to offer interconnection to Comcast under Section 251 of the Telecommunications Act of 1996 because Comcast is a telecommunications carrier, as defined by 47 U.S.C. § 153 (44). **(Brooks)**

#### Position of the Parties

**COMCAST:** Comcast qualifies as a telecommunications carrier entitled to interconnection with TDS because of the authority it has received from the Commission to operate in the state of

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<sup>5</sup> See 47 U.S.C. §251.

<sup>6</sup> *Id.* §252.

<sup>7</sup> *Id.* §252(b)(1): Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

<sup>8</sup> *Id.* §252(b)(4)(c).

Florida as a telecommunications carrier and because Comcast actually offers and provides telecommunications services.

**TDS:** No. Interconnection rights under Section 251 of the federal act are only available to common carriers providing telecommunications services. Comcast Phone does not offer telecommunications services in its own right, is not a common carrier and has not requested interconnection under state law; therefore, its petition should be denied.

### **Staff's Analysis**

#### *Parties' Arguments*

##### ***Comcast***

As discussed more fully below, Comcast contends that it is a telecommunications carrier entitled to Section 251 interconnection with TDS because:

1. its telecommunications service offerings satisfy the requirements to be identified as a common carrier under the NARUC common carrier test;<sup>9</sup>
2. it has received authority from the Florida Public Service Commission (Commission) to operate throughout the state of Florida as a telecommunications carrier;<sup>10</sup>
3. the type of traffic originated by Comcast's customers has no bearing on interconnection rights;<sup>11</sup>
4. policy considerations, like the enactment of Senate Bill 2626, support Comcast's interconnection request;<sup>12</sup> and
5. decisions from the FCC, other state commissions and reviewing courts, provide persuasive authority in support of Comcast's Petition for Interconnection.<sup>13</sup>

In support of its contentions, the points raised above are more fully discussed below.

#### *1) Comcast's Telecommunications Service Offerings Satisfy the NARUC Common Carrier Test*

Comcast's initial argument is that its telecommunications service offerings satisfy the requirements necessary to be identified as a common carrier, and therefore, a telecommunications carrier under the *NARUC* common carrier test.<sup>14</sup>

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<sup>9</sup> Comcast BR at 7-8.

<sup>10</sup> Comcast BR at 1.

<sup>11</sup> Comcast BR at 15.

<sup>12</sup> Comcast BR at 8.

<sup>13</sup> Comcast BR at 17.

<sup>14</sup> Comcast BR at 8.

Under the *NARUC* common carrier test, in order to qualify as a common carrier and thus a telecommunications carrier, a carrier must: (1) allow customers to transmit information of their choosing without change in the format or content of the message as sent and received, and (2) offer its services indifferently to all potential users.<sup>15</sup> Comcast argues that all of its telecommunications service offerings involve the transmission of customer information without change in the form or content of the information as sent and received and are offered to the public on a common carrier basis.<sup>16</sup> Comcast's telecommunications service offerings include Local Interconnection Service (LIS), Schools and Libraries Network Service, and Exchange Access Service.<sup>17</sup>

In particular, Comcast contends that its LIS is sufficient to qualify it as a common carrier because it makes this service available to any and all qualified prospective customers pursuant to its Florida price list and service guides filed with the Commission and posted on its website.<sup>18</sup> Comcast asserts that while it is true that its LIS is only available to a particular class of users, interconnected VoIP providers, the law is clear that Comcast is not required to offer its services to the entire public, nor must it secure a certain number of customers to be a common carrier.<sup>19</sup> Comcast asserts that the courts have explained that "[a] specialized carrier whose service is of possible use only to a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users," even if that fraction is primarily the carrier's affiliate.<sup>20</sup> Comcast argues that this rebuts TDS' argument that Comcast's focused customer base (interconnected VoIP providers) undermines the common carrier status of its LIS offering.<sup>21</sup>

Furthermore, Comcast argues that TDS' criticisms that the terms of Comcast's LIS are insufficiently clear lack truth and merit.<sup>22</sup> Comcast contends that the terms of its LIS including the customer eligibility requirements, early termination provisions, and the Individual Case Basis (ICB) nature of the LIS offering are all terms which are common and well accepted in the industry.<sup>23</sup> Specifically, Comcast states that several reviewing courts and state commissions have rejected claims that ICB pricing terms disqualify a carrier from common carriage status.<sup>24</sup>

Comcast also asserts that, in addition to LIS, both its School and Libraries and Exchange Access services qualify Comcast for telecommunications carrier status.<sup>25</sup>

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<sup>15</sup> *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, (D.C. Cir. 1976) ('NARUC').

