

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for)	DOCKET UT-083055
Arbitration of an Interconnection)	
Agreement Between)	
)	ORDER 05
COMCAST PHONE OF)	
WASHINGTON, LLC)	
)	ARBITRATOR’S REPORT AND
and)	DECISION
)	
LEWIS RIVER TELEPHONE)	
COMPANY, D/B/A TDS TELECOM)	
)	
Pursuant to 47 U.S.C. Section 252(b))	
)	
.....)	

1 ***Synopsis.** In this Order, the Arbitrator recommends granting Comcast Phone’s motion for summary determination and denying TDS’ motion, finding as a matter of law that Comcast Phone is a telecommunications carrier under the Act entitled to negotiate and arbitrate an interconnection agreement with TDS. The Arbitrator recommends the Commission condition approval of an interconnection agreement between the parties on Comcast Phone making publicly available its agreement with Comcast IP. The Arbitrator further denies TDS’ motion for summary determination, finding that Comcast Phone will be providing telecommunications service, not information service, traffic through its interconnection with TDS.*

I. BACKGROUND

A. Nature of Proceeding

2 Docket UT-083055 involves a petition by Comcast Phone of Washington, LLC (Comcast Phone) for arbitration of an interconnection agreement filed with Lewis River Telephone Company, d/b/a TDS Telecom (TDS) pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996.¹

¹ 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996).

B. Appearances

- 3 Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, and Michael C. Sloan, Davis Wright Tremaine LLP, Washington, D.C., represents Comcast Phone. Richard Finnigan, Attorney, Olympia, Washington, represents TDS.

C. Procedural History

- 4 Comcast Phone filed a petition with the Washington Utilities and Transportation Commission (Commission) for arbitration of an interconnection agreement with TDS on November 3, 2008. On November 17, 2008, the Commission entered Order 01, appointing an arbitrator and scheduling a prehearing conference.
- 5 The Commission held a prehearing conference in this matter on December 1, 2008, in Olympia, Washington, before Arbitrator and Administrative Law Judge Ann E. Rendahl. On December 3, 2008, Judge Rendahl entered Order 02, a prehearing conference order establishing a procedural schedule, and Order 03, a protective order.
- 6 On December 10, 2008, the Commission held a discovery conference to resolve discovery disputes between the parties. Judge Rendahl resolved the discovery disputes during the conference, making an oral decision on the record. Judge Rendahl requested information from both parties during the conference in the form of bench requests.
- 7 On December 15, 2008, Comcast Phone filed responses to Bench Request Nos. 1 through 4. On December 16, 2008, TDS filed a response to Bench Request No. 2.
- 8 On December 26, 2008, the Arbitrator entered Order 04, granting the parties' joint motion to modify the procedural schedule to allow the parties to continue their discovery efforts. On January 7 and February 3, 2009, the Arbitrator further modified the procedural schedule at the parties' request.

9 On April 2, 2009, the parties filed a set of joint Stipulated Facts, together with five exhibits.² On May 5, 2009, the parties filed cross motions for summary determination, and on May 28, 2009, filed responses to the motions.

10 On June 8, 2009, counsel for Comcast Phone filed a letter with the Commission to correct a portion of TDS' response. On June 10, 2009, counsel for TDS responded, requesting that Comcast Phone's letter be stricken.

D. Resolution of Disputes

11 This decision is limited to the disputed issues presented for arbitration and is subject to Commission approval. *47 U.S.C. §§ 252(e), 252(b)(4)*. Unlike other arbitrations, in which the parties primarily dispute contract language, the primary issues in this proceeding are questions of law, specifically:

- Whether Comcast Phone is a telecommunications carrier entitled to interconnection, and related rights, with TDS under Section 251 of the Telecommunications Act of 1996 (Act); and
- Whether Comcast Phone is entitled to interconnection with TDS under Section 251 if it delivers to TDS only information service.

This decision also addresses TDS' request to strike Comcast's letter.

12 This decision is issued in compliance with the procedural requirements of the Act, and resolves all issues that the parties submitted to the Commission for arbitration. The parties are directed to resolve all other existing issues consistent with this decision. In Section II. F.1., this Order requires parties to file a complete interconnection agreement with the Commission by **August 19, 2009**. At the conclusion of this Report, the Arbitrator addresses procedures for review to be

² The parties attached the following exhibits to the Stipulated Facts: Exhibit 1 – Washington Universal Service Fund Administration Agreement between Comcast Phone and the Washington Exchange Carrier Association; Exhibit 2 – Comcast Phone's service guide for its Schools and Libraries Network Service; Exhibit 3 – Comcast Phone's service guide for exchange Access Service to interexchange carriers; Exhibit 4 – Local Interconnection Service to qualifying interconnected Voice over Internet Protocol service providers; and Exhibit 5 – Agreement and Amendment between Comcast Phone and Comcast IP Phone II, LLC.

followed prior to entry of a Commission order approving an interconnection agreement between the parties.

II. MEMORANDUM

A. The Commission's Duty under the Telecommunications Act of 1996

13 Two central goals of the Act are the nondiscriminatory treatment of carriers and the promotion of competition. The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between incumbent local exchange companies (ILECs) and competitive local exchange companies (CLECs), which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act.³ Each interconnection agreement must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part.⁴ The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251 and 252 and RCW 80.36.610.

B. Standards for Arbitration

14 The Act provides that in arbitrating interconnection agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Federal Communication Commission (FCC) under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementing the terms and conditions by the parties to the agreement.⁵

³ 47 U.S.C. § 251(c)(1).

⁴ 47 U.S.C. § 252(d)

⁵ 47 U.S.C. § 252(c).

C. Background and Stipulated Facts

15 Lewis River Telephone Company, d/b/a TDS Telecom (TDS) is an ILEC operating in Washington under Section 251(h) of the Act, and providing local exchange telecommunications service to the public for compensation.⁶

16 Comcast Phone is registered with the Commission as a competitively classified telecommunications company.⁷ Comcast Phone is a subsidiary of Comcast Corporation, a multi-system cable broadband operator, which has deployed broadband networks in Washington and around the United States.⁸ Comcast Phone asserts that it offers competitive telecommunications services to retail and wholesale customers, while other Comcast affiliates provide high-speed Internet access services, Voice over Internet Protocol (VoIP) services, and video programming using common network plant.⁹

17 An affiliate of Comcast Phone offers cable television service in the TDS area. That affiliate is the only cable service provider in the TDS service area.¹⁰

18 Between April and July 2008, Comcast affiliates in five other states requested interconnection with nine other affiliates of TDS in those five states.¹¹ In May of 2008, Comcast Phone requested interconnection with TDS in Washington.

19 In Washington, Comcast Phone currently has Commission-approved interconnection agreements with the following ILECs: Qwest Corporation (Qwest) (approved February 6, 2004); CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., and CenturyTel of Cowiche, Inc. (collectively “CenturyTel”) (incorporated into and approved in a single agreement on October 12, 2005); United Telephone Company of the Northwest d/b/a Embarq (Embarq) (approved on February 25, 2006); Verizon

⁶ See Petition for Arbitration, ¶ 7; see also Answer to Petition, ¶ 10.

⁷ Stipulated Facts, ¶¶ 1, 5.

⁸ Comcast Phone Motion, ¶ 3.

⁹ *Id.*

¹⁰ Stipulated Facts, ¶ 16.

¹¹ *Id.*, ¶ 3.

Northwest Inc. (Verizon) (approved on January 8, 2003); and YCOM networks, Inc., d/b/a FairPoint Communications (YCOM) (approved on April 22, 2008). Comcast Phone exchanges locally-rated traffic with Qwest, CenturyTel, Embarq, Verizon and YCOM under these agreements.¹²

20 Comcast Phone affiliates currently have interconnection agreements with TDS affiliates in Vermont (effective May 1, 2008), Tennessee (effective May 1, 2006), and Indiana (Effective October 1, 2006).¹³

21 Until recently, Comcast Phone offered a retail, circuit-switched telephone service offering in Washington, marketed under the brand-name Comcast Digital Phone (CDP). Comcast Phone notified the Commission and the FCC that it would no longer provide this service in Washington state after November 28, 2009, but retained its authority to provide other telecommunications services in the state.¹⁴

22 Comcast Phone currently offers the following services in Washington: (1) Schools and Libraries Network Service (Schools and Libraries); (2) exchange Access Service to interexchange carriers; and (3) Local Interconnection Service (LIS) to qualified interconnected Voice over Internet Protocol (VoIP) service providers.¹⁵ Comcast Phone maintains service guides for these services on its web site, rather than filing tariffs or price lists for the services.¹⁶

23 Comcast Phone does not currently provide Schools and Libraries service to any customers in Washington.

24 Comcast Phone has executed a Washington Universal Service Fund (USF) Administration Agreement with the Washington Exchange Carrier Association (WECA), filed with the Commission on June 9, 2008. Comcast Phone has remitted

¹² *Id.*, ¶¶ 13-14.

