

**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. 08-162
Telecom and Wilton Telephone Company, Inc. d/b/a	)	
TDS Telecom Pursuant to the Communications Act	)	
of 1934, as Amended	)	

**REPLY BRIEF  
OF COMCAST PHONE OF NEW HAMPSHIRE, LLC**

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ATTORNEYS FOR COMCAST PHONE OF  
NEW HAMPSHIRE, LLC

May 15, 2009

**BEFORE THE  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

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**REPLY BRIEF  
OF COMCAST PHONE OF NEW HAMPSHIRE, LLC**

Comcast Phone of New Hampshire, LLC d/b/a Comcast Digital Phone (“Comcast”), through undersigned counsel, submits this Reply Brief in support of its petition to the New Hampshire Public Utilities Commission (“Commission”) for arbitration of an interconnection agreement, pursuant to Sections 251-252 of the Communications Act of 1934, as amended (the “Act”), between itself and Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. (collectively, “TDS”).

**INTRODUCTION**

Comcast demonstrated in its Opening Brief that it qualifies as a telecommunications carrier entitled to interconnection with TDS because it has received authority from the Commission to provide telecommunications services in the TDS service territory and because it does, in fact, offer such services. Comcast will not repeat that presentation here. Instead, this Reply Brief addresses solely TDS’ arguments to the contrary.

As we explain below, TDS’ arguments are based on mischaracterizations of Comcast’s service offerings, unsupported factual claims, or misstatements of the applicable law (and in some cases all three). TDS’ argument that the Commission should not consider all of Comcast’s service offerings in evaluating Comcast’s telecommunications carrier status suffers from the

additional flaw that it is internally contradictory. Similarly, TDS' criticisms of the terms of Comcast's service offerings – such as the potential for early termination penalties, the individual case basis (“ICB”) pricing, and the limitation of liability provisions found in Comcast's Local Interconnection Service (“LIS”) offering – mirror identical terms found in TDS' own tariffs. These are standard industry terms, as Comcast has explained; TDS' use of them in its own offerings is proof of that.

In sum, there is no legal or factual basis for TDS' claim that Comcast is not a telecommunications carrier entitled to Section 251 interconnection. Comcast affiliates in 38 states and the District of Columbia have entered into more than 150 such agreements with incumbent local exchange carriers (“ILECs”) like TDS around the country, including an agreement with Fairpoint in New Hampshire. TDS' strategy in this proceeding is simply to keep Comcast out of its service territory for as long as possible. Every day that Comcast is prevented from entering TDS' markets further adds to TDS' monopoly profits, at the expense of New Hampshire consumers. The Commission should not let TDS' anticompetitive, anti-consumer gambit continue one day longer than necessary.

## **ARGUMENT**

### **I. TDS Misrepresents the Controlling Legal Precedents**

Comcast noted in its opening brief that state regulatory agencies and reviewing federal courts in at least 10 states have expressly rejected similar challenges to a carrier's telecommunications carrier status, as has the Federal Communications Commission and the United States Court of Appeals for D.C. Circuit.<sup>1</sup> One of those cases was the FCC's *Bright*

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<sup>1</sup> Comcast Br. at 4.

*House* decision, which comes in for some intemperate criticism by TDS.<sup>2</sup> TDS' views of *Bright House* notwithstanding, the FCC's decision has been affirmed by the D.C. Circuit and is now the law of the land.<sup>3</sup> While TDS is correct that *Bright House* determined that Comcast is a telecommunications carrier under Section 222,<sup>4</sup> TDS has offered no explanation for why the statutory term should be applied any differently under Section 251. And there is none, as the Vermont Public Service Board,<sup>5</sup> and now the Eighth Circuit, have recognized.<sup>6</sup>

The Eighth Circuit's is the most recent decision affirming the telecommunications carrier status of carriers that provide PSTN interconnection services. And in that case, Sprint made no public disclosure of the rates, terms, or conditions of its offerings whatsoever.<sup>7</sup> Comcast's public disclosures, by contrast, go far beyond that which the Eighth Circuit found necessary to constitute a "public offering" of service. The Eighth Circuit also agreed that a carrier's *common carrier* status is largely a product of "self-certification."<sup>8</sup> A carrier is a common carrier because

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<sup>2</sup> TDS Br. at 12-14 (criticizing *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 (2008)).

<sup>3</sup> See Comcast Br. at 4, n.12 (citing *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009)).

<sup>4</sup> See TDS Br. 12-13.