<sup>16</sup> Comcast BR at 7.

<sup>17</sup> Comcast BR at 6.

<sup>18</sup> Choroser TR 37.

<sup>19</sup> *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 WL2366391 (Tex. PUC, Aug 14, 2006).

<sup>20</sup> Comcast BR at 12.

<sup>21</sup> Comcast BR at 11.

<sup>22</sup> Comcast BR at 12.

<sup>23</sup> Comcast BR at 13.

<sup>24</sup> Comcast BR at 14.

<sup>25</sup> Comcast BR at 7.

2) *Comcast has Authority from the Commission to Operate as a Telecommunications Carrier in Florida*

Comcast also argues that, because most states, including Florida, require the prospective carrier to obtain authorization from the appropriate regulatory authority to act as a common carrier, it qualifies as a telecommunications carrier because of the authority it has received from the Commission to operate throughout the state.<sup>26</sup> Comcast asserts that the Commission has authorized Comcast to provide local exchange, interexchange, and other telecommunications services pursuant to Certificates No. 4404 and 7834.<sup>27</sup> Comcast further asserts that the Commission has approved five (5) Section 251 Interconnection Agreements between Comcast and other ILEC's in Florida, under which Comcast currently exchanges significant volumes of traffic.<sup>28</sup>

3) *The Type of Traffic Originated by Comcast's Customers Has No Bearing on Interconnection Rights*

Comcast contends that TDS errs in its argument that Comcast would not qualify for interconnection, even if it was a common carrier, because its LIS customers are interconnected VoIP providers. Comcast states that this argument is directly contrary to the FCC's holding in *Time Warner*. Comcast asserts that in *Time Warner*, the FCC concluded that "wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers (LECs) when providing services to other providers, including VoIP providers pursuant to sections 251(a) and (b)."<sup>29</sup> Comcast further argues that TDS' reliance on a footnote from *Time Warner*, which cites FCC Rule 51.100(b), is misplaced.<sup>30</sup> FCC Rule 51.100(b) provides that telecommunications carriers may use interconnection arrangements with ILECs to also provide information services so long as they provide telecommunications services through the same arrangement.<sup>31</sup> Comcast argues that it will not provide any information services through its interconnection with TDS; therefore, TDS' reliance on Rule 51.100(b) is misplaced.<sup>32</sup>

4) *Enactment of Senate Bill 2626 Support Comcast's Interconnection Request*

Comcast also asserts that its interconnection rights are especially clear in Florida in light of the recent enactment of Senate Bill 2626, which became effective July 1, 2009. Senate Bill 2626 provides that a "competitive local exchange telecommunications company is entitled to interconnection with a local exchange telecommunications company to transmit and route voice traffic between both the competitive local exchange telecommunications company and the local exchange telecommunications company regardless of the technology by which the voice traffic is originated by and terminated to an end user."<sup>33</sup> With this enactment, Comcast argues that it

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<sup>26</sup> Comcast BR at 6.

<sup>27</sup> Choroser TR 25-26.

<sup>28</sup> Comcast BR at 7.

<sup>29</sup> Comcast BR at 15.

<sup>30</sup> Comcast BR at 17.

<sup>31</sup> Comcast BR at 17.

<sup>32</sup> Comcast BR at 17.

<sup>33</sup> The provisions of Senate Bill 2626 are captured in Section 364.013, F.S.

“is entitled” to interconnection with TDS, regardless of the technology used to serve the ultimate end user. In addition, Comcast argues that the Florida Legislature has generally found telecommunications services are, among other things, in the public interest. Comcast contends that permitting it to interconnect with TDS will further the achievement of this policy objective, and others, allowing Comcast to serve its interconnected VoIP service provider customers.<sup>34</sup>

5) *Decisions from the FCC, other state commissions and reviewing courts, provide persuasive authority in support of Comcast’s Petition for Interconnection.*

Last, Comcast argues that rulings from the FCC, other state commissions and reviewing courts are persuasive authority in favor of Comcast’s position.<sup>35</sup> Comcast highlights the FCC’s decision in *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 (2008) (“*Bright House*”).<sup>36</sup> Comcast asserts that *Bright House* arose from a Comcast affiliate’s complaint that Verizon was violating the customer proprietary network information (“CPNI”) privacy protections of Section 222 of the Act.<sup>37</sup> Comcast proffers that among Verizon’s defenses was the procedural claim that Comcast (and a co-complainant, Bright House Networks) were not entitled to the protection of the CPNI rules in the first place because they were not telecommunications carriers—the same argument that TDS makes here.<sup>38</sup> Comcast asserts that the FCC rejected Verizon’s claim and found particularly relevant that Comcast (and Bright House) “self certify that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally.”<sup>39</sup> The D.C. Circuit affirmed the FCC’s ruling in *Verizon California, Inc. v Federal Communications Commission*, No. 08-1234 at 10, 2009 WL 304745 at 4 (D.C. Cir., Feb 10, 2009) and Comcast notes that, among other things, the court rejected Verizon’s argument that the lack of multiple customers for LIS negated Comcast’s common carrier status.<sup>40</sup>

### **TDS**

TDS contends that Comcast does not operate as a common carrier and does not offer telecommunications services in its own right. As discussed more fully below, TDS argues the following:

1. Comcast does not operate as a common carrier under the NARUC common carrier test;
2. Comcast seeks interconnection to provide interconnected VoIP service to its affiliates rather than to provide telecommunications services in its own right,<sup>41</sup> and
3. State Law Does Not Provide a Basis for Relief in the Case.<sup>42</sup>

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<sup>34</sup> Comcast BR at 9.

<sup>35</sup> Comcast BR at 17.

<sup>36</sup> Comcast BR at 17.

<sup>37</sup> Comcast BR at 18.

<sup>38</sup> Comcast BR at 18.

<sup>39</sup> Comcast BR at 18.

<sup>40</sup> Comcast BR at 18.

<sup>41</sup> TDS BR at 12.

In support of its contentions, the points raised above are more fully discussed below.

*1) Comcast does not operate as a common carrier under the NARUC common carrier test*

TDS argues that whereas only the second part of the *NARUC common carrier test*—the requirement that a common carrier “serve indifferently” is at issue in this case; Comcast fails to meet this requirement.<sup>43</sup> TDS argues that there are “reasons implicit in the nature of [Comcast’s] operations to expect an indifferent holding out to the eligible user public” and, that Comcast’s decision to offer LIS as it does in Florida precludes a finding that LIS is offered indifferently to the public.<sup>44</sup> TDS finds the same is true of Comcast’s schools and library service.<sup>45</sup> Lastly, TDS believes what Comcast has labeled as “exchange access” services, is really not a service.<sup>46</sup>

Specifically, with regards to LIS, TDS believes that Comcast does not offer its LIS on a common carrier basis. TDS states that evidence in the record supports a finding that Comcast’s LIS was created to transit traffic from the customers of Comcast’s affiliates in Florida, Comcast IP Phone, LLC, Comcast IP Phone II, LLC, and Comcast Phone III, LLC (collectively known as “Comcast IP”) to the Public Switch Telephone Network (“PTSN”).<sup>47</sup> Additionally, TDS asserts that the fact that Comcast has no customers for LIS other than its affiliates after three years corroborates the notion that Comcast Phone offers LIS on a private carrier basis.<sup>48</sup> TDS argues that this is because virtually all of the terms and conditions of Comcast’s LIS, except the terms and conditions serving to limit the service, must be negotiated with the customer on a case-by-case basis to meet the individual needs of the customer.<sup>49</sup> TDS believes these provisions would likely deter unaffiliated third party retail VoIP providers from pursuing LIS due to the enormous discretion reserved to Comcast, in addition to the burdensome terms and conditions.<sup>50</sup> TDS contends that these provisions preclude a finding that Comcast’s LIS is offered indifferently to the public.<sup>51</sup>

TDS proffers a similar argument with regards to Comcast’s Schools and Library service. TDS states that the nature of the services, the limitations on its availability, and the absence of customers for the service show that Comcast does not offer this service to the public indifferently and therefore, does not provide the service as a common carrier.<sup>52</sup>

With regards to Comcast’s Exchange Service, TDS opines that what Comcast refers to as “exchange access” is not really exchange access. TDS states that, by definition, “exchange” access means “offering of access to telephone exchange services or facilities for the purpose of

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<sup>42</sup> TDS BR at 14.