¹³ *Id.*, ¶ 4.

¹⁴ *See Id.*, ¶ 11; Comcast Phone Response to Bench Request No. 4.

¹⁵ Stipulated Facts, ¶ 5

¹⁶ *Id.*

USF surcharges to WECA under the agreement for terminating intrastate switched access services.¹⁷

25 Comcast sends carrier access bills to an average of 12 to 18 carrier customers each month for terminating interexchange traffic.

26 Comcast Phone's affiliate, Comcast IP Phone II, LLC (Comcast IP) provides retail, interconnected VoIP service, as that term is defined by the FCC in 47 C.F.R. § 9.3, to end users in Washington. This service is marketed to the public under the brand name Comcast Digital Voice (CDV). Comcast IP is not registered as a telecommunications company with the Commission.¹⁸

27 CDV customers access the service using the "last mile" facilities provided by Comcast Phone's cable television operative affiliate.¹⁹

28 Comcast Phone provides LIS service to Comcast IP under an agreement, which includes an amendment. The agreement has been filed with the Commission as confidential subject to the protective order in this proceeding.²⁰

29 Comcast IP is currently the only customer receiving LIS service from Comcast Phone in Washington.²¹

30 If the Commission approves an interconnection agreement between Comcast Phone and TDS, Comcast Phone would offer its LIS service to Comcast IP so that Comcast IP may offer CDV to end user customers in the TDS serving area, allowing CDV end users to place calls to TDS end users within TDS local calling areas, and *vice versa*.²²

¹⁷ *Id.*, ¶ 2.

¹⁸ *Id.*, ¶ 7.

¹⁹ *Id.*, ¶ 12.

²⁰ *Id.*, ¶ 8.

²¹ *Id.*, ¶ 9.

²² *Id.*, ¶ 15.

D. Issues, Discussion, and Decisions

1. Standard for Summary Determination

31 The Commission's rules allow parties to move for summary determination of one or more issues in a case if the pleadings, together with any properly admissible evidentiary support, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.²³ Further, the rule allows the Commission to consider the applicable standards from Civil Rule 56.

32 The parties have identified all of the relevant material facts in this arbitration through the Stipulated Facts and other statements of fact in the record. The parties have filed motions for summary determination to resolve the legal issues at the heart of their dispute. As no party has raised any genuine issue with regard to any material fact, it is proper to resolve the disputed issues as a matter of law, based on the agreed facts.

2. Comcast Phone Correction Letter

33 After both parties filed responses to motions for summary determination, Comcast Phone filed a letter seeking to correct a portion of TDS' reply brief, asserting its intention to "foster compliance with [Rules of Professional Conduct] RPC 3.3 and ensure the record in the proceeding is accurate."²⁴ In its letter, Comcast Phone asserts that TDS mischaracterized an error in a decision by a Michigan Public Service Commission arbitrator by stating that it "underscores the confusion in the Michigan Decision."²⁵ Comcast Phone argues that the Michigan Public Service Commission recognized the error and corrected it in its final order, stating that the arbitrator's statement is not necessary to and forms no basis of the Michigan Commission's decision.²⁶

34 TDS objects to Comcast Phone's letter and requests the Commission strike the letter. TDS argues that the discussion in TDS' brief was intended to demonstrate the

²³ WAC 480-07-380(2).

²⁴ June 8, 2008, letter to David W. Danner from Gregory J. Kopta, Davis Wright Tremaine.

²⁵ *Id.*, quoting TDS Reply Brief at 5-6, ¶ 13.

²⁶ *Id.*

Michigan arbitrator's confusion over a letter from the FCC to Comcast, and the incorrect reference to the letter as a private letter ruling.²⁷ TDS argues in turn that portions of Comcast Phone's reply brief could be seen as mischaracterizing the law, also in violation of RPC 3.3.²⁸ TDS recommends the parties' briefs speak for themselves.

35 ***Discussion and Decision.*** Both Comcast Phone's June 8 letter and TDS' June 10 response are stricken and are not considered in the Arbitrator's decision of the issues in this matter.

36 RPC 3.3 requires candor towards the tribunal, specifically that lawyers advise the tribunal of any false statements of material fact or law.²⁹ In this case, both parties address the Michigan arbitrator's decision and the Michigan Commission's final order in their briefs, and express argument about how the decisions apply to the facts and law in this arbitration. A review of both parties' briefs demonstrates zealous representation by counsel for both parties, but no apparent violation of RPC 3.3. The issues were fully briefed by both parties and nothing in the parties' letters further aids the Arbitrator in resolving the issues in this proceeding.

37 Further, Comcast Phone's letter can be seen as an unauthorized reply to TDS' response to Comcast's motion for summary determination. The Arbitrator did not establish an opportunity for filing replies in this proceeding, and parties may not file replies without Commission authorization.³⁰ Comcast did not seek permission to file a reply to TDS's response, as required by rule.

²⁷ June 10, 2009, letter to David W. Danner from Richard A. Finnigan, Law Office of Richard A. Finnigan, at 2.

²⁸ *Id.*

²⁹ RPC 3.3 requires, in relevant part, that "(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

³⁰ WAC 480-07-370(1)(d).

38 Comcast Phone’s June 8 letter and TDS’ June 10 letter in reply are stricken.

3. Comcast Phone’s Status as a Telecommunications Carrier

39 The primary issue for decision is whether Comcast Phone is a “telecommunications carrier” under the Act entitled to interconnect with TDS.

(a) Statutes and Case Law Addressing Common Carrier Status

40 Section 251(a)(1) of the Act provides that “Each telecommunications carrier has the duty ... to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” Section 251(b) imposes several mutual and reciprocal obligations on all local exchange carriers, including the duty to provide number portability, dialing parity and “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”³¹

41 Telecommunications carriers are defined under the Act as “any provider of telecommunications services.”³² The definition further provides that “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 ...”³³

42 Telecommunications service is defined as “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.”³⁴

43 Finally, telecommunications is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”³⁵

³¹ 47 U.S.C. §§ 251(b)(2), (3) and (5).

³² 47 U.S.C. § 153(44).

³³ *Id.*

³⁴ 47 U.S.C. § 153(46).

³⁵ 47 U.S.C. § 153(43).

44 The parties concur that whether a provider is providing telecommunications services under the Act, i.e., offering services directly to the public, is based on the definition of a common carrier in case law.³⁶ The parties differ, however, on whether Comcast Phone meets the requirements for common carrier status, and hence status as a telecommunications carrier. The parties rely on the same cases, federal and state, as support for their respective positions. The cases are briefly discussed below.

45 The D.C. Circuit Court of Appeals has established the test for common carriage in a number of cases. A pair of cases, referred to as *NARUC I*³⁷ and *NARUC II*,³⁸ found that the key factor in distinguishing common carriage from private carriage is “the quasi-public character of the activity involved,” specifically “that the carrier ‘undertakes to carry for all people indifferently’.”³⁹ The second factor in determining common carrier status is whether the carrier allows customers to “transmit intelligence of their own design and choosing.”⁴⁰ More recently, the court found that the definition of “telecommunications services” in the Act recognizes the distinction between common and private carriers set forth in *NARUC I* and *II*.⁴¹

46 The court elaborated on what it means to hold oneself out to provide service:

This does not mean that the particular services offered must practically 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. Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status.⁴²

³⁶ Comcast Phone Motion, ¶ 10, citing *Virgin Islands Telephone v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); TDS Motion, ¶ 11.

³⁷ *National Association of Regulatory Util. Comm’rs v. FCC*, 525 F. 2d 630 (D.C. Cir. 1976) [*NARUC I*].

³⁸ *National Association of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) [*NARUC II*].

³⁹ *NARUC I* at 641; *NARUC II* at 608.

⁴⁰ *NARUC II* at 609, quoting *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966); *Frontier Broadcasting Co. v. FCC*, 24 F.C.C. 251, 254 (1958).

⁴¹ *Virgin Islands Telephone*, 198 F.3d at 926.