<sup>5</sup> See *Petitions of Vermont Telephone Company, Inc. and Comcast Phone of Vermont, LLC d/b/a Comcast Digital Phone, for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws*, Final Order, Docket No. 7469 (Vt. PSB, Feb. 2, 2009), slip op. at 17-18.

<sup>6</sup> *Iowa Telecom. Svcs. Inc. v. Iowa Utilities Board*, No. 08-2140 (8<sup>th</sup> Cir. April 28, 2009), slip op. at 9-10 (citing *Bright House* and the D.C. Circuit decision affirming it in finding that Sprint's PSTN interconnection offering qualified as a telecommunications service offering).

<sup>7</sup> *Id.* at 10-11.

<sup>8</sup> *Id.* at 9 (citation omitted).

it offers its services to the public, and in so doing accrues certain “privileges” but also “substantial responsibilities.”<sup>9</sup>

## **II. TDS’ Argument that the Commission Should Disregard Some of Comcast’s Service Offerings Should Be Disregarded**

TDS has correctly identified Comcast’s four telecommunications service offerings: exchange access services, Business Local Service (“BLS”), Schools and Libraries Network Service (“SLNS”) and the Local Interconnection Service (“LIS”).<sup>10</sup> But there is no basis for TDS’ claim that the Commission need “only ... consider ... LIS” in evaluating Comcast’s demand for interconnection.<sup>11</sup> To the contrary, in seeking authority from the Commission to provide service in TDS’ service territory, Comcast relied exclusively on its BLS and SLNS offerings,<sup>12</sup> not LIS, and the Commission assumed that Comcast would be entitled to interconnection with TDS on the basis of those two offerings.<sup>13</sup> It would therefore be anomalous, to say the least, to disregard those offerings in evaluating Comcast’s telecommunications carrier status at this stage of the proceedings.

Nor is there anything in the stipulated record that supports TDS’ claim that BLS should somehow not count “because it is simply a resale offering of the business service offered by the ILEC,” or because the “draft Interconnection Agreement has no provisions related to resale, it is clear that Comcast Phone does not seek an interconnection agreement for the purpose of offering

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<sup>9</sup> *Id.*; *c.f.* TDS Br. at 13-14.

<sup>10</sup> *See* TDS Br. at 6; *see also* Comcast Br. at 6. The latter three include exchange access and telephone exchange service components as part of the over-all service offering. *See* Comcast Br. at 8-9.

<sup>11</sup> TDS Br. at 6.

<sup>12</sup> *See* Order Granting Authority at 6, 8.

<sup>13</sup> *Id.* at 23.

[BLS].”<sup>14</sup> How Comcast plans to provision its services is irrelevant to its telecommunications carrier status or its right to obtain an interconnection agreement with TDS. Moreover, TDS is wrong. Comcast could provide BLS by reselling TDS’ tariffed service offerings, reselling the services of a third party, using its own facilities, or any combination thereof. Network interconnection with TDS would likely be required, depending on the network configuration Comcast chose.

Comcast requires interconnection with TDS for its exchange access service offerings, as well. While the parties will not exchange access traffic directly, exchange access is not a stand-alone service. End-users that make and receive long-distance calls also make and receive local calls.<sup>15</sup> Comcast, therefore, requires interconnection with TDS to exchange the locally-rated traffic that is originated by the same end-users that receive access services from interexchange carriers.

The Commission should likewise disregard TDS’ claim that the SLNS offering is “merely ink on paper.”<sup>16</sup> TDS made similar arguments in the Comcast certification proceeding and they are no more persuasive here than they were there.<sup>17</sup> The SLNS is a bona fide offering that Comcast offers to school and library customers. The Commission has ample enforcement power to assure that Comcast offers service upon request and that it does so on just, reasonable,

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<sup>14</sup> TDS Br. at 6.

<sup>15</sup> *See generally* Comcast Br. at 7-8.

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g., Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services*, Order Granting Authority, Docket No. DT-08-013, Order No. 24,938 (Feb. 6, 2009) (“*Order Granting Authority*”) at 11.

and nondiscriminatory rates, terms and conditions.<sup>18</sup> The collateral attack on those service offerings in this proceeding is inappropriate and misplaced.<sup>19</sup>

Finally, TDS claims (at 6) that the Commission should disregard Comcast's BLS and exchange access service offerings because "it is clear that Comcast does not seek an interconnection agreement for the purpose of offering [those services]." There is no factual basis for this claim (as explained above) and it contradicts TDS' contention that the FCC's *Time Warner Declaratory Ruling* is inapplicable to Comcast's interconnection rights. We explain the contradiction below.