<sup>43</sup> TDS BR at 10.

<sup>44</sup> TDS BR at 10.

<sup>45</sup> TDS BR at 10.

<sup>46</sup> TDS BR at 11.

<sup>47</sup> TDS BR at 8.

<sup>48</sup> TDS BR at 9.

<sup>49</sup> TDS BR at 8.

<sup>50</sup> TDS BR at 9.

<sup>51</sup> TDS BR at 11.

<sup>52</sup> TDS BR at 11.

origination or termination of telephone toll services.”<sup>53</sup> TDS argues that Comcast does not meet this definition because voice toll calls are not originated or terminated on Comcast’s network; all of the voice calls to be handled by Comcast begin and end on the network of some other entity.<sup>54</sup> TDS contends that what Comcast really provides is an aggregating or transport function that it calls “exchange access.”<sup>55</sup>

*2) Comcast Seeks Interconnection to Provide Interconnected VoIP Service to Its Affiliates Rather Than To Provide Telecommunications Services in Its Own Right*

TDS contends that Comcast is not seeking interconnection in its own right, but rather, so that it can provide LIS to its affiliates, Comcast IP.<sup>56</sup> TDS argues that where the FCC in its *Time Warner* decision has approved the practice of allowing fixed VoIP providers to interconnect to the PTSN through wholesale telecommunications carriers, such practice is only allowed under two conditions.<sup>57</sup> Those conditions are: (1) the wholesale carrier must provide services on a “common carrier basis” and (2) the carrier must seek interconnection “in its own right.”<sup>58</sup> TDS asserts that the requirement that a carrier seek interconnection “in its own right” was intended to disqualify wholesale carriers that seek interconnection solely or primarily for the purpose of providing a service like LIS and little or nothing else.<sup>59</sup> For these reasons, TDS believes that the record supports a conclusion that Comcast does not seek interconnection “in its own right.”

TDS also contends that Comcast has not shown that it will provide wholesale or retail telecommunications services “in its own right.”<sup>60</sup> TDS argues that Comcast discontinued the voice service it provided to end user customers in August 2007 and that Comcast’s LIS should not be considered a telecommunications service at this time.<sup>61</sup> TDS asserts that Comcast’s LIS, by its terms, is restricted to interconnected VoIP providers, involves the transport of VoIP traffic only, and that the FCC has not determined fixed interconnected VoIP traffic to be a telecommunications service.<sup>62</sup> Additionally, TDS believes that the point-to-point portion of Comcast’s schools and library service is a private line service that would not generate telecommunications traffic that is exchanged pursuant to a Section 251 interconnection agreement. Last, TDS contends that to suggest that Comcast seeks an interconnection agreement with TDS so that it can offer a “Channelized Exchange Service” would test the limits of credibility.<sup>63</sup> TDS proffers that exchange access service requires the provision of telephone exchange service which Comcast does not provide. TDS asserts that IXC traffic destined to TDS

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<sup>53</sup> *Id.* §153(16)

<sup>54</sup> TDS BR at 12.

<sup>55</sup> TDS BR at 13.

<sup>56</sup> TDS BR at 12.

<sup>57</sup> *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exch. Carrier May Obtain Interconnection under Section 251 of the Comm. Act of 1934 as Amended to Provide Wholesale Telecommns. Serv. to VoIP Providers*, Memorandum Opinion and Order, 22 F.C.C.R. 3513 (Mar. 1, 2007)

<sup>58</sup> TDS BR at 12.

<sup>59</sup> TDS BR at 12.

<sup>60</sup> TDS BR at 13.

<sup>61</sup> TDS BR at 13.

<sup>62</sup> TDS BR at 13.

