

**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     )

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

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NEW HAMPSHIRE, LLC

April 20, 2008

**BEFORE THE  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

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**INITIAL 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 Initial 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., all of which do business as TDS Telecom (collectively, “TDS”).

**INTRODUCTION & SUMMARY**

Comcast seeks an interconnection agreement with TDS so that it can offer competitive telecommunications services in the TDS incumbent local exchange carrier (“ILEC”) service territories in New Hampshire. TDS – by its claim that Comcast is not a telecommunications carrier entitled to interconnection under the Act – is trying to prevent that from happening. Comcast qualifies as a telecommunications carrier because of the authority it has received from

the Commission to operate in TDS' service territories,<sup>1</sup> and because it actually offers and provides telecommunications services. The Commission should reject TDS' anticompetitive attempt to exclude Comcast from its markets and approve the interconnection agreement that Comcast seeks.

## **BACKGROUND**

Comcast is a subsidiary of the multi-system cable broadband operator, Comcast Corporation. Comcast Corporation has operating subsidiaries in New Hampshire, 37 other states, and the District of Columbia. It has invested tens of billions of dollars to build and deploy high-capacity, broadband networks in New Hampshire and around the country. Comcast offers competitive telecommunications services to retail and wholesale customers.<sup>2</sup> Other Comcast affiliates provide high speed Internet access services and video programming using the same network plant. In its recent *Order Granting Authority*, the Commission found that Comcast's presence in the TDS markets would enhance competition and benefit consumers.<sup>3</sup> That order also assumed that TDS and Comcast would enter into an interconnection agreement to cover the terms of physical interconnection, the cost of transporting and terminating traffic, and other matters.<sup>4</sup>

TDS is an ILEC under Section 251(h)(1) of the Act.<sup>5</sup>

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<sup>1</sup> Stipulated Facts ¶ 1 (citing *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*").

<sup>2</sup> See Joint TDS and Comcast filing of Stipulated Facts (April 3, 2009) ("Stipulated Facts") ¶¶ 1, 5, 6, 7, 9, 10, 15 and 16. (Note that an *errata* to the Stipulated Facts was filed on April 16, 2009.)

<sup>3</sup> *Id.* at 23.

<sup>4</sup> *Id.* at 22-23.

<sup>5</sup> 47 U.S.C. § 251(h)(1).

Section 251(a)(1) of the Act requires all telecommunications carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”<sup>6</sup> In addition, section 251(b) imposes several mutual and reciprocal obligations on all local exchange carriers,<sup>7</sup> including the duty to provide for number portability, dialing parity, and “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”<sup>8</sup>

Comcast requested a Section 251 interconnection agreement with TDS in April 2008.<sup>9</sup> The parties spent the next six months in intermittent, but largely productive negotiations. In October 2008, however, after all of the technical issues related to interconnection had been resolved, TDS raised questions about Comcast’s telecommunications carrier status. TDS subsequently suspended negotiations and refused to execute the agreement the parties had negotiated.

Comcast filed its Petition for Arbitration on December 12, 2008. TDS filed an Answer and propounded two sets of data requests, to which Comcast responded. On April 3, 2009, the parties filed with the Commission a Stipulated Statement of Facts which, along with Comcast’s responses to TDS’s data requests, constitute the factual record in this proceeding. The sole disputed issue in this arbitration is whether Comcast is a telecommunications carrier entitled to interconnection and related rights under Sections 251(a) and (b).

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<sup>6</sup> 47 U.S.C. § 251(a)(1).

<sup>7</sup> See 47 U.S.C. § 153(26) (“The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access”). Comcast’s status as a local exchange carrier is addressed below. See *infra* notes 37-43 and accompanying text.

<sup>8</sup> 47 U.S.C. § 251(b)(2), (3) and (5), respectively.

<sup>9</sup> See Comcast Petition for Arbitration ¶ 14.

This arbitration is governed by the substantive and procedural requirements set forth in the Act and applicable Commission rules. Section 252(c)(1) of the Act directs the Commission to resolve open issues in a manner that “meet the requirements of Section 251, including the regulations prescribed by the [Federal Communications] Commission [“FCC”] pursuant to section 251.”<sup>10</sup>

## ARGUMENT

Comcast is a telecommunications carrier entitled to interconnection and related rights under Sections 251(a)-(b) because it has been authorized by the Commission to provide telecommunications services in New Hampshire and because it does, in fact, offer and provide telecommunications services. That is all that is required, as the FCC,<sup>11</sup> the United States Court of Appeals for the District of Columbia Circuit,<sup>12</sup> and state regulatory commissions and/or courts in Michigan,<sup>13</sup> Vermont,<sup>14</sup> Texas,<sup>15</sup> New York,<sup>16</sup> Pennsylvania,<sup>17</sup> Iowa,<sup>18</sup> Nebraska,<sup>19</sup> Illinois,<sup>20</sup> Ohio,<sup>21</sup> and Washington,<sup>22</sup> have determined.

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<sup>10</sup> 47 U.S.C. § 252(c)(1).

<sup>11</sup> *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 (2008).

<sup>12</sup> *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009), *aff'g* *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 (2008).

<sup>13</sup> *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*, Order, Case No. U-15725, U-15730 (Mich. PSC, March 5, 2009) (“*Comcast-TDS Michigan Decision*”), *aff'g* *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*, Decision of the Arbitrator, Case No. U-15725, U-15730 (Mich. PSC, Jan. 28, 2009) (“*Michigan Arbitrator Recommendation*”).

<sup>14</sup> *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) (“*Comcast-VTel Vermont Board Order*”).

The Act defines a “telecommunications carrier” broadly to include “any” provider that furnishes “telecommunications” – *i.e.*, the transport of information as directed by the customer – “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>23</sup> This definition was codified into law by the Telecommunications Act of 1996, and has been held to be generally consistent with the traditional common law definition of “common carrier.”<sup>24</sup>

To satisfy the common law test, the carrier must hold itself out to serve all potential users of its service indiscriminately and it must allow customers to transmit information of their

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<sup>15</sup> *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), *aff’g* *Petition of Sprint Comm Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006).

<sup>16</sup> *Berkshire Tel Corp v Sprint*, Case No. 05-CV-6502, 2006 WL 3095665 (WDNY, Oct. 30, 2006), *aff’g* *Sprint Comm. Co. LP*, Order Resolving Arbitration Issues, Cases 05-C-0170, -0183 (NY PSC, May 24, 2005) (“New York Commission Sprint Order”) and Order Denying Rehearing, Cases 05-C-0170, -0183 (NY PSC, Aug 24, 2005).

<sup>17</sup> *Sprint Comm. Co LP*, Order, App No. 310183F0002AMA, *et al*, 101 PaPUC 895, 2006 WL 3675279 (Pa PUC, Nov 30, 2006).

<sup>18</sup> *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) (“*Sprint Iowa Order*”).

<sup>19</sup> *Sprint Comm. Co. LP v. Nebraska Pub. Serv. Co.*, Case No. 4:05CV3260, 2007 WL 2682181 (D. Neb., Sept. 7, 2007), *rev’g* *Re Sprint Comm. Co LP*, Opinion and Findings, