STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

DT-09-048

BRIEF ON ISSUES

This proceeding was initiated by IDT America, Corp. ("IDT") when it filed a Petition for Arbitration on March 9, 2009 ("Initial Petition"). In the Initial Petition, IDT sought "arbitration of certain rates, terms and conditions in an agreement governing interconnection" pursuant to "47 U.S.C. §§ 252(b), 251(a) and 251(b)."[1] IDT went on to state that it was not seeking interconnection under Section 251(c) and that it has the ability to seek arbitration under Section 251(a) and Section 251(b) based almost entirely on an unsettled Vermont case which has no direct precedential value in New Hampshire and is still an open proceeding in Vermont.[2] The New Hampshire Public Utilities Commission ("Commission") has required Union Telephone Company ("Union") to participate in this proceeding despite Union's contention that IDT should not be able to request interconnection arbitration. In the Commission's various orders in this proceeding, the Commission has declined to rule on two threshold issues: 1) Is IDT entitled to forced interconnection without invoking section 251(c) which would require them to attempt to terminate Union's rural exemption prior to proceeding with interconnection; and 2) Is IDT a common carrier entitled to interconnection or is it a private carrier, through a special business arrangement with MetroCast Cablevision of New Hampshire, LLC ("MetroCast").

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1 Initial Petition at 1.

2 In the VTel case, a decision was issued on the arbitration however, the commission is still investigating if the interconnecting carrier, Comcast Phone, has met the conditions of the arbitration and VTel continues to have the right to appeal any arbitration decision.

In this brief, Union will first address the threshold arguments by showing that IDT can not pick and choose subsections of 251 to require Union to interconnect. It must first attempt to terminate Union's rural exemption. Secondly, Union believes that IDT is acting as a private carrier and therefore is not entitled to interconnection.

Following the instructions of the Commission and the Commission's appointed Arbitrator, Union has partially negotiated an interconnection agreement with IDT. Besides the threshold issues, the following issues remain unresolved:

1) Pricing;

2) The inclusion of certain definitions and clarifying language in the Reciprocal Compensation Appendix to ensure that traffic is rated according to location and not the protocol used; and

3) Whether a provision in the NIM Appendix should be excluded due to the fact that it is almost verbatim language from Section 251(c).

Finally, while we believe that most of the Arbitrator's issues are addressed in the context of Union's other responses, Union will address some specific questions raised by the Arbitrator during the proceeding.

I. Threshold Issues

A. Section 251 of the Telecommunications Act[3]

A critical threshold issue that must be determined in this proceeding is whether IDT is legally entitled to force Union into binding arbitration. IDT cannot. Throughout this proceeding, IDT has sought to force Union to enter into binding arbitration in order to obtain an interconnection agreement for local exchange traffic. Binding arbitration obligations stem directly from the duty to negotiate contained in Section 251(c)(1). Union has an exemption from

[3] Attached as Exhibit B is a filing made by Union on May 27, 2009 in this docket that supplements Union's argument concerning Section 251.

the duties of 251(c) unless and until its rural exemption is terminated. It is well established that such interconnection can only be demanded through Section 251(c) of the Communications Act (as amended),[4] and cannot be obtained through Section 251(a) of the Act, by virtue of Section 251(f). As a rural carrier, Union is exempt from the requirements of Section 251(c). IDT therefore has no legal basis to require Union to enter into a binding interconnection agreement pertaining to local exchange traffic. Union's rural exemption under 251(f)(1) cannot be terminated until the state commission finds that such interconnection is not unduly economically burdensome, is technically feasible, and is consistent with Section 254. IDT has not requested the Commission to make such a finding and, until that time, Union has no obligation for the duty to negotiate under the terms of 251(c)(1).

The obligation to conform with 251(c)(1) prior to a state removing the rural exemptions was recently considered and directly addressed by the Maine Commission in the CRC Decision.[5] In that case, a new entrant, CRC Communications of Maine, Inc. ("CRC"), demanded interconnection from several rural incumbent carriers operating in Maine be negotiated under the terms of 251(c)(1). The Maine Commission confirmed that Section 251(a) provides no independent basis to demand interconnection stating,

> . . . The statutory source of an ILEC's obligation to negotiate an interconnection agreement with competitive carriers is §251(c)(1). However, rural ILECs are exempt from this provision of the TelAct pursuant to §251(f)(1). Our authority to compel and conduct arbitration over the terms of an interconnection agreement between ILECs and competitive carriers pursuant to §251(b)(2) presumes a duty on the part of an ILEC to engage in good faith negotiations regarding the terms of such an agreement in the first instance.

