

**THE  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

Petition of Comcast Phone of New Hampshire, LLC     )  
d/b/a Comcast Digital Phone for Arbitration of     )  
Rates, Terms and Conditions of Interconnection with     )  
Kearsarge Telephone Company d/b/a TDS Telecom,     )  
Merrimack County Telephone Company d/b/a TDS     ) DOCKET NO. \_\_\_\_\_  
Telecom and Wilton Telephone Company, Inc. d/b/a     )  
TDS Telecom Pursuant to the Communications Act     )  
of 1934, as Amended     )

**PETITION FOR ARBITRATION  
OF COMCAST PHONE OF NEW HAMPSHIRE, LLC**

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ATTORNEYS FOR COMCAST  
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December 12, 2008

## PETITION FOR ARBITRATION

1. Comcast Phone of New Hampshire, LLC d/b/a Comcast Digital Phone (“Comcast Phone”), by and through its attorneys, petitions the New Hampshire Public Utilities Commission (“PUC” or “Commission”) to arbitrate, pursuant to Section 252(b) of the Communications Act of 1934, as amended (the “Act”), and PUC Rules 101, 103, and 203, an Interconnection Agreement between Comcast Phone and Kearsarge Telephone Company d/b/a TDS Telecom (“Kearsarge”), Merrimack County Telephone Company d/b/a TDS Telecom (“Merrimack”) and Wilton Telephone Company, Inc. d/b/a TDS Telecom (“Wilton”) (collectively, “TDS” or “the TDS entities”) (Comcast Phone and TDS are collectively referred to as the “Parties”). The Parties have been negotiating since April 2008 and only one issue remains open for arbitration.

2. This Petition includes background information on the Parties, the history of the parties’ negotiations, an explanation of the Commission’s jurisdiction and applicable legal standards, and a comprehensive presentation of the one open issue, including the positions of both Parties, where known. The Exhibits to the Petition set forth the following additional information: (1) the initial letter in which Comcast Phone requested that TDS enter into negotiations for an Interconnection Agreement under Sections 251(a) and 251(b) of the Act (attached hereto as Exhibit A); (2) a letter revising the arbitration schedule associated with this Petition (Exhibit B); and, (3) a copy of the proposed Interconnection Agreement that the Parties have negotiated (Exhibit C).<sup>1</sup> Attached as Exhibits D and E, respectively, is an excerpt from an interconnection agreement between Comcast Phone and TDS affiliates in Vermont and copies of Comcast Phone’s Business Local Service, Schools and Libraries Network Service, and Local

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<sup>1</sup> The disputed redlined language inserted at Section 3.1 of the attached interconnection agreement reflects TDS’ concern regarding Comcast’s status as a telecommunications carrier.

Interconnection Service telecommunications service offerings. Also included with this Petition is the Prefiled Direct Testimony of Beth Choroser in support of Comcast Phone's positions.

**I. Applicable Legal Standards.**

3. This Commission has jurisdiction over this Petition for Arbitration pursuant to Section 252(b)(1) of the Act.<sup>2</sup> Under the Act, Parties negotiating for interconnection and other rights under Section 251 within a particular state may petition the state commission for arbitration of any unresolved issues during the 135th to the 160th day of such negotiation.<sup>3</sup>

4. Pursuant to Section 252(b)(4)(C) of the Act,<sup>4</sup> this arbitration is to be concluded not later than nine (9) months after the date that TDS and Comcast Phone stipulated that TDS received a request for negotiations (July 5, 2008). Based on the dates stipulated to by the Parties and consistent with the statute, the arbitration should be concluded on or before April 5, 2009.

5. This arbitration must be resolved under the standards established in Sections 251 and 252 of the Act, the rules adopted and orders issued by the Federal Communications Commission ("FCC") in implementing the Act, and the applicable rules and orders of this Commission. *See* 47 U.S.C. §§ 252(b)(4), (c), (e)(1) – (4).

6. The Commission may, under its own state law authority, impose additional requirements pursuant to Section 251(d)(3), 252(e)(3), 261(b), and 261(c) of the Act, as long as such requirements are consistent with the Act and the FCC's regulations.<sup>5</sup>

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<sup>2</sup> 47 USC § 251(b)(1).

<sup>3</sup> *Id.* § 252(b).

<sup>4</sup> *Id.* § 252(b)(4)(C).

<sup>5</sup> 47 USC §§ 251(d)(3), 252(e)(3), 261(b), 261(c); *see Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 244 (1996) (contemplating that states may impose additional "access and interconnection obligations" over and above those required by federal law).

7. Although Comcast Phone has attempted to identify TDS' position with respect to the one remaining open issue, Comcast Phone respectfully requests that it be permitted to supplement this filing after it receives TDS' response and to provide any additional information deemed necessary by the Commission.