⁴² *NARUC II* at 608; *see also NARUC I* at 641.

The court set limits on this test, cautioning that “a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”⁴³

47 Finally, the court found that “since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”⁴⁴ The court has found service contracts for special services, such a dark fiber, established on an individual case basis (ICB), to be “individually tailored arrangements ... that were not like the indiscriminate offering of service on generally applicable terms that is the trademark of common carrier service.”⁴⁵ Particularly, the court found:

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case “whether and on what terms to serve” and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.⁴⁶

48 The FCC has also weighed in on the issue of common carrier status. The FCC has determined that “a carrier that offers to provide telecommunications on a common carrier basis, regardless of whether the carrier has actually supplied such service to a customer in the past” would qualify as a “telecommunications carrier” under the Act.⁴⁷ In the same case, the FCC found that service to one customer where the carrier intends to serve other future customers does not disqualify an entity from serving as a telecommunications carrier.⁴⁸

⁴³ *NARUC I* at 641; *NARUC II* at 608-9.

⁴⁴ *NARUC II* at 608.

⁴⁵ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

⁴⁶ *Southwestern Bell* at 1481, citing *NARUC I* at 608-9 and *NARUC II* at 643.

⁴⁷ *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum and Order, 22 FCC Rcd 3392, ¶ 20 (2007).

⁴⁸ *Id.*, ¶ 21.

49 In determining whether wholesale telecommunications providers, including those that provide wholesale service to VoIP providers, may interconnect with ILECs, the FCC has determined that the definition of “telecommunications service” in the Act does not distinguish between whether the services are provided at retail or wholesale, but upon whether the services are offered for a fee “directly to the public, or to such classes of users as to be effectively available directly to the public,” i.e., whether the services are offered by a common carrier.⁴⁹ The FCC clarified its decision, stating that:

[T]he rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.⁵⁰

Recognizing that states have primary jurisdiction over local exchange and intrastate long distance services, the FCC expressly left determination about whether a carrier offers a telecommunications service to a state commission’s assessment of the facts before it in an arbitration or other proceeding.⁵¹

50 In interpreting provisions of the Act governing customer proprietary information, the FCC states that whether a carrier is a common carrier is determined on a case-by-case basis, dependent on the specific facts.⁵² In *Bright House*, the FCC gave significant weight to the fact that a carrier has self-certified as a common carrier, i.e., that it does and will operate as a common carrier and will serve all similarly situated customers equally.⁵³ The FCC considered obtaining authority from the state in which it operates and entering into publicly-available interconnection agreements, filed with and approved by the relevant state commission as “prima facie” evidence of the status of a

⁴⁹ *Petition of Time Warner Cable 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, ¶ 12 (2007) [*Time Warner*].

⁵⁰ *Time Warner*, ¶ 14.

⁵¹ *Id.*

⁵² *In the Matter of Bright House Networks, LLC v. Verizon California, Inc.*, 23 FCC Rcd 10704 ¶ 38 (2008) [*Bright House*], *aff’d*, *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

⁵³ *Bright House*, ¶ 39.

carrier as a telecommunications carrier.⁵⁴ Further, the FCC found that whether a carrier was serving only its affiliate or lacked a tariff or website posting of the service did not disqualify the carrier from being a telecommunications carrier, as there was no “evidence that the carrier was unwilling to provide telecommunications services to unaffiliated entities on a nondiscriminatory basis.”⁵⁵ The FCC limited its decision to the specific facts in the case, and stated that a decision that a carrier is a “telecommunications carrier” under Section 222(b) of the Act may not apply or be relevant to a carrier’s status under other provisions of the Act.⁵⁶

- 51 The state commission decisions that the parties discuss and on which they rely address facts and questions of law highly similar to the ones presented in this arbitration. Decisions from the Michigan Public Service Commission and Vermont Public Service Board address the exact question presented in this case, in arbitrations between Comcast and TDS affiliates in those states. Decisions from Iowa and Washington reflect similar questions in arbitrations involving Sprint Communications, LP (Sprint) and ILECs operating in those states.
- 52 As in this case, Comcast Phone of Michigan, LLC, and Comcast Phone of Vermont, LLC, filed petitions for arbitration of interconnection agreements with TDS affiliates in Michigan and Vermont, respectively. In both cases, the state commissions found the Comcast companies to be “telecommunications companies” under the Act, and entitled to interconnection with TDS.
- 53 The Michigan arbitrator determined that Comcast stood ready to provide exchange and exchange access service under its LIS tariff on a wholesale basis to affiliated and unaffiliated VoIP service providers.⁵⁷ The arbitrator noted that TDS read too much

⁵⁴ *Id.*

⁵⁵ *Id.*, ¶ 40.

⁵⁶ *Id.*, ¶ 41.

⁵⁷ *In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms, and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone, Case No. U-15725, In the Matter of the Petition of Comcast Phone of Michigan, LLC, for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with TDS Telecommunications Corporation of Michigan, Case No. U-15730, Notice of Decision of*

into Comcast's decision to cease providing regulated local exchange and toll service in Michigan in September 2007.⁵⁸ The Michigan arbitrator found that the *Time Warner* decision supports ruling in favor of Comcast as the decision specifically addresses and supports any CLEC "offering to provide interconnected VoIP service providers with wholesale transmission of information across their respective networks are entitled to interconnect and exchange traffic with ILECs" under the Act.⁵⁹ Moreover, the Michigan arbitrator also found that a decision that Comcast has the right to interconnect with TDS is consistent with two of the expressed goals of the Act – promoting facilities-based competition and speeding the deployment of broadband service.⁶⁰

54 In a footnote, the Michigan arbitrator interprets a letter from the FCC as a private letter ruling that explicitly supports finding that Comcast's VoIP service is a telecommunications service.⁶¹ Based on this understanding, the arbitrator rejected TDS' argument that Comcast is providing information services traffic, not telecommunications, and thereby has no right to interconnection.

55 The Michigan Commission adopted its arbitrator's decision, finding the fact that Comcast has a valid license from the Commission to provide local exchange service is dispositive of whether it is a telecommunications carrier with rights to negotiate or arbitrate an interconnection agreement.⁶² After objection by Comcast, the

Arbitration Panel, Michigan Public Service Commission at 20 (Jan. 28, 2009) [*Michigan Arbitration Decision*].

⁵⁸ *Id.*

⁵⁹ *Id.* at 21.

⁶⁰ *Id.*

⁶¹ *Id.* at 20, n.6.

⁶² *In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms, and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone, Case No. U-15725, In the Matter of the Petition of Comcast Phone of Michigan, LLC, for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with TDS Telecommunications Corporation of Michigan, Case No. U-15730, Order, Michigan Public Service Commission at 2, 5 (Mar. 5, 2009) [*Michigan Decision*].*

Commission determined that the footnote referring to the FCC's letter formed no part of the Commission's decision.⁶³

56 In Vermont, the hearing officer for the Public Service Board determined that Comcast is a wholesale telecommunications carrier eligible for interconnection under Section 251 of the Act, but imposed one condition – that Comcast reveal all prices, terms, and conditions related to the wholesale local interconnection services Comcast provides to its affiliate.⁶⁴ The Vermont hearing officer relied on the FCC's *Bright House* decision to find that Comcast's holding a Certificate of Public Good under Vermont law and its offer to provide LIS service to all eligible customers “make it difficult not to conclude that Comcast Phone is a telecommunications carrier for purposes of Section 251 of the Act.”⁶⁵ However, the Vermont hearing officer determined that due to the confidential nature of Comcast's arrangements with its affiliate, “there is little basis for determining whether an offer by Comcast Phone to another party provides unjustly discriminatory service or whether Comcast held itself out ‘indifferently [to] all potential users’.”⁶⁶

57 In its final order, the Vermont Board adopted the hearing officer's conclusions. Specifically, the Board found that the hearing officer correctly applied the test for common carriage in *NARUC I* and *II*, and concluded that Comcast is a telecommunications carrier.⁶⁷ The Board found that Comcast holds authority to provide telecommunications service from the Board, provides telecommunications services under two previously approved interconnection agreements, and has shown its willingness to serve as a common carrier.⁶⁸ The Board also rejected Vermont Telephone Company, Inc.'s (VTel's) claims of unjust discrimination, finding that

⁶³ *Id.* at 5.

⁶⁴ *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, Vermont Public Service Board, Order at 14-15, 18 (Feb. 2, 2009) [*Vermont Decision*].

⁶⁵ *Vermont Decision*, at 18.