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4 47 USC §§ 151, *et seq* ("The Act").

5 CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 151, 252, Docket No. 2007-611 (May 5, 2008) ("CRC Decision").

> A rural ILEC is not exempt from the obligations set forth in §251(a) and §251(b). We are unable, however, to find in the text of the TelAct language conferring upon this Commission authority to directly enforce the requirements of §251(a) and §251(b). Instead the TelAct contemplates only that the requirements of §251(a) and §251(b) will be enforced by a state commission in the context of its authority to arbitrate "open issues" remaining after voluntary negotiations have yielded incomplete results. Again, however, rural ILECs are exempt from the duty to negotiate in good faith. Until and unless the rural exemption is lifted, there is, quite simply, nothing to arbitrate.[6]

Other states have reached identical conclusions and found that interpreting Section 251(a) to contain such a right would substantially undermine the entire Federal statutory regime relating to interconnection. When Level 3 sought interconnection for the provision of local services in North Dakota from a rural carrier under Section 251(a) for example, the Commission rejected Level 3's right to do so, stating:

> If Level 3 is truly offering a local exchange service, then it cannot simply declare that it is filing an exclusive 251(a) interconnection agreement. The clear language of the act prevents that occurrence. When interconnecting with an ILEC, such as SRT, the transmission and routing of telephone exchange service and exchange access is clearly stated under 251(c)(2)(A). While Level 3 may want to apply under solely 251(a), there is no basis upon which to allow that to happen. We do not view the act as a buffet menu from which carriers are allowed to choose which parts of it they wish to file under, to the exclusion of those sections they would rather ignore. Such an interpretation would seriously undermine the protections afforded rural carriers by Congress in section 251(f).[7]

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[6] *CRC Decision* at 14. Although the Maine Commission initially transitioned the case into an examination of whether the rural exemption should be terminated, the Maine Commission subsequently granted a Motion to Dismiss without Prejudice on November 8, 2008 based in large part on the fact that the record had not been properly developed in the interconnection proceeding. CRC Communications of Maine, Inc. later filed a request to terminate the rural exemption of a single rural, Unitel, Inc., in Docket No. 2009-40. The proceeding is currently open, although Unitel was recently granted a Motion for Partial Summary Judgment that had the effect of eliminated one of Unitel's exchange from the proceeding. Parties had until July 13, 2009 to file objections to the order granting Partial Summary Judgment, although it does not appear that CRC will oppose.

[7] North Dakota Public Service Commission Order, Case No. PU-2065-02-465 (May 30, 2003) and ¶10.

Similarly, the Texas Public Utility Commission likewise considered this issue when Sprint attempted to interconnect with rural Brazos Telecommunications, Inc ("BTI") by means of Sections 251 (a) and (b). In that case, the Commission stated:

> The Commission disagrees with Sprint's contention that it can receive interconnection through FTA [Federal Telecommunications Act] Section 251(a) to offer and provide telephone exchange service. FTA Section 251(c)(2) provides, in part, that an ILEC is obligated to provide interconnection for the transmission and routing of "telephone exchange service" and exchange access. FTA Section 251(a), however, does not require ILECs or other telecommunications carriers to interconnect for the express purpose of exchanging traffic relating to telephone exchange service. FTA Section 251(a) encompasses a broad duty to interconnect for all carriers. The duty of an ILEC to provide interconnection for purposes of exchanging "telephone exchange service" is solely and expressly a FTA Section 251(c) obligation. Therefore, according to FTA Section 251(f)(l)(A), BTI is exempt from this FTA Section 251(c) obligation until (1) it receives a bona fide request for interconnection and (2) the Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with FTA Section 254. Accordingly, the Commission finds that Sprint is requesting interconnection under FTA Section 251(c)(2), and therefore, Sprint is required to petition to lift BTI's rural exemption under FTA Section 25 l(f)(l)(A) before proceeding to negotiate and arbitrate an interconnection agreement.[8]

These precedents make it clear that IDT simply does not have the right to force interconnection through an arbitrated agreement for local exchange traffic under Section 251(a). These cases also make it clear that IDT can not simply ask for interconnection under certain subsections of Section 251 without addressing other subsections. Simply put, when dealing with carrier with a rural exemption, IDT must also address Section 251(c) and (f) when requesting local interconnection.