<sup>63</sup> TDS BR at 13.

end-user customers (which Comcast asserts is transported through its exchange access service) is routed through already established arrangements with the IXCs.<sup>64</sup>

### *3) State Law Does Not Provide a Basis of Relief in the Case*

Last, TDS asserts that state law does not provide a basis for relief in this case for several reasons.<sup>65</sup> First, TDS argues that, except for the request in the petition, there is nothing in the record showing that Comcast ever requested interconnection with TDS under Florida State Law or that the parties attempted to negotiate an interconnection agreement under Chapter 364, F.S.<sup>66</sup> Second, TDS believes that the provisions in Sections 364.16, 364.161, or 364.162, F.S., have been preempted by the provisions in Sections 251, 252 and 253 of the Telecommunications Act.<sup>67</sup> Lastly, TDS argues that Section 3 of CS/CS for SB 2626 enacted by the 2009 Legislature is not relevant to the decision in this case because that statute did not come into effect until July 1, 2009, and was not in effect when the petition was filed.<sup>68</sup>

### Analysis

Upon thorough analysis of FCC Orders, the Act, case law and the record in this proceeding, staff believes that Comcast is a telecommunications carrier entitled to interconnection under Section 251 of the Telecommunications Act of 1996. Staff believes that Comcast qualifies as a common carrier, under the *NARUC* common carrier test, and that Comcast provides telecommunications services in “its own right”, as set forth in the FCC’s *Time Warner* case.

Both parties agree that for Comcast to be considered a common carrier it must qualify as such under both prongs of the *NARUC* common carrier test. Both parties also agree that Comcast’s service offerings qualify under the first prong because Comcast allows customers to transmit information of their choosing without change in the format or content of the message as sent and received.<sup>69</sup> However, TDS argues that Comcast does not offer its telecommunications services “indifferently” to all potential users.<sup>70</sup> Staff disagrees. In reaching this conclusion, staff accepts Comcast witness Choroser’s testimony that Comcast does in fact offer its telecommunications services “indifferently” to all potential users.<sup>71</sup> Comcast has announced the availability of its services, through the issuance of its price lists and service guides, and continues to offer its services to the clientele that it is best suited to serve.<sup>72</sup> Comcast acknowledges that its clientele includes only interconnected VoIP providers for Comcast’s LIS service, and only interexchange carriers for Comcast’s Exchange Access Services; however, staff believes that Comcast is offering “indiscriminate service to [the] public its service may

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<sup>64</sup> TDS BR at 13.

<sup>65</sup> TDS BR at 14.

<sup>66</sup> TDS BR at 14.

<sup>67</sup> TDS BR at 14-15.

<sup>68</sup> TDS BR at 15.

<sup>69</sup> Comcast BR at 7.

<sup>70</sup> TDS BR at 11

<sup>71</sup> Choroser TR 38.

<sup>72</sup> Comcast BR at 6.

legally and practically be of use.”<sup>73</sup> Although Comcast has only three LIS service customers, its affiliates—Comcast IP, and no current customers in its School and Libraries Network Service; these services are still, based upon the record in the proceeding, offered to any qualified prospective customers.<sup>74</sup> Further, with regards to TDS’ assertions that the terms and conditions of Comcast’s services are limited, staff believes these terms and conditions are common industry practice, and are similar to the terms and conditions offered by other Florida carriers.<sup>75</sup>

Staff also believes that Comcast seeks interconnection in its own right. The FCC held in its *Time Warner* decision that competitive local exchange carriers who provide wholesale telecommunications services to VoIP providers may obtain interconnection under Section 251 of the Act, if those carriers meet two conditions. Those conditions are: (1) the wholesale carrier must provide services on a “common carrier basis” and (2) the carrier must seek interconnection “in its own right.” As discussed above, staff believes that Comcast provides services on a “common carrier” basis. Staff also believes the record in this proceeding establishes that Comcast meets the FCC’s second condition by seeking interconnection “in its own right”. Despite Comcast’s cancellation of its retail service offerings in 2007, Comcast provides three other telecommunications services in the state of Florida: LIS, Schools and Libraries Network Service, and Exchange Access Service.<sup>76</sup> In particular, under its exchange access service, Comcast has over 35 interexchange carriers in Florida who purchase either intrastate or interstate terminating access service.<sup>77</sup> Comcast also serves interconnected VoIP providers through its LIS service.<sup>78</sup> Staff believes that TDS errs in its assertion Comcast is a VoIP provider and not a telecommunications carrier seeking interconnection in its own right just because Comcast has affiliates who are VoIP providers and would interconnect to the public switched network through its LIS service. Rather, staff believes that Comcast is seeking interconnection in its own right by offering its LIS, Schools and Libraries Network Service, and Exchange Access Service indifferently to all potential users.