## **II. Contact Information for Petitioner and its Counsel.**

8. Comcast Phone is a Delaware limited liability company with its principal place of business at One Comcast Center, Philadelphia, PA 19103. Comcast Phone is a telecommunications carrier as defined in Section 3(44) of the Act.<sup>6</sup> Comcast is registered to provide service in the FairPoint f/k/a Verizon New England service area in New Hampshire.<sup>7</sup> Comcast Phone has registered for authority to provide service in the service areas of the TDS entities subject to this Petition, and that registration is currently pending before the Commission.<sup>8</sup> Comcast Phone provides both intrastate and interstate telecommunications services to its customers in New Hampshire. These services are offered under both its federal tariff and state

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<sup>6</sup> 47 USC § 153(44).

<sup>7</sup> The Commission's order in *Petition for Authority to Provide Local Telecommunications Services*, Order Nisi Granting Authorization, Order No. 23,088, DE 98-208 (NH PUC Dec. 15, 1998) authorized MediaOne Telecommunications of New Hampshire, Inc. to provide service in the Bell Atlantic service territory. By letter dated April 17, 2001, Media One Telecommunications of New Hampshire, Inc. notified the Commission of a name change to AT&T Broadband Phone of New Hampshire, LLC. By letter dated February 6, 2003, the Commission was informed that AT&T Broadband Phone of New Hampshire, LLC was changing its name to Comcast Phone of New Hampshire, LLC d/b/a Comcast Digital Phone as a result of the merger transaction whereby Comcast Corporate acquired AT&T broadband Corp.

<sup>8</sup> Comcast Phone filed an application for authority to provide local exchange telecommunications services in each of the TDS entities' service territories. The Commission granted Comcast's application in its Order No. 24,843, DT 08-013, dated April 4, 2008. On April 16, 2008, TDS filed a motion to suspend the order until issuance of an order approving a settlement in Docket No. DT 07-027, concerning TDS' request for an alternative form of regulation pursuant to RSA 374:3-b. In its Order No. 24,854, dated May 2, 2008, the Commission suspended its grant of CLEC authority to Comcast Phone pursuant to Order No. 24,843. On August 18, 2008, the Commission ordered that Comcast's petition for authority is complete and complies with the Commission rules governing CLEC applications. However, the Commission then ordered prefiled testimony be filed and a hearing be held on whether the offer of telecommunications services described in Comcast Phone's application is consistent with the public good. By Stipulation of the parties and consent of Staff, the hearing was waived. Parties filed testimony on September 9, 2008 and the sole remaining issue as to whether Comcast Phone's certification in the TDS territories is consistent with the public good is currently under consideration with the Commission. Order No. 24,887, DT 08-013.

rate schedules.<sup>9</sup> Comcast Phone currently has an interconnection agreement with FairPoint f/k/a Verizon New England, Inc. in the state.<sup>10</sup>

9. The names, addresses, and contact information for Comcast Phone's representatives in this proceeding are as follows:

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<sup>9</sup> As a CLEC, Comcast Phone is not required to file tariffs as such with the Commission, but is required to file rate schedules or adopt the Commission's uniform tariff. Comcast Phone has filed rate schedules for its Business Local Service (Revised Rate Schedule No. 1, filed June 9, 2008; effective June 9, 2008) and Schools and Libraries Network Service (Revised Rate Schedule No. 1, filed Dec. 8, 2008; effective Dec. 9, 2008). Comcast's New Hampshire rate schedule and uniform tariff are available for viewing at: <http://www.comcast.com/corporate/about/phonetermsofservice/circuit-switched/statetariffs/newhampshire.html>. Comcast Phone's federal tariffs are available at: <http://www.comcast.com/corporate/about/phonetermsofservice/circuit-switched/cdpfederaltariffs.html>. Comcast Phone also offers to the public its Local Interconnection Service which, while generally available to qualified customers, is not offered pursuant to tariff. *See, e.g.*, [http://www.comcast.com/MediaLibrary/1/1/About/PhoneTermsOfService/PDF/interconnection/Local\\_Interconnecti\\_on\\_Service.pdf](http://www.comcast.com/MediaLibrary/1/1/About/PhoneTermsOfService/PDF/interconnection/Local_Interconnecti_on_Service.pdf).

<sup>10</sup> *See infra* note 57.

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### **III. Contact Information for Respondent.**

10. Upon information and belief, the principal place of business for Kearsarge, as registered with the Commission, is 173 Main St., New London, NH 03257. Upon information and belief, the principal place of business for Merrimack, as registered with the Commission, is 3 Kearsarge Ave., Contoocook, NH 03257. Upon information and belief, the principal place of business for Wilton, as registered with the Commission, is Route 101, Ste. 104, The Summit Executive Office, 1 Chalet Dr., Wilton, NH 03086.