⁶⁶ *Id.*

⁶⁷ *Id.* at 75.

⁶⁸ *Id.*

Comcast has not restricted service to its affiliates, and “may still constitute a common carrier even if there are only a limited number of non-affiliated providers who can use the service.”⁶⁹ Further, the Board asserted that imposing the condition on Comcast to reveal its terms, conditions and rates will alleviate VTel’s concerns about unjust discrimination.⁷⁰

58 In an Iowa proceeding, Sprint partnered with a local cable company to provide wholesale telecommunications services to a cable company, which would then provide the services at retail to customers using its last-mile facilities. Sprint sought interconnection with various local exchange carriers in Iowa to provide service under its business arrangement with the cable company. The ILECs refused to interconnect with Sprint, asserting that Sprint was not the proper party to the agreement, and was not a common carrier as it tailored contracts to each individual customer.⁷¹

59 While the Iowa Utilities Board initially found Sprint would not offer its services as a common carrier, on remand from the district court, the Board determined that Sprint met the definition of a common carrier, finding that Sprint offered its services indiscriminately to a class of users that were “capable of offering their own last-mile facilities.”⁷²

60 The Eighth Circuit Court of Appeals upheld the Iowa Utilities Board’s decision that Sprint was a telecommunications carrier entitled to interconnection. Following the D.C. Circuit’s decision in *Verizon California*, the court found that Sprint has self-certified as a common carrier, has made public its intent to act as a common carrier and has entered into a public interconnection agreement.⁷³ The court found that Sprint’s individually negotiated contract with the cable company did not outweigh evidence of common carriage, recognizing that Sprint’s contracts with last-mile

⁶⁹ *Id.* at 76.

⁷⁰ *Id.*

⁷¹ *Iowa Tel. Servs., Inc. v. Iowa Utils. Bd.*, 563 F. 3d 743, 747 (8th Cir, 2009) [*Iowa*].

⁷² *Iowa*, 563 F. 3d at 748, quoting *Sprint Comm. Co., L.P. v. Ace Comm. Group*, et al., Docket No. ARB-05-2, at 14, Order on Rehearing, 2005 WL 3624405 (Iowa Utils. Bd, Nov. 28, 2005).

⁷³ *Iowa*, 563 F. 3d at 749.

providers will vary depending on the services the provider chooses and that the contracts may be confidential.⁷⁴

61 In a virtually identical proceeding before this Commission, a Washington arbitrator determined that Sprint was a telecommunications carrier under the Act, eligible to interconnect with Whidbey Telephone Company (Whidbey) to provide wholesale services to a local cable company offering retail telecommunications services.⁷⁵ Based on evidence presented in the case, the Washington arbitrator determined that Sprint, through its arrangement with the cable company, intended to hold itself out to serve subscribers within the cable company's service area, and thus qualified as a "telecommunications carrier" under the Act.⁷⁶

(b) Comcast Phone's Position

62 Comcast Phone argues that it qualifies as a telecommunications carrier under the Act because it has been authorized by the Commission to provide telecommunications service in Washington as a competitively classified local exchange carrier, and because it offers and provides telecommunications services in Washington.⁷⁷ Comcast Phone argues that TDS's efforts to exclude Comcast Phone from its service territory are anticompetitive.⁷⁸

63 Comcast Phone argues that a preponderance of decisions by the FCC, the D.C Circuit Court of Appeals, and a number of state commissions, including Washington, support its position that all that is required to meet the standards for common carriage, and thus status as a telecommunications carrier under the Act, are state authority to provide telecommunications service and offering and providing telecommunications

⁷⁴ *Id.* at 750.

⁷⁵ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Company L.P. with Whidbey Telephone Company Pursuant to 47 U.S.C. Section 252(b)*, Docket UT-073031, Order 04 – Order Determining Threshold Issues (Wash. Utils. & Transp. Comm'n, Jan. 24, 2008) [*Sprint-Whidbey*].

⁷⁶ *Sprint-Whidbey*, ¶¶ 25-29.

⁷⁷ Comcast Phone Motion, ¶¶ 2, 12.

⁷⁸ *Id.*, ¶ 2.

services.⁷⁹ Comcast Phone asserts that TDS misconstrues the FCC's *Bright House* decision and mischaracterizes the facts in that case. Comcast claims that *Bright House* remains applicable to this case, even though the decision applied to a dispute under Section 222 of the Act, not Section 251.⁸⁰ Further, Comcast Phone asserts that the FCC found that Comcast-affiliated competitive providers, not their VoIP provider customers, had obtained certificates of public convenience and necessity from the states in which they operated.⁸¹

64 Comcast Phone seeks interconnection with TDS to provide interconnection to the public switched telephone network (PSTN) for VoIP customers.⁸² Although TDS argues that the FCC's *Time Warner* decision does not apply in this case, Comcast Phone asserts that while Sprint's status as a telecommunications carrier was not at issue, the question of Sprint's right to interconnection to provide wholesale PSTN interconnection was at issue. Further, Comcast Phone asserts that a number of states have addressed the issue of a carrier's status as a telecommunications carrier and its offering of telecommunications services in providing PSTN interconnection, finding the carrier qualifies as a telecommunications carrier in its own right.⁸³

65 Comcast Phone asserts that both Washington and federal law require telecommunications carriers to serve the public in ways that private carriers are not, including the duty to provide service upon request, and are subject to enforcement by regulators and claims for damages in the courts if they do not.⁸⁴ Comcast Phone states that it has subjected itself to oversight by the Commission. Relying on the recent Michigan decision, Comcast Phone argues that its current registration in Washington as a competitively classified telecommunications company should be dispositive of whether it is a telecommunications company entitled to

⁷⁹ *Id.*, ¶¶ 9, 14.

⁸⁰ Comcast Phone Response, ¶ 39.

⁸¹ *Id.*, ¶ 40.

⁸² *Id.*, ¶ 32.

⁸³ *Id.*, ¶¶ 33-36.

⁸⁴ Comcast Phone Motion, ¶ 28.

interconnection.⁸⁵ Comcast Phone also relies on the Vermont Board's decision as dispositive of the issues in this case.⁸⁶

66 In response to TDS' argument that LIS and other Comcast Phone services cannot be considered telecommunications services because the company discontinued service in Washington in November 2007, Comcast Phone asserts that it "discontinued circuit-switched local voice telephone service, but ... retained ... [its] state certification and continued to provide other telecommunications services."⁸⁷ Comcast Phone argues that its filing with the FCC has no bearing on the services it currently provides, and cites the Michigan commission's decision as support.⁸⁸

67 Comcast Phone asserts that to meet the common law test for common carriage, "a carrier must hold itself out to serve all potential users of its service indiscriminately and allow customers to transmit information of their choosing."⁸⁹ Comcast Phone argues that a carrier may be a common carrier, even if it does not serve all members of the public,⁹⁰ if it is not actually providing service to a customer, or if it intends to serve only one customer.⁹¹ Comcast Phone asserts that "common carriers routinely offer service packages that 'are based on contractual negotiations with a single customer and specifically designed to meet the needs of only that customer'."⁹² Further, Comcast Phone claims that it is a common carrier because it has chosen to be one.⁹³

68 Comcast Phone asserts that it offers three separate telecommunications services to the public through service schedules posted on its website: Exchange Access, Schools and Libraries Network Service, and Local Interconnection Service (LIS) for providers

⁸⁵ *Id.*, ¶¶ 9, 18.

⁸⁶ *Id.*, ¶ 23.

⁸⁷ Comcast Phone Response, ¶ 22.

⁸⁸ *Id.*

⁸⁹ Comcast Phone Motion, ¶ 11, citing *NARUC I*, 525 F.2d at 642.

⁹⁰ *Id.*, ¶ 13, citing *NARUC II*, 533 F.2d at 608.

⁹¹ *Id.*, ¶ 13, citing *Fiber Technologies Networks*, 22 FCC Rcd. 332, ¶ 20.

⁹² *Id.*, ¶ 13.

⁹³ *Id.*, citing *Southwestern Bell*, 19 F.3d at 1481.

of interconnected VoIP.⁹⁴ Comcast Phone asserts that it offers the capability to make local calls through its Schools and Libraries Service and LIS, and facilitates the origination and termination of locally-rated telecommunications services traffic through its Commission approved interconnection and reciprocal compensation agreements with seven ILECs in Washington.⁹⁵

69 In response to TDS's assertion that LIS is so limited that no customer other than Comcast Phone's affiliate could use it, Comcast Phone states that under its service guide, LIS is available to any qualified, facilities-based interconnected VoIP service provider in Washington capable of offering their own last-mile facilities.⁹⁶ Comcast Phone argues that a common carrier's offerings may serve a particular class of users. Comcast Phone notes that the Eighth Circuit recently affirmed the decision of the Iowa Utilities Board that Sprint was a common carrier as it offered a similar wholesale interconnection service to "that class [of potential customers] consisting of entities capable of offering their own last-mile facilities."⁹⁷ Comcast Phone also claims that there is no requirement that a carrier have a certain number of customers before it can gain status as a common carrier.⁹⁸ Comcast Phone responds to TDS' concerns about the three-year term and early termination provisions in the LIS guide, asserting that TDS's response here conflicts with arguments made in New Hampshire, and that whether the term is too short or too long depends on the facts of the particular contract.⁹⁹ The company also claims that early termination provisions are common in filed tariff offerings.¹⁰⁰

70 Comcast Phone refutes TDS's argument that the LIS offering appears to be private carriage. Comcast Phone argues that its confidential agreement with Comcast IP to provide LIS service does not undermine its common carrier status. Comcast Phone

⁹⁴ *Id.*, ¶ 12; *see also* Stipulated Facts, ¶ 5 and Exhibits 2-4.

⁹⁵ *Id.*, ¶ 15; *see also* Stipulated Facts, ¶¶ 2, 6 and Exhibit 1.

⁹⁶ Comcast Phone Response, ¶¶ 6-7.

⁹⁷ *Id.*, ¶¶ 7-9, quoting Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Util. Bd. Nov. 28, 2005); *see also* *Iowa*, 563 F. 3d at 750, n.6.

⁹⁸ *Id.*, ¶ 10.

⁹⁹ *Id.*, ¶¶ 15-16.

¹⁰⁰ *Id.*, ¶¶ 18-19.

asserts that there is no requirement that a carrier publicize its rates and contracts to be considered a common carrier.¹⁰¹ Further, the company notes that carriers routinely offer services on an individual case basis (ICB), and because every potential customer's network will be different, every contract might well be different.¹⁰² Comcast Phone notes that TDS's tariffs filed with the Commission offer services on an ICB basis, including local transport services.¹⁰³ Further, Comcast notes that the provision allowing Comcast Phone to unilaterally change rates during the term of the contract is of no import, as a different customer could negotiate a different agreement and the customer could seek Commission intervention if the company seeks to impose unreasonable terms or conditions.¹⁰⁴

71 In addition to LIS, Comcast Phone claims it offers exchange Access Service to a number of interexchange carriers: After receiving an incoming call, Comcast Phone routes the call to its LIS customers for delivery to the end user, using telephone exchange facilities to help terminate a toll call.¹⁰⁵ Comcast offers this same service to interexchange carriers in conjunction with its Schools and Libraries Service offering.¹⁰⁶ Comcast Phone averages 12 to 18 interexchange customers for its exchange Access Service per month in Washington.¹⁰⁷ Further, Comcast Phone has an agreement with WECA that defines Comcast Phone as a Local Exchange Carrier.¹⁰⁸ Comcast Phone asserts it has paid a substantial amount in exchange access surcharges to the Washington Universal Service Fund under the agreement.¹⁰⁹

72 While TDS claims that Comcast Phone's exchange Access Service is so unusual as to not be truly a telecommunications service because it provides only a terminating switched access service, Comcast Phone asserts that TDS' claim is false, as the

¹⁰¹ *Id.*, ¶ 14, citing *Iowa*, 563 F.3d at 749.

¹⁰² *Id.*, ¶ 12.

¹⁰³ *Id.*, ¶ 13.

¹⁰⁴ *Id.*, ¶ 20.

¹⁰⁵ Comcast Phone Motion, ¶ 16.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, ¶ 17; *see also* Stipulated Facts, ¶ 6.

¹⁰⁸ *Id.*; *see also* Stipulated Facts, ¶ 2, Exhibit 1.

¹⁰⁹ *Id.*; *see also* Stipulated Facts Exhibit 1.

company provides both terminating and originating switched access service.¹¹⁰ Comcast Phone also states that it is the carrier providing local telecommunications service, not Comcast IP, contrary to TDS's claims: Comcast Phone provides the switched Access Service to interexchange carriers seeking to terminate calls to Comcast IP's VoIP subscribers, similar to how other carriers provide service to the VoIP customers they serve.¹¹¹ Comcast Phone also explains that TDS misinterprets a diagram in its Access Service guide, stating that the diagram is intended to show the elements of service that Comcast Phone will charge interexchange customers, not how the company routes traffic to and from actual customers.¹¹²

73 In response to TDS's argument that there is no evidence in the record that Comcast Phone is offering the Schools and Library Service in Washington, Comcast Phone states that the terms and conditions for the service are maintained on its web site, and the service guide is an exhibit to the Stipulated Facts in this case.¹¹³ Comcast Phone also defends its claim that the service is a telecommunications service: The high-speed data service that uses point-to-point T-1 circuits to interconnect Local Area Networks is the same as what has been regulated by the Commission and the FCC as a "special access" service for years.¹¹⁴ The service also provides connectivity to the public switched telephone network.¹¹⁵

74 Comcast Phone claims that if the Commission has any doubts about its status as a telecommunications carrier, it should give the benefit of the doubt to Comcast Phone based on policy reasons: a narrow reading would impair competition and would fail to promote facilities based competition as well as broadband deployment.¹¹⁶

¹¹⁰ Comcast Phone Response, ¶¶ 28-29.

¹¹¹ *Id.*, ¶ 29.

¹¹² *Id.*, ¶ 30.

¹¹³ *Id.*, ¶ 25.

¹¹⁴ *Id.*, ¶¶ 26-27.

¹¹⁵ *Id.*, ¶ 27.

¹¹⁶ Comcast Phone Motion, ¶ 27.

(c) TDS's Position

- 75 TDS asserts that Comcast Phone cannot establish that it qualifies as a telecommunications carrier that offers telecommunications services in its own right, and thus is not entitled to Section 251 interconnection with TDS for the exchange of telecommunications service traffic. Further, TDS argues that even if the Commission determines that Comcast Phone is a telecommunications carrier, it is not entitled to interconnection as none of the traffic Comcast Phone intends to deliver to TDS is classified as telecommunications service traffic.¹¹⁷
- 76 TDS asserts that it is appropriate to question Comcast Phone's common carrier status, as Comcast IP seeks all the rights of a telecommunications carrier, such as local number portability through interconnection, without having any of the responsibilities for treatment of end-users.¹¹⁸ Further, TDS claims that by deliberately splitting the corporate functions of Comcast Phone and Comcast IP, the company avoids the consumer protections and light handed regulation of a CLEC for the provision of end user services.¹¹⁹
- 77 TDS asserts that "it is the widespread, general solicitation of customers from the general population ... that constitutes common carriage."¹²⁰ TDS further asserts that several factors preclude a carrier's status as a common carrier, including "1) a relatively stable clientele, with terminations and new clients the exception rather than the rule, 2) methods of operation that may be highly individualized and comprise grounds for accepting or rejecting an applicant, and 3) an operator that would desire and expect to negotiate with and select future clients on a highly individualized basis."¹²¹

¹¹⁷ TDS Motion, ¶ 2.

¹¹⁸ TDS Motion, ¶ 2; TDS Reply, ¶ 37.

¹¹⁹ TDS Motion, ¶ 63; *see also* TDS Reply, ¶¶ 37, 39.

¹²⁰ TDS Motion, ¶ 21.

¹²¹ *Id.*

- 78 TDS argues that simply because Comcast Phone has been issued a certificate by the Washington Commission does not establish that it is a common carrier.¹²² TDS argues that Comcast Phone's reliance on *Bright House* is not correct, as self-certification was but one factor in the determination of common carriage.¹²³ TDS argues that self-certification, by itself, is insufficient to meet the test for common carriage, and rejects Comcast's argument that it is a common carrier because it has chosen to be one.¹²⁴ TDS claims that an entity is a common carrier by virtue of what it does, not what it declares itself to be.¹²⁵
- 79 TDS argues that the FCC's *Bright House* and *Time Warner* decisions do not apply to this arbitration.¹²⁶ TDS asserts that *Bright House* did not decide whether a carrier was a common carrier for Section 251 purposes, but concerned a question about whether one carrier may use the proprietary information of another carrier without violating restrictions in Section 222 for the use of customer proprietary network information.¹²⁷ TDS notes that the FCC clearly limited the application of its decision to Section 222.¹²⁸ TDS further claims that the facts in the case do not support Comcast's position in this docket, as the FCC found that both VoIP providers had authority from the states in which they operated and the Verizon had entered into interconnection agreements with the VoIP providers.¹²⁹ TDS asserts that the Michigan and Vermont decisions relied on *Bright House* in error.¹³⁰
- 80 Similarly, TDS claims that *Time Warner* does not support a finding that Comcast Phone is a common carrier: The FCC determined that "the rights of telecommunications carriers to Section 251 interconnection are limited 'to those

¹²² TDS Reply, ¶ 16.