Although IDT is aware of these precedents and has had ample opportunity to respond to them, to date IDT has presented no authority to contradict these precedents or their reasoning. In

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[8] Public Utility Commission of Texas, Order Denying Sprint's Appeal of Order No. 1, PUC Docket No. 31038 (December 2, 2005)(*emphasis added*). This decision was subsequently upheld on Court Appeal.

fact, the sole case cited by IDT is the unsettled Vermont Telephone Company, Inc. ("VTEL") case.[9] Ironically, the Vermont Public Service Board explicitly and repeatedly states that Comcast (the new entrant in the proceeding) was not entitled to obtain relief pursuant to Section 251(c) because VTEL (the rural carrier), was exempt from Section 251(c) obligations due to Section 251(f) of the Act.[10] Furthermore, the VTEL case never addressed whether a new entrant can demand interconnection. Nor could it have because in that case VTEL, the rural carrier was one of the carriers requesting arbitration. In stark contrast, in this matter Union has not sought arbitration and, has consistently opposed this proceeding. In addition, the VTEL case is still open. It has not be fully established that Comcast Phone has met the requirement as being a telecommunications carrier offering a common carrier service that is eligible for interconnection.

In light of the foregoing, it is clear that IDT has no basis to demand an arbitration for an interconnection agreement for the exchange of local access by virtue of Section 251(a) and that as a result, IDT can only demand such interconnection (if at all) under Section 251(c) of the Act. However, Section 251(c) interconnection is also not currently available to IDT because Section 251(f) of the Act specifically exempts rural carriers from Section 251(c) interconnection obligations. Specifically, Section 251(f)(1) of the Act states that Section 251(c) does not apply to rural carriers "until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines...that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of

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[9] *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 (Feb 2, 2009) ("VTEL Case").

[10] *VTEL Case* at 11 & 23.

this title..."[11] To date, such a *bona fide* request has neither been made nor ruled on. Instead, IDT is attempting to do an end run around Section 251(f) by allegedly demanding interconnection only under Section 251(a) and then pretending that such interconnection ought to afford Section 251(c) rights. Such a construction is neither available nor permissible under the Act.

Given that IDT must have the legal right to require the requested interconnection before it can require Union to provide the requested interconnection, resolution of this threshold issue is of critical importance. The parties to this proceeding continue to commit significant resources to the many matters at issue – even though the agreement ultimately reached is likely to be unenforceable at least with respect to the agreements central purpose – local exchange traffic. For that reason, Union respectfully asserts that this proceeding should be dismissed and that an issue by issue resolution of the disputed items set forth below is unnecessary.

B. Common Carriage

Interconnection under Section 251 of the Act[12] is available only to common carriers. Section 251 of the Act requires Union to interconnect with "telecommunications carriers." Section 153(44) of the Act defines the term "telecommunications carrier" as:

> . . . any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). 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, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[13]

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11 47 U.S.C. § 251(f).

12 47 U.S.C. §251.

13 47 U.S.C. §153(44).

The term "telecommunications services, in turn, is defined by Section 153(46) of the Act to mean "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." [14]

By its plain meaning, Section 251 of the Act only entitles an entity that is acting as a "common carrier" – an entity that holds itself out as offering service indiscriminately to the public on non-discriminatory terms – to demand interconnection. It has been long settled that the key feature of common carriage is that the service provider undertakes to provide service "indifferently" to all potential customers, whereas a private carrier "make[s] individualized decisions, in particular cases, whether and on what terms to deal" with customers.[15] In short, the widespread, general solicitation of customers from the general population, *i.e.*, the indiscriminate offering of service on generally applicable terms, constitutes common carriage.[16]

By its own admission, IDT will exclusively serve MetroCast and has no current intention of acting as a common carrier in Union's territory in New Hampshire.[17] IDT does not propose to make its service available on a non-discriminatory basis, to seek to draw its customer base out of the general public or even to service all customers indifferently. Rather, IDT currently proposes to serve only a single entity in Union's territory, MetroCast, on specialized terms and conditions.

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14 47 U.S.C. §153(44).