11. The TDS entities are Incumbent Local Exchange Carriers (“ILECs”) in this state as defined in Section 251(h) of the Act.<sup>11</sup> Within their respective operating territory, the TDS entities have been the incumbent providers of telephone exchange service during all relevant times.

12. The names, addresses, and contact information for TDS’ representatives during the negotiations with Comcast Phone are as follows:

Linda Lowrance  
Manager – Interconnection  
TDS Telecom – Knoxville  
10025 Investment Drive, Suite 200  
Knoxville, TN 37932  
(865) 671-4758  
(865) 966-4720 Fax  
E-Mail: Linda.Lowrance@tdstelecom.com

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<sup>11</sup> 47 USC § 251(h).

13. On information and belief, TDS' regulatory contact in New Hampshire is:

Michael C. Reed  
Manager State Government Affairs  
Government and Regulatory Affairs Department  
24 Depot Square, Unit 2  
Northfield, VT 05663  
E-Mail: mike.reed@tdstelecom.com

**IV. Brief Summary of the Negotiation History and Date of Bona Fide Request for Negotiations.**

14. Comcast Phone requested negotiation for an Interconnection Agreement with TDS in New Hampshire in April 2008.<sup>12</sup> Via letter dated November 7, 2008, the parties agreed to extend the arbitration window to provide additional time to resolve the final outstanding issues.<sup>13</sup> Comcast Phone and TDS resolved all issues, and all that remained was for the Parties to execute the proposed fully-negotiated Interconnection Agreement, attached hereto as Exhibit C.<sup>14</sup> On or about October 13, 2008, however, TDS raised unspecified "concerns" about Comcast Phone's telecommunications carrier status and suspended negotiations with Comcast Phone based on the unsupported contention that Comcast Phone is not a telecommunications carrier entitled to interconnection. TDS now refuses to execute the agreement the parties have negotiated.

15. TDS received Comcast Phone's request to negotiate on April 21, 2008. The Parties stipulated to a revised schedule with day 135 as November 17, 2008 and Day 160 as December 12, 2008.<sup>15</sup> Accordingly, pursuant to the Act, the arbitration shall be concluded on or

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<sup>12</sup> See Exhibit A.

<sup>13</sup> See Exhibit B.

<sup>14</sup> As mentioned at *supra* note 1, Section 3.1 of the attached proposed interconnection agreement incorporates the disputed language in redline proposed by TDS.

<sup>15</sup> *Id.*

before April 5, 2009, nine (9) months after the stipulated date that TDS received Comcast Phone's request for negotiation, July 5, 2008.

**V. SUMMARY OF RESOLVED ISSUES.**

16. The Parties have negotiated contract language to govern the Parties' relationship and resolved all but one issue. The issues resolved by the Parties are reflected in the proposed fully-negotiated Interconnection Agreement attached as Exhibit C, which includes the disputed language proposed by TDS set forth in Section 3.1 (in redline).

**VI. SUMMARY OF UNRESOLVED ISSUES NOT BEING SUBMITTED FOR ARBITRATION.**

17. None.

**VII. SUMMARY OF UNRESOLVED ISSUES SUBMITTED FOR ARBITRATION.**

18. The sole open issue is whether Comcast Phone is a telecommunications carrier under Section 3(44) of the Act entitled to the rights accorded to such carriers under Sections 251(a)-(b) of the Act.

19. While Comcast Phone can only guess at the arguments that TDS may raise to support its claim that Comcast Phone is not a telecommunications carrier, the *objective* underlying TDS' position is clear: TDS is looking for any means possible to delay or prevent Comcast Phone's entry into its local markets. TDS has taken a similar approach with respect to the Comcast Phone application for registration to provide service in its New Hampshire Territories, which has now been pending for one full year. The Commission should reject TDS' continued efforts to frustrate the development of competition in New Hampshire and promptly reaffirm Comcast Phone's status as a telecommunications carrier and associated rights under the Act.



**A. TDS Has Waived the Argument that Comcast Phone Is Not a Telecommunications Carrier.**

20. As an initial matter, TDS has already stipulated that Comcast Phone is a telecommunications carrier and thus waived any right to argue otherwise. That stipulation can be found in the November 7, 2008 Letter Agreement (“Stipulated Agreement”) that it entered into with Comcast Phone (Exhibit B), which the Parties executed in order to extend the Section 252(b)(1) negotiation timeline. The Stipulated Agreement states specifically that the Parties were engaged in negotiations for an “interconnection agreement ... pursuant to Section 251 and 252 of the Communications Act of 1934.” Because only telecommunications carriers have rights under Sections 251 and 252 of the Act, TDS has expressly waived the right to argue otherwise now.

