

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 08-162

Comcast Phone of New Hampshire

Petition for Arbitration of Rates, Terms and Conditions of Interconnection
with Kearsarge Telephone Company, Merrimack County Telephone
and Wilton Telephone Company

**Sur-Reply Brief of Kearsarge Telephone Company, Merrimack County
Telephone Company and Wilton Telephone Company, Inc.**

NOW COME Kearsarge Telephone Company (“KTC”), Merrimack County Telephone Company (“MCT”) and Wilton Telephone Company, Inc. (“WTC”) (collectively, “the TDS Companies”), and hereby submit the following Sur-Reply Brief in connection with the Petition for Arbitration (the “Petition”) filed by Comcast Phone of New Hampshire, LLC (“Comcast Phone”).

**I. THE EIGHTH CIRCUIT DECISION OFFERS NO MORE SUPPORT OF
BRIGHT HOUSE THAN DID THE D.C. CIRCUIT.**

In addition to *Bright House*¹ (and its affirmation by the D.C. Circuit), Comcast Phone in its Reply (“Comcast Reply”) now also draws on *Iowa Telecom*² to support its troika of indicators for common carrier status: self certification, public offering/disclosure of services, and entry into an interconnection agreement. However, like the D.C. Circuit, the Eighth Circuit found that

¹ *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008) (“*Bright House*”).

² *Iowa Telecomms. Servs. v. Iowa Utils. Bd.*, Case No. No. 08-2140 (8th Cir. 2009) (“*Iowa Telecom*”).

all three factors (of which, again, “none . . . by itself seems compelling”)³ must be present in the aggregate to establish that a service provider is a common carrier. This is not the case here.

Comcast can only lay claim to one of the three factors that both the D.C. and Eighth Circuits required. It has self certified as a telecommunications carrier, but it does not meet the other two factors. First, it has no interconnection agreement with the TDS Companies. Furthermore, as the TDS Companies have established, Comcast cannot truly be said to offer its services to any other potential customer than its own affiliate. While Comcast Phone maintains that its public disclosures of its service constitute a “public offering,”⁴ its efforts in this respect are considerably less affirmative than those of Sprint, the interconnecting carrier in *Iowa Telecom*.

As the *Iowa Telecom* court noted, Sprint not only offers its VoIP interconnection service, it actively promotes it as well. The court related how Sprint markets its service indiscriminately to *all* VoIP carriers, publishing brochures and going to trade shows to find customers for its interconnection service.⁵ It also noted that “[t]here is no evidence in the record that Sprint discriminates or will discriminate in providing telecommunication services.”⁶ Contrast this with Comcast Phone, whose “public” offering consists solely of the posting of terms and conditions deep within its affiliate’s website, and whose obvious intention is to serve only its affiliate. Clearly, Comcast would be dismayed if a cable company ever actually asked for LIS – but on the other hand it knows that this will never happen, since prospective customers can go to Sprint, MCI, and many others who really promote and seek out this business.

³ *Id.*, slip op. at 10 (quoting D.C. Circuit)

⁴ Comcast Reply at 3.

⁵ *Iowa Telecom*, slip op. at 11.

⁶ *Id.*

II. THE TDS COMPANIES ARE NOT INCONSISTENT IN THEIR ANALYSIS OF THE FACTS OF THIS CASE IN COMPARISON TO *TIME WARNER*.

In its Reply, Comcast Phone criticizes the TDS Companies for a purported inconsistency in their analysis of *Time Warner*.⁷ Comcast Phone complains that TDS concedes on the one hand that Sprint and MCI are telecommunications carriers in their own right because they are offering services other than LIS-type interconnection, but on the other hand the TDS Companies will not grant Comcast Phone the same consideration for Comcast Phone's non-LIS services, BLS and SLNS.⁸ However, there is no inconsistency here. As the TDS Companies explained, Sprint and MCI actually have customers for their non-LIS services and actively promote them as well.⁹ Comcast, on the other hand, does not have any customers for BLS and SLNS.¹⁰ Sprint and MCI are telecommunications carriers because they actually perform as telecommunications carriers, unlike Comcast, which only pretends to be.