15 *National Assn. of Regulatory Util. Commrs. v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) ("*NARUC II*"); *National Assn. of Regulatory Util. Commrs. v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"); *see also PLDT v. Int'l. Telecom*, File No. E-95-29, FCC 97-233, at 13 (released July 18, 1997) (citations omitted); *Independent Data Communications*, 10 FCC Rcd 13717, 13723-24 (1995) (citations omitted); *Beehive Tel., Inc. v. Bell Operating Cos.*, 10 FCC Rcd 10562, 10564-65 (1995), *remanded*, No. 95-1479 (D.C. Cir. Dec. 27, 1996).

16 *See PLDT v. Int'l. Telecom*, File No. E-95-29, at 13 (citing *Southwestern Bell*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)).

17 "[t]his Petition will seek Commission rulings on all arrangements necessary for IDT to interconnect with Union under Sections 251(a) and (b), *for the benefit of MetroCast Cablevisions of New Hampshire, LLC...*" Initial Petition at 1 (*emphasis added*). *See also* MetroCast/IDT settlement agreement. IDT has no intention of offering common carrier service.

Furthermore, not only has IDT thus far not agreed to hold itself out to provide service to other third parties, to Union's knowledge, IDT has not even made public the rates, terms and conditions under which it intends to provide service to MetroCast. In short, IDT seeks to provide private carrier service.

The provision of private carrier services does not entitle IDT to demand interconnection. As set forth in greater detail above, Section 251 of the Act requires an entity to act as a common carrier before it can demand interconnection. Yet IDT does not even assert that it intends to provide common carrier services in Union's territory. For that reason, IDT is not entitled to demand interconnection under Section 251 of the Act.

II. Open Items in Agreement

A. Pricing

IDT has allegedly requested interconnection under sections 251(a) and (b). There is no specific pricing standard designated under these sections. Under certain circumstances, valid interconnection agreements may be available to be adopted by other carriers wishing to interconnect with Union in New Hampshire. Therefore, when there is a question of which proposed rates should be suggested to the Commission by the arbitrator, the rates proposed by the incumbent carrier should be weighed more heavily because the ILEC will have to offer the same rates to other carriers. Union has proposed rates that are the same or very similar rates as offered under its tariffs to other carriers. These rates are just and reasonable and non-discriminatory. The rates proposed by IDT have no relation to the rates other Union customers pay so by definition would be discriminatory.

Attached as Exhibit A is a pricing chart that shows the differences in pricing between what Union believes to be appropriate charges and what IDT has offered for pricing. Union's

prices are based on the prices contained in the NECA tariff (Exhibit A.1 through A.7) for which Union is a member carrier. The NECA tariff and the rates contained within have been fully vetted and are subject to oversight by the FCC and the many carriers purchase services from the tariff across the nation. For certain services, NECA classifies carriers (rate banding), to designate prices, according to the carrier's operations and costs. Therefore, Union's NECA prices take into consideration Union's relative size and operations. NECA rates are based on the costs of the companies participating in the tariff and are updated annually. Therefore, these rates are current, cost based, have been deemed just and reasonable by the FCC, and are non-discriminatory.

IDT has explained that the rates it has offered is a blend of rates it pays to other carriers. Despite Union asking for pricing sheets from IDT's other agreements that IDT claims to have used in computing its prices, IDT has provided no backing for its rates. Union strongly disagrees with using IDT's unsupported pricing. Even if IDT can show that it has similar pricing in other areas with other incumbents, Union believes that reliance on these price structures is misplaced in many cases. Certainly IDT should not expect Union's rates to be comparable to those of the RBOCs and large incumbents like Embarq and FairPoint. Those carriers have economies of scale and mechanized structures in place devoted to interconnection and the responsibilities contained in the agreements. The interconnection process and services required is completely new to Union and Union will have to complete many of its responsibilities manually. Even comparisons to mid-sized incumbents who have multiple interconnection agreements are misplaced given that they also may have mechanized systems in place and still are much larger than Union. Indeed, the only rational way to establish a pricing structure for this agreement is to follow the prices set out in the NECA tariff.

The specific disputes between Union and IDT regarding pricing for services are as follows:

- Difference of wording regarding when supplemental order charges apply;
- Difference of how direct trunk transport termination services are applied; and
- Overall price differences for the majority of services excluding pricing for services that will be determined when the rates become applicable.