21. TDS affiliates in other states have entered into interconnection agreements with Comcast Phone’s competitive local exchange carrier affiliates in Tennessee, Indiana, and most recently in Vermont. The Vermont agreement, which the Vermont Public Service Board approved in August 2008, states expressly that it was entered into pursuant to Section 251 of the Act.<sup>16</sup> These agreements constitute additional evidence that TDS has already acknowledged Comcast Phone’s telecommunications carrier status and right to interconnection. TDS should be barred from taking a contrary position now.<sup>17</sup>

22. The Commission should not permit TDS to further benefit from its conduct and further delay Comcast Phone’s market entry. The Commission should, therefore, find that TDS is estopped from making its argument now and refuse to consider TDS’ contention that Comcast Phone is not a telecommunications carrier.

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<sup>16</sup> See Exhibit D (excerpt from agreement).

<sup>17</sup> To the extent that TDS may argue that Comcast surrendered its right to provide telecommunications service by virtue of its discontinuance of one of its product offerings, that is clearly contradicted by the facts. See Direct Testimony of Beth Choroser (“Choroser Direct”) at 6-7.

## B. Comcast is a Telecommunications Carrier.

23. If the Commission nonetheless chooses to consider TDS' claims on the merits, it will find that they have no basis in law or fact. A telecommunications carrier under the Act is a "provider of telecommunications service," 47 U.S.C. § 153(44); "telecommunications service," in turn, means "the offering of telecommunications" – transporting data without change 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." 47 U.S.C. § 153(46). This definition was added by the 1996 Act, but has been held to be generally consistent with the traditional common law definition of "common carrier."<sup>18</sup> Under the common law test, there are two requirements for qualifying as a common carrier. First, the carrier must hold itself out to serve all potential users of its service indiscriminately and, second, it must allow each customer to transmit information of the customer's choosing.<sup>19</sup> There is no doubt that Comcast Phone qualifies under both prongs of this test. Indeed, many of Comcast Phone's telecommunications services are offered pursuant to its federal tariffs and publicly available rate schedule.<sup>20</sup> Moreover, the courts and the FCC uniformly have allowed providers of telecommunications to self-identify as common carriers. All that is required is that the carrier declare its willingness to serve as a common carrier.<sup>21</sup> While there are reported cases in which

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<sup>18</sup> See *Virgin Islands Telephone v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

<sup>19</sup> *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976). In *Virgin Islands Telephone*, *supra*, the D.C. Circuit affirmed the FCC's decision to apply the traditional common law test for whether an entity is a common carrier when interpreting Section 153(44), without deciding whether the statute and the common law test would in all cases be completely identical in their application.

<sup>20</sup> Comcast's New Hampshire-specific offerings are available for viewing on Comcast's public website. See *supra* note 9; see also *Choroser Direct* at 5-11.

<sup>21</sup> See *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1474, 1481 (D.C. Cir. 1994) (whether a carrier is a "common carrier" or "private carrier" ultimately turns on what the carrier "chooses" to be); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("NARUC II") (explaining that "the primary sine qua non of common carrier status ... arises out of the undertaking 'to carry for all people indifferently' ...") (citation omitted); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 91 (2005) (confirming that facilities-based providers of broadband

providers have successfully *avoided* being labeled “common carriers,” there are few if any in which a provider has chosen to be treated as a common carrier and yet ultimately been found not to meet the test. The reason is clear: an entity that, (1) holds itself out as a telecommunications carrier, and that (2) seeks and obtains authorization from the appropriate regulator to provide telecommunications services but that, (3) refuses to do so upon reasonable request therefore, is subject to discipline by regulators and the courts.

24. Comcast Phone offers telecommunications services to prospective customers in New Hampshire. Since 1998, Comcast Phone has been certified by the Commission to offer telecommunications services as a competitive local exchange carrier in the New Hampshire territory of FairPoint f/k/a Verizon New England.<sup>22</sup> In the current proceeding on Comcast Phone’s registration to provide competitive telecommunications services in TDS companies’ territory, the Commission found in Order No. 24,887 that “Comcast’s initial application lists three telecommunications services and Comcast has demonstrated that those three services will be offered through two specific retail telecommunications offerings.”<sup>23</sup> TDS is a party to stipulated facts in that proceeding that acknowledge “Comcast Phone is relying on Business Local Service and Schools and Libraries Network Service as retail telecommunications services for certification in New Hampshire.”<sup>24</sup> Comcast Phone is already offering those

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Internet access may declare whether they will provide the “telecommunications” underlying their broadband service as a private carrier or common carrier); 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) (determining that Sprint is a common carrier because “Sprint is willing to provide wholesale service to any last-mile retail service provider that wants Sprint’s services in Iowa”).

<sup>22</sup> See *supra* note 7.