Additionally, staff believes the FCC finding in its *Bright House* decision supports Comcast’s position that it is a telecommunications carrier. In *Bright House*, one of the primary arguments presented by Verizon is that Comcast (and a co-complainant, Bright House Networks) were not entitled to the protection of the CPNI rules because they were not telecommunications carriers. In support of its argument, like TDS, Verizon also argued that Comcast (and Bright House) served only their affiliates. The FCC rejected Verizon’s claim and found particularly relevant that Comcast (and Bright House) “self certify that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally.” Verizon’s argument in *Bright House* is analogous to TDS’ argument to this Commission that Comcast is not a telecommunications carrier entitled to interconnection. Staff believes that, like Verizon, TDS errs in its argument. Although the arguments in *Bright House* are not made pursuant to Section 251 of the Act, rather under Section 222(b) of the Act, staff believes the FCC’s finding is relevant because it also examines the definition of a telecommunications carrier under the Act.

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<sup>73</sup>National Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976)

<sup>74</sup> Choroser TR 44.

<sup>75</sup> Choroser TR 48.

<sup>76</sup> Comcast BR at 6.

<sup>77</sup> Choroser TR 40.

<sup>78</sup> Choroser TR 27.

Staff also notes the decisions of other state commissions who have supported 251 interconnection agreements for Comcast affiliates and similarly situated carriers who have presented analogous facts. Particularly, on March 5, 2009, the Michigan Public Service Commission confirmed an arbitrator's decision that rejected TDS' concerns regarding Comcast's status as a telecommunications carrier.<sup>79</sup> Before the Michigan Public Service Commission, a TDS affiliate argued that Comcast Phone of Michigan, LLC was not a telecommunications carrier. The Michigan Public Service Commission ruled in favor of Comcast Phone of Michigan, LLC, dismissing TDS' argument that Comcast's lack of multiple customers for some of its services disqualified it from common carrier status. This decision joined similar decisions from the Vermont Public Service Board and the New Hampshire Public Utilities Commission.<sup>80</sup>

Section 251(a) imposes a general obligation on all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Staff believes, based upon the record, an obligation to interconnect under the Act, should rightfully be imposed on TDS.

Finally, staff notes that although Comcast, in its Petition, requested arbitration pursuant to 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., Comcast failed to raise its state law claims throughout the pendency of this case. However, staff does note that its recommendation that Comcast is entitled to interconnection pursuant to applicable law is further bolstered by the recent revisions to s. 364.013, F.S. which sets forth that,

. . . a competitive local exchange telecommunications company is entitled to interconnection with a local exchange telecommunications company to transmit and route voice traffic between both the competitive local exchange telecommunications company and the local exchange telecommunications company regardless of the technology by which the voice traffic is originated by and terminated to an end user. The commission shall afford such competitive local exchange telecommunications company all substantive and procedural rights available to such companies regarding interconnection under the law.

### Conclusion

In conclusion, staff believes that TDS is required to offer interconnection to Comcast under Section 251 of the Telecommunications Act of 1996 because Comcast is a telecommunications carrier, as defined by 47 U.S.C. § 153 (44).

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<sup>79</sup> See *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, at 20 (Mich. PSC, Jan. 28, 2009), consolidated with Case No. U-15730.

<sup>80</sup> Comcast BR at 19-20.

**Issue 2:** Should this docket be closed?

**Recommendation:** No, if the Commission approves staff's recommendation in Issue 1, then the parties should be required to submit a signed final interconnection agreement. Staff recommends that the parties be required to file the final interconnection agreement for approval within 45 days of issuance of the Final Order. (Brooks)

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 1, then the parties should be required to submit a signed final interconnection agreement. Staff recommends that the parties be required to file the final interconnection agreement for approval within 45 days of issuance of the Final Order.