IDT believes a supplemental order charge should only apply when an original service order has already received its form order commitment (FOC) date. Union believes any supplemental order should incur a charge since each order is separate and must be handled separately. At minimum, the multiple orders will cause confusion as to which order is correct and controls the time interval for completing the service. Placing a restriction on when an order charge applies complicates the billing process and does not account for how much service has been provided for each original Local Service Request (LSR). Union should be protected from the extra work effort required when IDT submits an order that is incorrect and needs remediating supplements. IDT claims it needs this protection in case Union rejects the original LSR in bad faith so as to generate more service orders to which to apply a charge. Union believes IDT has the proper dispute resolution process in the agreement to protect it from Union falsely rejecting orders to generate more service fee charges. Union would have to pay IDT if Union provides changes to orders prior to receipt of an FOC. Union asserts that the words "on Pending LSR already FOC'd" should be deleted from the pricing appendix for Supplemental orders.

Union and IDT disagree on the use of the term "circuit" compared with "termination" when referring to the pricing elements. As commonly used the term circuit refers to a path between two points. The circuit can have many sub-elements including terminations,

multiplexing, and mileage. Each of these sub-elements may have a separate rate element. The total charge of the circuit is the sum of all the elements utilized by that particular circuit. This structure is consistent with Union's tariffs. Union's charge for direct trunk transport termination applies per termination not per circuit. The NECA tariff specifically states that such charge is applied per termination and Union bills all other carriers per termination. Union asserts that the word "circuit" be used instead of "termination" on the pricing sheet.

As discussed above Union's rates are based on NECA tariff's specific pricing for services that are either similar or exactly the same as proposed to be provided in this agreement. Specifically Union determined its prices as follows:

- Local Service Order (LSR) charge - $60 – Union used NECA's Service Date Change Charge (Exhibit A.1) to determine its LSR charge. Under the NECA tariff, the Service Date Change Charge would only be applied to an order that was already received by Union and thus a carrier would only want to update the service date from its original order. Union's LSR process will be a manual process for the foreseeable future requiring the updating and review of records to confirm the customer information, change existing records, update E911 and other databases, etc. Although Union believes the work involved in an LSR will likely be more onerous than a Service Date Change Charge, Union chose this rate as it seemed like a reasonable rate in the NECA tariff. Another comparable rate, arguably a better comparison, would have been the Access Order Charge ($76 per Exhibit A.1), which is a charge that covers the administration of handling an access order and such as order would also include a separate installation charge for the specific service in addition to the Access Order Charge. Union being

unfamiliar with the LSR process chose the lower Service Date Change Charge to be conservative in developing rates for this agreement.

- Supplement Order ($30) and Cancelled Order ($30) – Union based the pricing of these services on one half of the LSR order charge. Union believes the best comparison in the NECA tariff would have been the rate of $60 for the Service Date Change Charge because the most likely reason for a LSR Supplemental Order is a service date change. However Union thought a more reasonable approach would be to price this service at one half the rate of the LSR rate.
- Expedited Charge ($100) – Union added an additional $40 to its LSR rate for an Expedited Charge. Typically these types of requests provide for additional resources and inconvenience that warrant an increase above the standard LSR charge.
- Customer Service Record Order ($30) – Union based this service price on its Supplemental Order rate. Union also reviewed NECA's service charge for Billing Name and Address Service which is typically provided to carriers to obtain similar customer information under a CRS in order to allow the carrier to bill its end user customers. NECA's charge for this service is $50.94 per order (Exhibit A.2) with an additional charge per record. Union again chose to price its service at a lower rate (Supplemental Order rate) in order to provide a reasonable rate under this agreement that Union thought would be acceptable to other parties.
- Hourly Rates (Exhibit A.3) – Union's proposed rates are almost identical to NECA rates.
- Direct Interconnection Facilities (Exhibit A.4 through A.7) – Union's proposed rates are identical to the rates NECA calculated for Union effective 7/1/2009. All other carriers requesting these services from Union would be paying these exact rates.

Union proposes non-recurring rates that apply for orders between carriers and not retail end user rates. This is appropriate because both Union and IDT are carriers and because non-recurring costs generally drive the non-recurring rate. Retail tariffs have no such link between the cost to actually perform the service order work and the rate charged to the end user. The non-recurring rates charged to retail end users are historically based and at best are associated with a residual revenue requirement. Therefore rates based on current cost based rates in the NECA tariff are far superior to use of retail rates. As with the other rates proposed by Union, these rates are just, reasonable and non-discriminatory.