<sup>23</sup> *Request for Authority to Provide Local Telecommunications Services*, Order Granting Hearing, Order No. 24,887, DE 08-013, 6 (NH PUC Aug. 18, 2008).

<sup>24</sup> See Letter from F. Anne Ross, Staff Attorney, New Hampshire Public Utilities Commission, to Debra A. Howland, Executive Director and Secretary, New Hampshire Public Utilities Commission (June 18, 2008).

telecommunications services in other parts of New Hampshire, a fact acknowledged by the Commission.<sup>25</sup>

25. Although, pursuant to stipulation of the parties, the Commission's ruling in Order No. 24,887 that Comcast Phone offers telecommunications services did not address Comcast Phone's wholesale Local Interconnection Service ("LIS"), that service also is a telecommunications service offered to qualified providers of interconnected Voice over Internet Protocol ("VoIP") services, as the term is defined in Section 9.3 of the FCC's rules.<sup>26</sup> Comcast Phone's LIS offering provides interconnected VoIP service providers with access to the public switched telephone network ("PSTN"),<sup>27</sup> access to emergency calling ("E911"), numbering resources, directory listings and other services on a wholesale basis that make it possible for interconnected VoIP service providers to serve their retail end user customers. The LIS service is available to NH prospective customers through Comcast Phone's LIS Service Guide, which is posted on Comcast's website.<sup>28</sup>

26. The FCC has recognized "that interconnected VoIP service is increasingly used to replace traditional telephone service."<sup>29</sup> Indeed, more than 16 million U.S. consumers currently receive interconnected VoIP service.<sup>30</sup> Undoubtedly one of the reasons that subscription to

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<sup>25</sup> Hearing Order at 6 ("Comcast is already offering one of its proposed services, the local business service, in other parts of New Hampshire . . .").

<sup>26</sup> See 47 C.F.R. § 9.3 (defining interconnected VoIP service). A copy of Comcast's LIS offering is attached hereto in Exhibit E.

<sup>27</sup> As explained below, the "PSTN interconnection" feature of LIS constitutes a telephone exchange service offering under Section 3(47) of the Act, 47 U.S.C. § 153(47), which qualifies Comcast to the rights afforded to local exchange carriers under Section 251(b).

<sup>28</sup> The Commission does not accept wholesale service offering rate schedules.

<sup>29</sup> *Telephone Number Requirements for IP-Enabled Services Providers, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, 22 FCC Rcd 19531, ¶ 18 (2007) ("VoIP Number Portability Order").

<sup>30</sup> This is a conservative estimate based on the reports of the National Cable and Telecommunications Association's estimate that cable VoIP providers currently serve 13.5 million customers (see <http://www.ncta.com/IssueBrief.aspx?contentId=3023>) and Vonage's recent report that it serves 2.6 million customers. See Vonage Holding Corp. Reports Third Quarter 2008 Results, Press Release (2008) (available at <http://files.shareholder.com/downloads/VAGE/462838671x0x247533/6dd8cb96-f536-405b-9681-cd84817d8db3/>

interconnected VoIP has grown so explosively in recent years is the stability that has come from the FCC's official sanctioning of the essential relationship between interconnected VoIP service providers and their local exchange / telecommunications carrier "partners."<sup>31</sup> The FCC has recognized that interconnected VoIP service providers require the services of LECs – usually CLECs like Comcast Phone – to serve their customers. Thus, the FCC has definitively ruled that competitive local exchange carriers like Comcast Phone that provide wholesale service 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 [Act]."<sup>32</sup> And this is true *regardless* of the classification of interconnected VoIP as either an information service or a telecommunications service, which remains unresolved.<sup>33</sup>

27. Moreover, Comcast Phone's wholesale LIS offering qualifies as a telecommunications service because Comcast Phone offers it prospectively to qualified customers. The FCC expressly ruled as much in its recent *Verizon Order*.<sup>34</sup> The case arose from claims that Verizon was violating Section 222(b) of the Telecommunications Act, which requires that proprietary information received by one carrier from another carrier not be used by the receiving carrier to market its own services. Verizon attempted (unsuccessfully) to defend the claim on the merits, but it also argued that Comcast (and a co-complainant, Brighthouse Networks) were not entitled to the benefit of the rules protecting carrier proprietary information

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VG\_News\_2008\_11\_6\_Financial.pdf). Given that there are other providers, the actual number of VoIP customers is no doubt significantly higher.

<sup>31</sup> VoIP Number Portability Order, ¶¶ 12, 17-37. Promoting interconnected VoIP furthers other policy objectives, as well, including "driving demand for broadband connections and consequently encouraging more broadband investment and deployment." *Id.* ¶ 29 & n.102.

<sup>32</sup> *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶ 1 (2007) ("Time Warner Declaratory Ruling").