TDS claims that the *Time Warner Declaratory Ruling* is inapplicable here because "[i]t was never a disputed issue in the *Time Warner* proceeding whether Sprint and MCI were (or were not) CLECs entitled in their own right to Section 251 interconnection,"<sup>20</sup> whereas that is the basis for TDS' challenge here. But if TDS is correct that Sprint and MCI "did not establish that [they] ... were telecommunications carriers" based on their own LIS-equivalent, PSTN interconnection service offerings,<sup>21</sup> then it must have been because those carriers offered *other* telecommunications services – such as exchange access, BLS or SLNS. If that is the case, then it is contradictory for TDS to claim in *this* case that the Commission should disregard Comcast's other offerings, since similar "other offerings" were the basis for Sprint and MCI's carrier status in those cases. Moreover, while the FCC did not address the question in its *Time Warner* ruling,

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<sup>18</sup> See Comcast Br. at 10-11 and n.49 (citing NH PUC Rule 431.19).

<sup>19</sup> See *Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone*, Order, Case No. U-15725, U-15730 (Mich. PSC March 5, 2009) ("Michigan Final Order"), slip op. at 3.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.*

many of the Sprint/MCI interconnection cases that Comcast cited in its opening brief do, observing that Sprint/MCI offer other services.<sup>22</sup>

Finally, there is nothing in any of the Sprint/MCI cases that addressed the purpose for which MCI and Sprint were seeking interconnection – *i.e.*, whether interconnection was sought to exchange interconnected VoIP or other services traffic. The question did not arise because it is irrelevant. Telecommunications carriers are entitled to interconnection under Section 251(a) regardless of what kind of traffic they seek to exchange with interconnected carriers.

Here, the Commission should find that Comcast is entitled to an interconnection agreement with TDS based on all of Comcast's telecommunications service offerings, including, but not limited to, LIS. They are all relevant to establishing Comcast's telecommunications carrier status and the Commission should not disregard any of them.

## **II. TDS' Criticisms of the LIS Offering are Misplaced**

At pages 7-8 of its initial Brief, TDS takes a number of shots at the terms of the LIS offering. As Comcast has explained, this Section 251-252 interconnection arbitration is not the appropriate place to consider those claims.<sup>23</sup> But if the Commission nonetheless chooses to consider TDS' criticisms, it will find that they lack merit, as we explain below.

### **A. The Relatively Narrow Potential Customer Base for LIS Does Not Undermine its Status as a Telecommunications Service Offering**

LIS is currently offered to interconnected VoIP service providers only. TDS claims that this is unreasonably narrow. In particular, TDS claims:

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<sup>22</sup> See, e.g., *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill CC, July 15, 2005) (noting that ILECs conceded that Sprint "is a telecommunications carrier that provides telecommunications services in various areas of Illinois"); *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) (noting Sprint's various offerings).

<sup>23</sup> See Comcast Br. at 10-11.



this service offering is not widely and indiscriminately marketed. Comcast Phone has one customer in New Hampshire for its LIS service. Moreover, as discussed further below, the potential market for LIS is one customer — Comcast Phone IP. Thus, it can hardly be said that Comcast Phone actively solicits customers on a widespread, general and indiscriminate basis.<sup>24</sup>

There is no record basis for TDS' claim that there is only one potential customer for LIS.

Pursuant to the Comcast Service Guide, LIS is available to any qualified, facilities-based interconnected VoIP service provider in New Hampshire. It is, by definition, *not* only available to Comcast's affiliate.

Moreover, a provider's offerings need not be "widely and indiscriminately marketed," as TDS contends. The Act defines "telecommunications service" not just as "the offering of telecommunications for a fee directly to the public," but also (in the alternative) "to such class of users as to be effectively available directly to the public, regardless of the facilities used."<sup>25</sup> In *Sprint Comm. Co LP v ACE Comm Group*, the Iowa Utilities Board found that Sprint, which offered wholesale interconnection service in Iowa, was a common carrier because, while it did not offer its services "directly to the public," it did "indiscriminately offer its services to a class of users so as to be effectively available to the public, that class consisting of entities capable of offering their own last-mile facilities."<sup>26</sup> That order, as noted, was just recently affirmed by the Eighth Circuit.<sup>27</sup> Similarly, Comcast's LIS service is suited to serve a particular "class of users," *i.e.*, retail interconnected VoIP service providers capable of offering their own last-mile facilities that require or desire Comcast's interconnection service. Comcast is not required to expand the scope of the offering.

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<sup>24</sup> TDS Br. at 7.

<sup>25</sup> 47 U.S.C. § 153(46).