In conclusion, Union believes its pricing of services is reasonable and valid based on NECA's rates for similar or the exact same services. The Union proposed rates are just, reasonable and non-discriminatory. In contrast, Union does not believe the rates proposed by IDT would be compensatory. In approving IDT as a CLEC in Union's territory, the Commission stated that Union would have the opportunity to recover the costs of competition through the negotiation of interconnection agreement. Therefore approval of IDT rates would not comply with the previous Commission order. The Arbitrator should adopt the Union proposed rates.

B. <u>The inclusion of certain definitions and clarifying wording in the Reciprocal Compensation Appendix to ensure that traffic is rated according to location and not the protocol used.</u>

It is Union's understanding that both Parties agree to the principle that traffic should be rated according to the end users' physical locations and not the protocol used. In order to clarify this point, Union has requested the inclusion of two definitions in the Reciprocal Compensation Appendix. Union would like to include the following:

"Voice Over Internet Protocol (VoIP) or IP-Enabled Traffic" means any IP-Enabled, real time, multidirectional voice call, including, but not limited to, service that mimics traditional telephony. For purposes of the Agreement, VoIP or IP-Enabled Traffic includes:

> Voice Traffic originating on an Internet Protocol Connection (IPC), and which terminates on the PSTN; and
> Voice Traffic originated on the PSTN, and which terminates on an IPC.

"Internet Protocol Connection (IPC)" means the physical location where End-User information is originated or terminated using internet protocol.

Union also would like to include the following clarifying language to ensure certain types of traffic are included in the traffic for which the agreement includes. Essentially, Union wants to make it clear to IDT (and any other carriers who may adopt this agreement) that all traffic exchanged with Union is subject to the terms of the agreement including the terms that require the jurisdiction of the traffic to be based on the physical location of the customer. Many carriers claim that VoIP traffic is excluded from access regardless of where the physical location of the end points of the call. This interpretation of the FCC rules is not accurate. Union wants to avoid any conflict in interpretation by clearly identifying, VoIP traffic as traffic that is exchanged and subject to the terms of the agreement. If at some future point, the FCC makes further rulings on this topic, IDT can avail itself of the change of law provisions to update the agreement. IDT states that it agrees with the concept but is not willing to actual state that concept in a way that it can be enforced. Without enforcement, Union would be subject to all carriers refusing to pay access because their traffic is VoIP traffic. Thus the language is essential to the interconnection agreement. The disputed language of Section 2.1 of the RC Appendix appears below in double underline.

2.1 Each Party is responsible for all traffic, regardless of the protocol or transmission method, that each Party (or its Retail Provider) exchanges with the other party including but not limited to the following protocols or transmission methods; Public Switched Telephone Network (PSTN) and Voice traffic or Voice Over

> Internet Protocol (VoIP) and IP-Enabled Traffic. The traffic exchanged between CLEC and UNION will be classified as Local Traffic, intraLATA Toll Traffic, or interLATA Toll Traffic. Neither Party shall provision any of its services in a manner that permits the circumvention of applicable switched access charges.

IDT asserts they do not plan to exclude VOIP traffic (that IDT intends to provide via its partner MetroCast) in a malicious manner, however this assertion is suspect since they oppose the proposed language that would not harm them if it was included in the agreement. Union is concerned that with all the open issues surrounding the treatment of VOIP traffic, that carriers may try to exclude and treat such traffic differently, which could likely harm IDT's primary objection seems to be that it believes that the definitions and clarifying wording are unnecessary. They have not given any reason why the inclusion of these changes would be harmful or detrimental to them or any rights or obligations that they gain from this agreement. As such, we ask for their inclusion.

IDT may assert that these changes were agreed upon and that Union is trying to make changes to previously agreed upon wording. At the Commission offices, Union and IDT spent 13 hours negotiating changes to the interconnection agreement and during that time period Union requested the inclusion of such definitions. After review of the drafts from that long day of negotiations, Union promptly asserted its need for the definitions and clarifying language and IDT had plenty of time to consider the changes. Thus this change should be considered by the arbitrator and the Commission.

C. Whether a provision in the NIM Appendix should be excluded due to the fact that it is almost verbatim language from Section 251(c).