<sup>33</sup> *Id.* ¶¶ 15-16.

<sup>34</sup> *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704, ¶¶ 37-41(2008).

in the first place, because they were allegedly not telecommunications carriers. “Verizon’s argument,” the FCC explained, “boil[ed] down to an assertion that” Comcast was not “engage[d] in offering telecommunications directly to the public, or to such classes of users as to be effectively available directly to the public.”<sup>35</sup>

28. The FCC rejected Verizon’s claim. The FCC found particularly relevant that the complainant’s “self-certify that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally.”<sup>36</sup> 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 statements lightly. Further supporting our conclusion are the public steps the Comcast and Bright House Competitive Carriers have taken, consistent with their undertaking to serve the public indifferently. Specifically, each of the Comcast and Bright House Competitive Carriers has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates. Moreover, each of the Comcast and Bright House Competitive Carriers 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 the Comcast and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of section 222(b).<sup>37</sup>

29. The facts in this case are similar to those presented to the FCC, and the Commission here should reach the same result.<sup>38</sup> That the FCC should affirm the telecommunications service status of the PSTN interconnection services offered to interconnected VoIP service providers by CLECs like Comcast was not surprising, as it followed

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<sup>35</sup> *Id.* ¶ 38 (internal citation omitted) (internal punctuation altered).

<sup>36</sup> *Id.* ¶ 39.

<sup>37</sup> *Id.* ¶ 39.

<sup>38</sup> While TDS may argue that the FCC limited its findings to Section 222(b) of the Act (*see* Verizon Order ¶ 41), in light of the clarity and persuasiveness of the FCC’s analysis, the burden is clearly on TDS to explain why the FCC’s ruling should not apply in this case.

on the heels of more than one-half dozen similar state orders.<sup>39</sup> The Ohio Commission's reasoning is illustrative:

MCI is a certificated carrier in the state of Ohio. As such, MCI is a provider of telecommunications services and is qualified to submit an interconnection request to Applicants. Further, the Commission finds that MCI is acting in a role no different than other Telecommunications Carriers whose network could interconnect with Applicants so that traffic is terminated to and from each network and across networks. Therefore, the Commission disagrees with Applicants that MCI is not a telecommunications carrier and that Applicants have no duty to interconnect with MCI.<sup>40</sup>

30. Likewise, the New York Commission found that:

Sprint's agreement to provide Time Warner Cable with interconnection, number portability order submission, intercarrier compensation for local and toll traffic, E911 connectivity, and directory assistance, for Time Warner to offer customers digital phone service, meets the definition of 'telecommunications services.' Sprint's arrangement with Time Warner enables it to provide service directly to the public. While Sprint may act as an intermediary in terminating traffic within and across networks, the function that Sprint performs is no different than that performed by other competitive local exchange carriers with networks that are connected to the independents. Sprint meets the definition of 'Telecommunications Carrier' and, therefore, is to interconnect with the independents pursuant to § 251 (a).<sup>41</sup>

31. The facts in this case are identical in all material respects. The only difference that TDS will be able to point to is that Comcast's only LIS customer at this point is its own

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<sup>39</sup> See Consolidated Comm Of Fort Bend Co v. Public Utility Commission of Texas, 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); Berkshire Tel Corp v Sprint, Case No. 05-CV-6502, 2006 WL 3095665 (W.D.N.Y. 2006) (*affirming* Sprint Communications Co. LP, Order Resolving Arbitration Issues, Cases Nos. 05-C-0170, 0183 (N.Y. PSC May 24, 2005) ("New York Case") and Order Denying Rehearing, Cases Nos. 05-C-0170, 0183 (N.Y. PSC Aug. 24, 2005)); *see also* Sprint Comm. Co. LP, Order, App. No. 310183F0002AMA, et al., 101 PaPUC 895, 2006 WL 3675279 (Pa. PUC, Nov. 30, 2006); 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); Re Sprint Comm. Co. LP, Opinion and Findings, Appl. No. C-3429, 2005 WL 3824447 (Neb. PSC, Sept 13, 2005); Cambridge Telephone Company, et al., Order, Docket No. 05-0259, et al., 2005 WL 1863370 (Ill. CC, July 15, 2005); Re The Champaign Tel. Co., Finding and Order, Case No. 04-1494-TP-UNC (Ohio PUC Jan. 26, 2005), *request for rehearing denied in part, granted in part*, Order on Rehearing (Apr. 13, 2005) ("Ohio Case").

<sup>40</sup> Ohio Case, *supra* note 39, ¶ 5.