III. COMCAST PHONE'S THEORY OF THE CASE WOULD GENERATE A PERVERSE RESULT.

In its Reply, Comcast reiterates that the public disclosures of its service [i.e. website posting] "go far beyond that which the Eighth Circuit found necessary to constitute a 'public offering' of service,"¹¹ that a carrier's common carrier status is "a product of 'self certification'"¹² and that a "service provider may be deemed a common carrier . . . even if it intends 'to serve only a single customer,'"¹³ and thus concludes that it is a telecommunications carrier.

⁷ *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) ("*Time Warner*").

⁸ Comcast Reply at 6.

⁹ TDS Brief at 10-11.

¹⁰ See Stipulations 11 and 12.

¹¹ Comcast Reply at 3.

¹² *Id.* at 3 (quoting *Iowa Telecom*).

¹³ *Id.* at 9 (quoting *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 para. 21 (2007)).

The implications of this theory are profoundly disturbing. Under the standard that Comcast advocates, *any* entity (corporate or personal) can become a telecommunications carrier eligible to receive Section 251 services from an ILEC. For example, for \$100, any business in New Hampshire can establish a limited liability company affiliate. Under the name of this affiliate, the parent can file a CLEC Application for Registration, which the Commission is in the practice of accepting without notice or hearing. Somewhere on its website, the parent company can, on behalf of its “CLEC” affiliate, post a price list offering the barest minimum of a local business service. (In fact, it could easily just copy the one that Comcast Phone has posted on its parent’s website.) At this point, according to Comcast Phone, this “CLEC” affiliate is now a “telecommunications carrier” entitled to the benefits of Section 251.

Now, as a “telecommunications carrier,” this affiliate can begin ordering services from the ILEC’s resale tariff and “resell” these services to its parent at an immediate – and continuing – discount in the vicinity of 20% off of the retail rates the parent is currently paying.¹⁴ Furthermore, according to Comcast, the affiliate need never solicit or obtain any other customers other than its parent. In fact, if the parent is small enough and its interstate calling limited enough, its “CLEC” affiliate may qualify for the USF contributor “de minimis” exception and avoid contributing to USF – tantamount to a further 9-10% discount off of long distance rates. Taking this scenario one step further, if the parent is ambitious enough, it can direct its affiliate to acquire and dedicate a PBX-type switch to its parent, provision “interconnection” from this switch to the ILEC, and begin collecting reciprocal compensation from the ILEC and terminating access charges from IXCs!

¹⁴ See, e.g. FairPoint Tariff NHPUC 86 § 10.5

In this scenario, New Hampshire could end up with thousands of “telecommunications carriers” for the Commission to oversee – and less competition overall as more and more customers self-provision through captive “CLEC” affiliates. As outrageous as this sounds, this perverse outcome is entirely consistent with Comcast’s theory of the case and the facts as presented. To avoid such a precedent, the Commission, in its role as fact finder as well as judge, must look beyond Comcast Phone’s facile representations, look beyond the superficial reasoning of the decisions that Comcast Phone cites, and focus on the reality of the situation. Unlike the other carrier parties in the cases on which Comcast Phone relies, Comcast Phone is not offering telecommunications services in New Hampshire, and does not qualify for interconnection with the TDS Companies.

IV. CONCLUSION.

Comcast Phone has not met its burden of demonstrating that it is a telecommunications carrier. Comcast Phone's theory of the case advocates unreasonable practices that undermine, rather than promote, the local competition goals of the Telecommunications Act. Accordingly, the Petition should be dismissed on the ground that Comcast Phone does not qualify as an entity entitled to seek interconnection under Section 251 of the Act or arbitration under Section 252 of the Act.

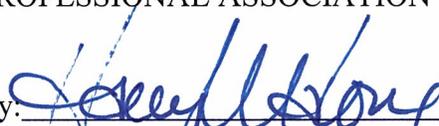
Respectfully submitted,

KEARSARGE TELEPHONE COMPANY
MERRIMACK COUNTY TELEPHONE
COMPANY
WILTON TELEPHONE COMPANY

By Their Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: May 22, 2009

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CERTIFICATE OF SERVICE

I hereby certify that a PDF copy of the foregoing sur-reply brief was forwarded this day to the parties by electronic mail.

Dated: May 22, 2009

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