<sup>26</sup> Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Util. Bd., Nov 28, 2005).

<sup>27</sup> *See supra* n.6.

Although Comcast currently has only one LIS customer, there is no requirement under federal or New Hampshire law that Comcast secure a particular number of customers in order to be deemed a common carrier. Indeed, as Comcast noted in its opening brief, a service provider may be deemed a common carrier “even where it is not yet actually supplying service to *any* customers” in a particular area, and can be a common carrier even if it intends “to serve only a single customer.”<sup>28</sup> TDS’ claim that Comcast must first have multiple customers before TDS will enter into an interconnection agreement with Comcast is illogical and contradicts the pro-competitive policies of the New Hampshire legislature, this Commission, and the federal Act.<sup>29</sup>

**B. The 3-Year Term Commitment Is Not Unreasonable**

Comcast requires that LIS customers make minimum term commitments to reduce the risk of potential “stranded investment.”<sup>30</sup> TDS claims that LIS is “only offered on a long term basis,” which, it argues, is “indicative of a non-common carrier” offering.<sup>31</sup> There is no basis for this claim. Nothing in the stipulated record suggests that three years is an unusually long term for a telecommunications service contract. Moreover, the very FCC case that TDS cites suggests

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<sup>28</sup> See Comcast Br. at 7 (quoting *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392, ¶ 20 (2007)); see also *Michigan Final Order* at 3 (“To hold that a LEC has no right to negotiation and arbitration of an interconnection agreement unless it is serving customers currently would effectively end adding new entrants to the telecommunications market”).

<sup>29</sup> See, e.g., *Time Warner Declaratory Ruling* ¶ 13 (concluding that wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas); *Consolidated Comm Of Fort Bend Co v Public Utility Commission of Texas*, Memorandum Opinion and Order, 497 F Supp 2d 836 (WD Tex 2007), *aff’g* *Petition of Sprint Comm Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex PUC, Aug 14, 2006) (citing FCC reliance on competitive policies of Communications Act).

<sup>30</sup> LIS Service Guide § 1.B.

<sup>31</sup> TDS Brief at 7.

that it is not.<sup>32</sup> In *Philippine Long Distance*, the FCC stated that it considered a five year term “relatively short.”<sup>33</sup> Here, LIS is available for an initial term of only three years – two years less than that deemed “short” by the FCC.

**C. The Early Termination Provision is Reasonable**

TDS claims that the early termination penalty provision found in the LIS Service Guide, along with the three year term provision, is designed to foster “a relatively stable clientele,” which TDS argues is indicative of a private, not a common carrier, offering.<sup>34</sup> Once again, there is no factual or legal basis for this claim. In the first place, the LIS Guide states that Comcast *may* assess such termination liability if necessary for Comcast to fully recover costs associated with providing LIS.<sup>35</sup> It is not required in all circumstances.

Moreover, early termination clauses such as that found in LIS are standard in the industry. The FCC has found that early termination clauses are “typically found in fixed term contracts” and constitute an “accepted commercial practice, both inside and outside of the telecommunications industry.”<sup>36</sup> TDS itself incorporates early termination provisions in its own

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<sup>32</sup> See *id.* at 5, n.14 (citing *Philippine Long Distance Telephone Co., v. Int’l Telecom, Ltd.*, 12 FCC Rcd. 15001 (1997)).

<sup>33</sup> *Id.* ¶ 13.

<sup>34</sup> TDS Brief at 7.

<sup>35</sup> See LIS Guide, § 5.B (“In the event of early termination of service by the Customer before the expiration of the Term, the Company *may* assess a termination liability equal to 100% of all monthly recurring rates multiplied by the number of months left in the contract. Such early termination charges do not constitute a penalty under this Guide but are assessed in order for the Company to fully recover costs associated with providing LIS.”) (emphasis added).

<sup>36</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978, ¶¶ 692, 698 (2003).

tariffs, including a *mandatory* early termination charge for dedicated DS1 service equal to 100% of the remaining monthly rate provided under its service contract.<sup>37</sup>

**D. ICB Pricing is an Industry Standard Practice and Perfectly Reasonable**

TDS asserts that “[t]he recurring and non-recurring charges for LIS are determined by Comcast on an individual case basis in response to a bona fide request,” and that “nothing ... compels Comcast to agree to any particular terms [because] ... there are no provisions for arbitration or dispute resolution by a regulatory body or third party ....”<sup>38</sup>