<sup>41</sup> New York Case, *supra* n.39, at 5.

interconnected VoIP service provider affiliates. But that “distinction” makes no difference. First, as noted, Comcast offers LIS as a telecommunications service offering to any qualifying interconnected VoIP service provider that may request it. Comcast has engaged in preliminary discussions about the service with several potential customers in other states, and specifically offered the service to a prospective customer in Vermont.<sup>42</sup> Most importantly, no prospective customer has filed a complaint with any regulator anywhere in the country alleging that Comcast has denied a reasonable request for service.<sup>43</sup>

32. But even if Comcast did serve only its own interconnected VoIP affiliates, that would still not alter the telecommunications service status of the offering. There is no requirement that an entity secure a certain number of customers before it can gain status as a telecommunications carrier. All that is required is that it serve “indiscriminately ... the clientele [it is] ... suited to serve.”<sup>44</sup> While a carrier may not “make individualized decisions in particular cases” about who and who not to serve,<sup>45</sup> that “does not mean that the particular services offered must actually 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.”<sup>46</sup> Indeed, a service provider may be deemed a common carrier “even where it is not yet actually supplying service to *any* customers” in a

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<sup>42</sup> See Choroser Direct at 9.

<sup>43</sup> *Id.*

<sup>44</sup> Consolidated Comm. Of Fort Bend Co. v. Public Utility Commission of Texas, Memorandum Opinion and Order, 497 F. Supp. 2d 836, 845 (W.D. Tex. 2007) (quotation omitted).

<sup>45</sup> *NARUC I*, 525 F.2d at 641

<sup>46</sup> National Ass’n of Regulatory Utility Com’rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*); see also *NARUC I*, 525 F.2d at 641; *USTA v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002) (upholding FCC determination that a network that could serve only certain schools and other entities was a common carrier).



particular area, and can be a common carrier even if it intends “to serve only a single customer.”<sup>47</sup>

33. Indeed, under Section 3(46) of the Act, all that is required to qualify as a “telecommunications service” is the “*offer*” to provide telecommunications for a fee, not the actual *provision* of telecommunications for a fee. Requiring any specific number of actual customers – or indeed any actual customers at all – would place Section 251 “requesting telecommunications carriers” in an impossible “Catch-22.” In many cases a requesting telecommunications carrier could not effectively gain any customers at all until interconnection arrangements are established with an ILEC; but if the entity is not a carrier at all until it has customers, then it would never be permitted to negotiate and arbitrate interconnection arrangements in the first place.<sup>48</sup>

34. To the extent that the Commission has any doubt about the telecommunications service status of Comcast’s LIS offering, it should give the benefit of that doubt to Comcast, the new entrant seeking to bring the benefits of competition and lower cost innovative communications services to New Hampshire consumers in TDS’ service territory. The “holding out indifferently” standard is, by design, not hard to satisfy for at least two reasons. First, public policy, as embodied in the Act, requires that telecommunications carriers must serve the public in various ways that private carriers need not, and are subject to enforcement action by regulators and claims for damages in the courts if they fail to honor requests for service. Second, because many of the rights (and corresponding duties) that make local competition possible are available only to telecommunications carriers, a narrow reading would impair competition in violation of the public policy that animates the Act. Indeed, the FCC expressly ruled that it is critical to treat

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<sup>47</sup> See *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 3392, ¶ 20 (2007).

<sup>48</sup> *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990).

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.”<sup>49</sup>

35. Finally, the Commission, in Order 24,887, addressed the question framed by Chairman Getz at a May 31, 2008 prehearing conference: “Is there some service that Comcast Phone . . . is going to provide that is a common carrier service?”<sup>50</sup> The Commission ruled that the Business Local Services and Schools and Libraries Network Service Comcast Phone proposes to offer in the TDS territories are “retail telecommunications services” and that Comcast “has met the requirements of our CLEC registration rules as we interpret them.” The only remaining issue in that docket is whether the offer of services that the Commission has already determined are telecommunications service is in the ‘public good.’” The Commission therefore already has ruled that Comcast Phone is providing common carrier services under New Hampshire law.

36. For all these reasons, there is no basis for the Commission to deny Comcast Phone Section 251(a)-(b) rights by virtue of the fact that Comcast Phone has interconnected VoIP service provider customers, including its affiliates. To the contrary, Comcast fully meets the definition of “telecommunications carrier” in the Act and is therefore entitled to such rights.

37. But even if the Commission has unresolved questions about the telecommunications service status of Comcast Phone’s LIS offering (which it should not), Comcast Phone offers other telecommunications services that definitively resolve Comcast Phone’s telecommunications carrier status. Moreover, while all telecommunications carriers are

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<sup>49</sup> Time Warner Declaratory Ruling ¶ 13; *see also id.* (finding that CLEC common carrier rights are “a critical component for the growth of facilities-based local competition”).