¹²³ *Id.*, ¶¶ 17-18; 22.

¹²⁴ TDS Motion, ¶¶ 58-59; TDS Reply, ¶¶ 17-18, 22.

¹²⁵ TDS Motion, ¶ 58, quoting *U.S. v. California*, 297 U.S. 175, 181, 56 S.Ct. 421, 80 L.Ed. 567 (1936); TDS Reply, ¶¶ 22-23, citing *NARUC I* at 644 and *Southwestern Bell* at 1481.

¹²⁶ TDS Motion, ¶ 38.

¹²⁷ *Id.*, ¶ 39; *see also* TDS Reply, ¶ 19.

¹²⁸ TDS Motion, ¶ 39.

¹²⁹ *Id.*, ¶ 40.

¹³⁰ TDS Reply, ¶ 20.

carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”¹³¹ In addition, TDs asserts the FCC requires “that the telecommunications carrier also be ‘offering telecommunications services through the same arrangements’ as it seeks for interconnection.”¹³² Further, the FCC stated that state commissions must determine on the facts before them whether a carrier offers telecommunications services,¹³³ and determined that Section 251 interconnection is available only to those telecommunications carrier who “seek interconnection in their own right.”¹³⁴

- 81 TDS argues that Comcast Phone cannot be providing telecommunications services through LIS or Access Service, as it sought and was granted permission to discontinue offering telecommunications service in Washington after November 28, 2007, specifically “local exchange and interexchange telephone service.”¹³⁵ TDS asserts that there is little value to its authority to operate in Washington, and that perhaps it should be revoked.¹³⁶
- 82 TDS questions whether Comcast Phone’s LIS offering is sufficient to demonstrate common carriage. TDS argues that “the LIS service is an extremely limited offering and, as a practical matter, only a Comcast affiliate would purchase the LIS service.”¹³⁷ TDs asserts that LIS is available only to providers of retail interconnected VoIP service, not nomadic VoIP. A customer must have particular facilities to use the service: “an IP-based, broadband network that uses a Cable Modem Termination System (CMTS) employing the Network-based Call Signaling specified by Cable Television Laboratories, Inc. (CableLabs®.”¹³⁸ TDS also objects to the pricing for

¹³¹ TDS Motion, ¶ 41, quoting *Time Warner*, ¶ 14, n.39.

¹³² *Id.*, ¶ 41, citing *Time Warner*, n.39, quoting 47 C.F.R. § 51.100(b).

¹³³ *Id.*, ¶ 43, citing *Time Warner*, ¶ 14.

¹³⁴ *Id.*, ¶ 44, quoting *Time Warner*, ¶ 16.

¹³⁵ TDS Motion, ¶ 37, citing Comcast Phone’s Response to Bench Request 4; TDS Reply, ¶ 21.

¹³⁶ TDS Reply, ¶ 21.

¹³⁷ TDS Motion, ¶¶ 22, 34; TDS Reply, ¶ 2.

¹³⁸ TDS Motion, ¶ 23, quoting Exhibit 4, at 2, Section 3.A.

LIS, asserting that prices are only provided on a case-by-case basis through a bona fide request, and that the entire agreement with Comcast IP is confidential.¹³⁹

83 TDS further objects to the three year term of service as too short, and provides no “evergreen” provisions as there are in interconnection agreements to allow it to continue until replaced by another agreement or termination.¹⁴⁰ Further TDS objects to the fact that prices and terms may be varied under the contract, that there is a one hundred percent termination liability, and that it appears a customer must use Comcast Phone for long distance service.¹⁴¹

84 Given these facts, TDS claims that LIS service sounds like contract or private carriage, i.e., making “individualized decisions in particular case whether and on what terms to serve.”¹⁴² TDS asserts that while components of the LIS service may be consistent with common carriage, looking at the service as a whole, the service does not meet the test in *NARUC I* and *NARUC II* of a carrier holding itself out indiscriminately to serve the public.¹⁴³ Further, TDS argues that the LIS offering is not being provided through the same arrangement that is sought with TDS; it requires specialized equipment that has nothing to do with the delivery of traffic to TDS.¹⁴⁴

85 Similarly, TDS finds fault with the Schools and Libraries Service. TDS claims that there is no evidence that Comcast Phone is offering the service in Washington, that posting the service on the web site is not sufficient to offer or solicit for the service, and that Comcast Phone is not providing the service to any customers in Washington.¹⁴⁵ TDS claims that very little of the service has to do with providing a telecommunications service. The service is described as a high-speed data service, point-to-point service, and as Channelized Exchange Service, i.e., “the functional

¹³⁹ *Id.*, ¶ 24-25, citing Exhibit 4 at 1, Section 1.B.

¹⁴⁰ *Id.*, ¶ 28.

¹⁴¹ *Id.*, ¶¶ 29-33.

¹⁴² *Id.*, ¶¶ 24-26, quoting *NARUC I* at 641.

¹⁴³ *Id.*, ¶ 35.

¹⁴⁴ *Id.*, ¶ 36.

¹⁴⁵ *Id.*, ¶ 45; TDS Reply, ¶ 3.

equivalent of twenty-four voice grade facilities.”¹⁴⁶ TDS asserts that this describes provisioning a school or library’s internal communications network, not a telecommunications service, and calling through the PSTN that is accomplished through case-by-case rates and bona fide requests, similar to LIS.¹⁴⁷ Further as Comcast Phone has discontinued its local exchange and interexchange services, TDS argues that Comcast Phone must be providing the service through VoIP, which Comcast Phone has described as an information service.”¹⁴⁸

86 TDS also claims that Comcast Phone’s Access Service does not support a conclusion that Comcast Phone is a common carrier. TDS asserts that Comcast Phone’s Access Service is unusual, as it only bills interexchange carriers for terminating access.¹⁴⁹ TDS argues that most access service is for service to both origination and termination directions, and provided by the entity providing local service, in this case Comcast IP, not the intervening entity, Comcast Phone.¹⁵⁰ TDS questions whether Comcast Phone actually provides access service, and asserts that the offering has to do with providing service so that CDV users may place calls to TDS end-users within the TDS local calling areas, not local interconnection with TDS.¹⁵¹ Specifically, TDS argues that the interconnection Comcast Phone seeks is for local traffic that would use different facilities than the access service facilities for interexchange carriers to reach Comcast IP, *i.e.*, the Access Service has nothing to do with the arrangements between Comcast Phone and TDS for which Comcast Phone seeks interconnection, contrary to the requirements in *Time Warner*.¹⁵²

87 In response to Comcast Phone’s arguments that interconnection will “bring the benefits of competition and lower cost innovative communication service to Washington’s consumers in TDS’ service territory,” TDS asserts that there is nothing that prevents Comcast IP from providing those services to its cable customers in its

¹⁴⁶ TDS Motion, ¶¶ 46-49.

¹⁴⁷ *Id.*, ¶¶ 46-48.

¹⁴⁸ *Id.*, ¶¶ 46-49, 51.

¹⁴⁹ *Id.*, ¶¶ 52-53.

¹⁵⁰ *Id.*, ¶ 53.

¹⁵¹ *Id.*, ¶ 56.

¹⁵² *Id.*, ¶¶ 56-57; *see also* TDS Reply, ¶¶ 31-33.

service territory.¹⁵³ TDS argues the Commission should not be lulled into feeling good about Comcast Phone’s policy arguments, as Comcast Phone and Comcast IP are simply seeking the benefits of interconnection, such as number portability, through an artificial distinction of using two entities to provide the service.¹⁵⁴

88 ***Discussion and Decision.*** The primary issue in dispute is whether Comcast Phone is a telecommunications carrier entitled to negotiate or arbitrate an interconnection agreement with TDS under Section 251 of the Act. As the definitions of a telecommunications carrier and of telecommunications service derive from the common law standard for common carriage, the first issue for resolution is whether Comcast Phone is a common carrier. The federal cases and FCC decisions discussed above require that whether an entity qualifies as a common carrier depends on the specific facts at hand. *NARUC I* and *II* require first that the carrier “undertakes to carry for all people indifferently,”¹⁵⁵ and second, that the carrier allows customers to “transmit intelligence of their own design and choosing.”¹⁵⁶ There appears to be no dispute about this second prong of the test.