These criticisms of the LIS offering are unfounded. It is undisputed that “common carriers do not have to offer standardized contracts.”<sup>39</sup> PSTN interconnection services like LIS are complex offerings, the requirements of which will inevitably vary somewhat from customer to customer, as the Eighth Circuit has recognized.<sup>40</sup> Common carriers routinely offer service packages that “are based on contractual negotiations with a single customer and are specifically designed to meet the needs of only that customer.”<sup>41</sup> Services offered on an “individual case basis” (“ICB”), with material terms left open for negotiations, are not only well accepted, they are the *norm* for offerings such as LIS. Given that every potential customer’s network will, presumably, be different, every contract might have to be different, as well. Accordingly, it is not surprising that different contracts have “different pricing.”<sup>42</sup> Thus, the Texas commission, among others, has approved ICB pricing arrangements, explaining that “a common carrier does

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<sup>37</sup> See Merrimack County Tele. Co., Part III, Sec. 4(III)(C)(5) (on file with the Commission at <http://www.puc.state.nh.us/Regulatory/companies-regulated-tariffs.htm#tel>).

<sup>38</sup> TDS Br. at 8.

<sup>39</sup> *Sprint Comm. Co LP v ACE Comm Group, et al*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405, at 14-15 (Iowa Util Bd, Nov 28, 2005).

<sup>40</sup> See *Iowa Telecom Srvcs.*, *supra* n.6, at 11.

<sup>41</sup> *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990).

<sup>42</sup> *Id.*

not lose its common-carrier status merely by entering into private contractual relationships with its customers.”<sup>43</sup>

TDS offers many of its services on an ICB basis, as well. TDS, for example, offers “customer specific pricing on a special contract basis” and individualized contract terms for enhanced business service of more than 50 lines.<sup>44</sup> Comcast, like most other telecommunications carriers in the country, does the same.

**E. The Limitation on liability Provisions in the LIS Guide are Standard Industry Terms**

TDS’ criticism of the limitation on liability provisions in the LIS Guide is given that TDS has nearly identical terms in its own Commission-approved offerings.<sup>45</sup> Moreover, they are standard in the industry. The FCC, relying on long-standing U.S. Supreme Court precedent, has explained that “[a]n important principle of tariff law is the recognition of the carrier's right to place a reasonable limitation on its own liability. This reasonable limitation will generally be enforced, absent willful misconduct or gross negligence on the part of the carrier.”<sup>46</sup>

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<sup>43</sup> *Petition of Sprint Comm. Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex PUC, Aug 14, 2006), *aff'd by Consolidated Comm. Of Fort Bend Co. v Public Utility Commission of Texas*, Memorandum Opinion and Order, 497 F. Supp. 2d 836 (W.D. Tex 2007).

<sup>44</sup> See Merrimack County Tele. Co., Tariff NMPUC No. 9, Pt. III, Sec. 2(IV)(I) (on file with the Commission at <http://www.puc.state.nh.us/Regulatory/companies-regulated-tariffs.htm#tel>). See also *id.* Pt. III, Sec. 4(I)(D)(2)(a) (applying ICB rates for certain basic rate interface services); Wilton Tele. Co., Local Exchange Service Schedule of Rates and Charges, Sec. 4, Sheet 1 (applying ICB rates for certain private line services) (on file with the Commission at <http://www.puc.state.nh.us/Regulatory/companies-regulated-tariffs.htm#tel>).

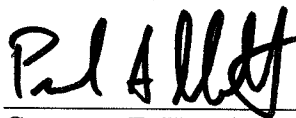
<sup>45</sup> See Merrimack County Tele. Co., Tariff NMPUC No. 9, Pt. I, Sec. III (on file with the Commission at <http://www.puc.state.nh.us/Regulatory/companies-regulated-tariffs.htm#tel>).

<sup>46</sup> *Unimat, Inc. v MCI Telecom. Corp.*, 14 FCC Rcd. 7829, 7835, ¶ 13 (1999) (citing *Primrose v. Western Union Telegraph Co.*, 154 U.S. 14, (1894)).

## CONCLUSION

For the foregoing reasons, the Commission should find that Comcast is a telecommunications carrier and order TDS to execute the agreement that the parties have negotiated and which is attached as Exhibit P-2 to Comcast's Petition.

Respectfully submitted,



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May 15, 2009

ATTORNEYS FOR COMCAST PHONE OF  
NEW HAMPSHIRE, LLC

## CERTIFICATE OF SERVICE

I, Paul D. Abbott, hereby certify that I have, this 15th day of May, 2009, served the foregoing *Reply Brief of Comcast Phone Of New Hampshire, LLC* by email, on all parties of record.

  
Paul D. Abbott