<sup>50</sup> *See* attached Exhibit F at 39 (Prehearing Conference Transcript of May 21, 2008 in Comcast Phone of New Hampshire Petition to Waive PUC 431.01(d), DT 08-013 (New Hampshire Public Utilities Commission)).

entitled to interconnection under Section 251(a)(1), local exchange carriers (“LECs”) – a special class of carriers that offer either “exchange access or telephone exchange services” – are also entitled to the mutual and reciprocal obligations provided by Section 251(b).<sup>51</sup> In addition to its LIS offering, Comcast Phone also clearly qualifies as both a telecommunications carrier and as a LEC by virtue of its exchange access service offerings to interexchange carriers that purchase terminating access service from Comcast Phone pursuant to its New Hampshire rate schedule and federal tariff.<sup>52</sup> Furthermore, “exchange access or telephone exchange services” were the services that Comcast Phone listed in its original CLEC-10 application under consideration in Order 24,887; when the Commission ruled in that order that “Comcast’s initial application lists three telecommunications services and Comcast has demonstrated that those three services will be offered through two specific retail telecommunications offerings,” it considered the Business Local Service and Schools and Libraries Network to be exchange access or telephone exchange services. “Exchange access” is defined as offering access to “telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.”<sup>53</sup> This is exactly the function that Comcast Phone performs when it receives an incoming toll call and then switches it to the interconnected VoIP service provider customer for delivery to the end user. In that case, it is using its “telephone exchange facilities” to help terminate a toll call. Comcast Phone has approximately 35 exchange access customers in New Hampshire, as its Carrier Access Billing (“CABs”) records reflect.<sup>54</sup>

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<sup>51</sup> A LEC is defined as any provider of telephone exchange service or exchange access. 47 U.S.C. § 153(26). Section 251(b) obligates all LECs to provide one another with number portability (§ 251(b)(2)), dialing parity and nondiscriminatory access to directory listings (§ 251(b)(3)), as well as the duty to transport and terminate traffic and pay reciprocal compensation (§ 251(b)(5)).

<sup>52</sup> See *Choroser Direct* at 10. Comcast Phone also pays terminating access charges to numerous carriers, including TDS. *Id.*

<sup>53</sup> 47 U.S.C. § 153(16).

<sup>54</sup> See *Choroser Direct* at 10.

38. Comcast Phone also provides “telephone exchange service,” which the Act defines as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.<sup>55</sup>

39. In plain terms, “telephone exchange service” is the ability to make and receive local calls. This is exactly what Comcast Phone provides when it makes its services available to business customers, schools and libraries, and interconnected VoIP service providers. Evidence that Comcast Phone facilitates the origination and termination of telecommunications services is found in its reciprocal compensation billing records, which payments Comcast Phone makes and receives pursuant to an interconnection agreement *already* approved by the Commission.<sup>56</sup> Indeed, the Commission approved Comcast Phone’s interconnection agreement with FairPoint f/k/a Verizon New England, Inc. in 2003,<sup>57</sup> adding to the more than 150 Section 251 interconnection agreements that Comcast Phone has with other ILECs and wireless carriers around the country. There is no reason why New Hampshire consumers in TDS’ service territories should be the only end users in the nation denied the benefits of Comcast Phone’s competitive service offerings. But that would be the case if the Commission did not grant Comcast Phone’s petition and failed to order TDS to execute the fully negotiated agreement.

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<sup>55</sup> 47 U.S.C. § 153(47).

<sup>56</sup> See Choroser Direct at 10.

<sup>57</sup> See Re Verizon New Hampshire, Order No. 24,141, DT 03-012 (NH PUC March 17, 2003).

**VIII. Proposed Contract Language Reflecting Parties' Position on Disputed Item.**

40. The proposed contract language is represented by the parties' negotiated interconnection agreement that is attached as Exhibit C. The disputed language proposed by TDS is set forth in Section 3.1 of the interconnection agreement, in redline.

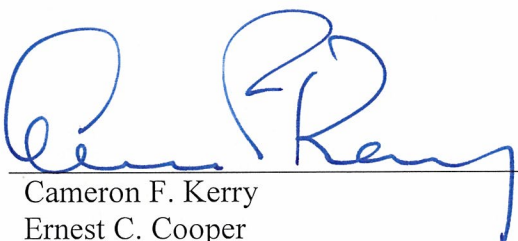
41. WHEREFORE, Comcast Phone requests that TDS file and serve an answer to this Petition within 25 days pursuant to Commission Order 22,236, DE 96-177 (July 12, 1996).

42. WHEREFORE, Comcast Phone respectfully requests that the Commission reject TDS' proposed language and adopt the interconnection language as agreed to by the parties.

43. WHEREFORE, Comcast Phone respectfully requests that the Commission grant such other and further relief as the Commission deems just and proper.

Respectfully Submitted,

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& POPEO. PC.

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