89 As Comcast Phone and TDS demonstrate in their pleadings, a carrier may be deemed a common carrier even if it is “a specialized carrier whose service is of possible use only to a fraction of the population ... [but] holds himself out to serve indifferently all potential users.”¹⁵⁷ However, “a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”¹⁵⁸ Further, a carrier may be a common carrier for some activities, but not others, may qualify as a common carrier if it merely holds itself out to provide service but has not yet supplied service, and where it serves only one customer.¹⁵⁹

¹⁵³ TDS Reply, ¶ 36.

¹⁵⁴ *Id.*, ¶ 37.

¹⁵⁵ *NARUC I* at 641; *NARUC II* at 608.

¹⁵⁶ *NARUC II* at 609, quoting *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966); *Frontier Broadcasting Co. v. FCC*, 24 F.C.C. 251, 254 (1958).

¹⁵⁷ *NARUC II* at 608; *see also NARUC I* at 641.

¹⁵⁸ *NARUC I* at 641; *NARUC II* at 608-9.

¹⁵⁹ *NARUC II* at 608; *Fiber Technologies*, 22 FCC Rcd 3392, ¶¶ 20-21.

- 90 Turning to the specific facts in this case, the first question is whether Comcast Phone holds authority to provide telecommunications service in Washington state. The parties agree that Comcast Phone is registered as a telecommunications company with the Commission.¹⁶⁰ TDS questions the validity of Comcast Phone’s registration due to the company’s filing with the FCC to discontinue “local exchange and interexchange telephone service” in Washington as of November 28, 2007. While this is true, Comcast Phone retains its registration in Washington, and this is not the proper proceeding to determine whether to revoke the registration. Until the Commission determines otherwise, Comcast Phone has a valid registration authorizing it to provide telecommunications services in Washington.
- 91 Comcast Phone, relying on *Bright House* and various state decisions, argues that its status as a registered competitively classified telecommunications carrier is dispositive of its common carrier status.¹⁶¹ While these cases are instructive, they do not determine the result in this case. Self certification by itself is not sufficient to demonstrate status as a common carrier. An entity must also show by its practice that it is a common carrier.¹⁶²
- 92 State certification is one way of demonstrating that a carrier is holding itself out to serve the public. Providing service to the public or a fraction of the public is another way to meet this standard, although, contrary to TDS’s claim, a carrier need not actually provide service. Nor is it a requirement that a carrier pursue “widespread, general solicitation of customers from the general population” to qualify as a common carrier.¹⁶³ A carrier may meet the standard by publicly filing tariffs or maintaining offers of service on a website, i.e., holding itself out to provide service.¹⁶⁴
- 93 Comcast Phone offers several services through service guides on its web site. TDS argues that none of these services are telecommunications services, and that under the

¹⁶⁰ Stipulated Facts, ¶ 1.

¹⁶¹ Comcast Phone also claims that it is a common carrier because it chooses to be one, citing *Southwestern Bell*. A review of the case shows it does not support Comcast Phone’s claim.

¹⁶² *NARUC II* at 608; *see also U.S. v. California*, 297 U.S. at 181.

¹⁶³ TDS makes this claim, citing *Southwestern Bell*. TDS Motion, ¶ 21. Nothing in that case requires such solicitation for classification as a common carrier.

¹⁶⁴ *Sprint-Whidbey*, ¶ 25.

FCC's requirements in *Time Warner*, Comcast Phone cannot be a telecommunications carrier if it does not provide telecommunications services. The Arbitrator disagrees.

94 Contrary to TDS' claims, Comcast Phone has provided evidence that it is offering its Schools and Libraries Service. The parties stipulated to the fact that Comcast Phone posts a service guide for the offering on its web site – which is notice to the public at large, as well as that portion of the public seeking this service. A copy of the service guide is attached as an exhibit to the parties' statement of stipulated facts. Further, TDS's claim that the service is not a telecommunications service fails. As Comcast notes, the service offered under its Schools and Libraries offering is similar to intrastate special access, which long has been a regulated telecommunication service. Comcast Phone also points out that the service provides connectivity to the public switched telecommunications network (PSTN), indicia of a telecommunications service.

95 Similarly, TDS's claims about Comcast Phone's Access Service fail. WECA recognizes Comcast Phone as a Local Exchange Carrier, and Comcast Phone pays exchange access surcharges to the Washington Universal Service Fund for services it provides under this offering. Despite TDS' assertions, Comcast Phone's Access Service is not unusual- while it currently may provide only terminating access, it also clearly offers originating access, and is used by, on average, 12 to 18 interexchange carrier customers per month. Further, although TDS claims that the service is information, not telecommunications, service, Comcast Phone correctly asserts that its Access Service is a telecommunications service – it is the carrier providing local telecommunications service, not Comcast IP.

96 TDS raises the most concerns with Comcast's LIS service offering, asserting that it looks more like private, not common carriage, and as with the Access Service offering, is more properly characterized as an information service. Comcast effectively counters TDS' claims. The terms of LIS service, a specialized service, are indeed available to a particular class of customers – qualified, facilities-based interconnected VoIP service providers capable of providing their own last-mile facilities. However, the terms are not limited to Comcast affiliates, and decisions to serve a particular customer are no more individualized than those of other specialized services, including those offered under TDS's own tariff. In a similar case, the Eighth Circuit found that Sprint's individually negotiated agreement with a cable company

for interconnected VoIP did not outweigh evidence of common carriage, recognizing that Sprint's contracts with last-mile providers will vary depending on the services the provider chooses and that the contracts may be confidential.¹⁶⁵ The fact that Comcast Phone currently has only one LIS customer, and that the customer is an affiliate of Comcast Phone, does not mean that the company does not qualify as a common carrier.

97 Finally, we take note that Comcast Phone currently exchanges locally-rated traffic pursuant to five negotiated interconnection agreements with ILECs in Washington that were approved by the Commission.¹⁶⁶

98 Having weighed the arguments proffered by both parties, and recognizing this is a very close decision, the arbitrator finds the balance of the facts in this proceeding weigh in favor of finding that Comcast Phone is a common carrier as a matter of law, and thus a telecommunications carrier under the Act.¹⁶⁷ Comcast Phone actively holds itself out to a portion of the public to provide Access Service, Schools and Libraries Services and Local Interconnection Service. As in a recent arbitration involving Sprint and Whidbey Telephone, the key determinant is evidence of an entity holding itself out to serve indiscriminately.¹⁶⁸ The evidence in this case supports such a finding.

99 As discussed above, and below, TDS's argument that Comcast Phone cannot be offering telecommunications service as it discontinued service in Washington is rejected. Comcast has demonstrated that it continues to provide telecommunications service in Washington. Similarly, despite the fact that Comcast Phone has agreed that the interconnected VoIP service would be an information service, it is Comcast IP, not Comcast Phone, that provides interconnected VoIP.¹⁶⁹ The Arbitrator finds that

¹⁶⁵ *Iowa*, 563 F.3d at 749.

¹⁶⁶ Stipulated Facts, ¶¶ 13-14.

¹⁶⁷ The parties do not dispute the facts, but disagree about how the facts in this case apply to the law. The Arbitrator does not find TDS's arguments about Comcast Phone's Schools and Libraries, Access Service and LIS services to be disputed facts, but as disputes about how the facts apply in the decision about whether Comcast Phone is a common carrier.

¹⁶⁸ *Sprint-Whidbey*, ¶ 25.

¹⁶⁹ See TR 56, ll. 2-15; TR 75, ll. 16-18.

Comcast Phone has reasonably and effectively demonstrated it is a common carrier providing telecommunications service in Washington.