IDT wants the inclusion of the following language in the NIM Appendix:

> UNION shall provide Interconnection for CLEC's facilities and equipment for the transmission and routing of telephone exchange service and exchange access, at a level of quality equal to that which UNION provides itself, a subsidiary, an

affiliate, or any other party to which UNION provides Interconnection and on rates, terms and conditions that are just, reasonable and non-discriminatory.

Although Union had initially agreed to the language, it subsequently raised an objection based upon the fact that IDT has continually stated that it is not seeking Section 251(c) rights and this language is taken directly from Section 251(c). Section 251(c)(2) states that incumbent local exchange carriers have "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection for the local exchange carrier's networks--...(C) that is at least equal in quality to that provided by the local exchange carrier to itself or any subsidiary, affiliate or any other party to which the carrier provides interconnection...."[18]

Even if the Commission allows IDT to proceed with a form of 251(a) and (b) interconnection, the Commission should exclude provisions contained directly in Section 251(c) unless Union expressly agrees to them. Union does not have the obligation to voluntarily comply with 251(c) obligations and Union does not chose to do so. It would not be consistent with the law to require Union to comply with such obligations unless and until the rural exemption is removed.

III. Response to Arbitrator's Questions

Union believes that it has addressed the majority of the questions raised by the Arbitrator within the body of this brief. Nonetheless, a few of the questions require a direct response.

A If the Commission determines that it can not order interconnection without terminating Union's rural exemption, can the Commission immediately move towards terminating that exemption?

Union does not believe that it is appropriate to transition this docket into such an examination. IDT has explicitly stated several times that it is not seeking termination of Union's rural exemption. The record in this proceeding has not focused at all on Union's rural

[18] 47 U.S.C. § 251(c)(2) (*Emphasis added*).

exemption. While the Maine Commission initially moved towards transitioning an interconnection docket into a docket examining the rural exemption, it subsequently dismissed the case because the record was not properly developed. The Act requires a carrier to request interconnection and the termination of the rural exemption. The burden of proof that it is not unduly economically burdensome, technically feasible, and consistent with section 254 (in the public interest) is on the requesting carrier. Without the requesting carrier to present the case, there can not be a showing of the facts. Therefore, Union believes that IDT or another carrier must request the rural exemption be terminated. Therefore, we believe that it would be more appropriate to address the rural exemption in a separate docket if and when someone requests such an examination.

B. What effect does the IDT/MetroCast settlement have on this proceeding?

The IDT/MetroCast settlement reinforces the idea that IDT is involved with a business partnership with MetroCast as a private carrier and is not offering services to the public on a non-discriminatory basis. The IDT/MetroCast settlement essentially limits both companies ability to obtain numbering resources in New Hampshire and outlines the way in which those companies can provide service in New Hampshire. The fact that the Commission has signed off on the business partnership does not mean that the Commission has classified the arrangement as a common carrier arrangement. Furthermore, nothing in the IDT/MetroCast settlement bestows any rights to interconnect with carriers with rural exemptions upon IDT.

C. To what degree, if any, does RSA 374:22-g address the protections afforded by Section 251(f), given 374:22-g's delineation of factors?

RSA 374:22-g does not address Section 251(f). RSA 374:22-g provides the regulatory process and considerations for obtaining authority to operate in the state of New Hampshire, and does not address Commission action to terminate the rural exemption from interconnection requirements under 47 USC § 251(c).[19] Termination of the exemption, while carried out by the state commission, is governed by the federal statutes in 47 U.S.C. 251(f). They are both important, but totally separate legal matters that commission addresses pursuant to different legal statues and standards.

[19] Union notes that the New Hampshire Supreme Court is considering a challenge to IDT's state authorization, in part, for the Commission's failure to consider the factors contained in RSA 374:22-g.

IV. Conclusion

IDT does not have the right to craft an arbitrated interconnection order out of certain subsections of Section 251 nor does IDT have the right to pick and choose interconnection under 251. If IDT wishes to interconnect with Union for local access traffic, it must first make a bona fide request with the Commission to have Union's rural exemption terminated. Secondly, IDT must offer a common carriage service to customers in the State of New Hampshire. Until IDT takes such actions, the Commission should not force arbitrated interconnection upon Union.

If the Commission mistakenly disregards the clear language of Section 251 and other states' interpretation of that Section, Union urges that the Commission adopt Union's position on the remaining issues within the proposed negotiated agreement.

Respectively submitted,

/s/
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Dated: July 14, 2009