100 The fact that Comcast Phone has designated its entire contract with Comcast IP to be confidential, however, does raise some concerns. Designating its contract as confidential makes it difficult to determine if an offer by Comcast Phone to another customer would result in unjust discrimination or whether the company holds itself out “indifferently [to] all potential users” as required by *NARUC II*.¹⁷⁰ Thus, the Arbitrator recommends the Commission require Comcast Phone, as a condition of approving an interconnection agreement between Comcast Phone and TDS, to file its agreement with Comcast IP, and amendment, with the Commission in this docket, and to post the agreement on its web site or other publicly available location, making public all the terms and conditions of the agreement. Making the agreement publicly available should alleviate some of TDS’s concerns about the agreement between Comcast Phone and Comcast IP.

101 After finding that Comcast Phone is a telecommunications carrier entitled to interconnection with TDS under Section 251, the Arbitrator recommends that the Commission grant Comcast Phone’s motion for summary determination and deny TDS’ motion on this issue.

4. Whether Comcast Phone may interconnect using only information service

102 In its *Time Warner* decision, the FCC determined that “the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”¹⁷¹ In addition, the FCC requires that the carrier must be “offering telecommunications services through the same arrangement” for which it requests interconnection.¹⁷² TDS raises the question whether Comcast Phone can meet this requirement, asserting that none of the traffic

¹⁷⁰ *NARUC II* at 608.

¹⁷¹ *Time Warner*, ¶ 14, n.39.

¹⁷² *Id.*, ¶ 14, n.39, quoting 47 C.F.R. § 51.100(b).

that Comcast Phone intends to deliver to TDS is classified as telecommunications service traffic.¹⁷³ TDS concludes that Comcast Phone is not eligible for interconnection with TDS under Section 251.

- 103 TDS asserts as a resolved fact that Comcast Phone and Comcast IP assert that the service offered by Comcast IP is an information service.¹⁷⁴ TDS concludes that all of the traffic delivered to TDS by Comcast Phone for interconnection would be information service traffic, and that by its admission, Comcast Phone will not be providing telecommunications service to TDS.¹⁷⁵ TDS argues that under FCC rules, Comcast Phone may not seek to interconnect for the delivery of only information traffic.¹⁷⁶
- 104 TDS argues that Comcast Phone ignores the “same arrangement” requirement of *Time Warner*, and that Comcast fails to demonstrate that Comcast IP’s information service is transformed into telecommunications service traffic under Comcast Phones’ Access and LIS service offerings.¹⁷⁷
- 105 Comcast Phone argues that CLECs have the right to interconnect and exchange traffic with ILECs when providing services under Section 251, regardless of the classification of interconnected VoIP as either an information service or a telecommunications service.¹⁷⁸ Comcast Phone argues that TDS misconstrues the FCC’s finding in *Time Warner*. The FCC explained that its existing rules allow a carrier to exchange information service traffic through the same arrangement as it exchanges telecommunications traffic, such that “the fact that a telecommunications carriers is also providing non-telecommunications service is not dispositive of its rights.”¹⁷⁹

¹⁷³ TDS Motion, ¶ 2; TDS Reply, ¶¶ 33, 35.

¹⁷⁴ TDS Motion, ¶ 60, citing TR 56, ll.2-15; TR 75, ll. 16-18.

¹⁷⁵ *Id.*, ¶¶ 60-61.

¹⁷⁶ *Id.*, ¶ 62; TDS Reply, ¶ 5.

¹⁷⁷ TDS Reply, ¶ 38.

¹⁷⁸ Comcast Phone Motion, ¶ 24, citing *Time Warner*, ¶¶ 15-16; Comcast Phone Response, ¶ 37.

¹⁷⁹ Comcast Phone Reply, ¶ 37, quoting *Time Warner*, ¶ 14, n.39.

106 Comcast Phone argues that the FCC's statements are not applicable here, as Comcast Phone does not seek to exchange information service traffic with TDS.¹⁸⁰ Further, Comcast Phone states that regardless of whether the interconnected VoIP service provided to end-users is considered an information or telecommunications service, the wholesale PSTN interconnection that Comcast Phone provides to its interconnected VoIP service provider customers is a telecommunications service.¹⁸¹

107 Comcast Phone also claims that there is no truth to TDS' claim that Comcast Phone is not seeking interconnection in its own right to provide its services. Comcast Phone argues that the arrangement is functionally comparable to the arrangement the Commission approved in the arbitration between Sprint and Whidbey Telephone.¹⁸² Comcast Phone asserts that it will be providing telecommunications through the same arrangement for which it seeks interconnection.¹⁸³

108 ***Discussion and Decision.*** While there is no dispute that the Comcast entities have stated that the interconnection VoIP service is information service, the question before the Commission is whether this fact bars Comcast Phone from interconnecting with TDS under Section 251. It is indisputable the FCC has determined that "The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251."¹⁸⁴ In this case, it is Comcast IP, not Comcast Phone that will be providing the interconnected VoIP service. Accordingly, the arbitrator finds the classification of the service Comcast IP provides to retail consumers is irrelevant for purposes of the question of whether Comcast Phone is a telecommunications carrier entitled to interconnection under Section 251. Michigan and Vermont have reached similar decisions on similar facts.¹⁸⁵ Further, however Comcast IP may describe its service, the FCC has yet to determine the regulatory

¹⁸⁰ *Id.*, ¶ 37.

¹⁸¹ Comcast Phone Reply, ¶ 37.

¹⁸² *Id.*, ¶ 38.

¹⁸³ *Id.*

¹⁸⁴ *Time Warner*, ¶ 15.

¹⁸⁵ Michigan Arbitration Decision at 19; Vermont Board Decision at 76.

classification of interconnected VoIP and, as discussed above, this not dispositive to resolving Comcast Phone's right to interconnection.

109 In addition, Comcast Phone has demonstrated that it is providing telecommunications services, and will be providing telecommunications services through the same PSTN connection through which it seeks to provide interconnection, consistent with the FCC's requirements in *Time Warner*.

110 TDS' arguments on this issue are not supported by the facts in this proceeding. As a matter of law, TDS' motion for summary determination on this issue is denied.

E. Implementation Schedule

111 Pursuant to 47 U.S.C. § 252(c)(3), the Arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Act, applicable FCC Rules, and this Commission's orders.

F. Conclusion

112 The Arbitrator's resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). The parties are directed to submit an interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

113 Any party may petition for Commission review of this Arbitrator's Report and Decision by **August 19, 2009**. Any petition for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrator's Report and Decision should be modified. Replies to any petition for Commission review must be filed by **August 31, 2009**.

114 The parties must also file, by **August 31, 2009**, a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all

negotiated terms, all terms requested pursuant to Section 252(i), and all terms intended to fully implement arbitrated decisions. This filing will include the parties' request for approval, subject to any pending petitions for review.¹⁸⁶ The agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text.

- 115 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers, are consistent with the public interest, are consistent with the public convenience, and necessity, and satisfy applicable state law requirements, including relevant Commission orders.
- 116 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders. A party that petitions for review must provide alternative language for arbitrated terms that would be affected if the Commission grants the party's petition.
- 117 Any petition for review, any response, and any request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must be attached for the convenience of the Commission. The parties are not required to file a proposed form of order.
- 118 Any petition for review of this Arbitrator's Report and Decision and any response to a petition for review must be filed **(original and six (6) copies)** with the Commission's Executive Secretary and served as provided in WAC 480-07-145. Post-arbitration hearing filings and any accompanying materials must be served on the opposing party by delivery on the day of filing, unless jointly filed.

¹⁸⁶ If the parties agree that no petition for review will be filed, the parties may file their joint request for approval and complete interconnection agreement at any time after the date of this Report and Decision.

119 An electronic copy of all post-arbitration hearing filings must be provided by delivery to the Commission Secretary either via the Commission's Web Portal (www.wutc.wa.gov/e-filing) or by sending an e-mail to records@utc.wa.gov. Alternatively, Parties may furnish an electronic copy by delivering with each filing a CD or 3.5-inch, IBM-formatted, high-density diskette including the filed document(s), in MSWord file format (*i.e.*, <filename>.doc) and Adobe Acrobat file format (*i.e.*, <filename>.pdf), reflecting the pagination of the original. Attachments or exhibits to pleadings and briefs that do not pre-exist in an electronic format do not need to be converted.

2. Approval Procedure

120 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.

121 The Commission will endeavor to enter an order approving or rejecting the Agreement by **September 30, 2009**.¹⁸⁷ The Commission's order will include its findings and conclusions.

Dated at Olympia, Washington, and effective July 20, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Arbitrator and Administrative Law Judge

¹⁸⁷ As noted above, the parties have agreed to waive the statutory deadlines in 47 U.S.C. § 252(e)(4), but have requested prompt resolution of the petition.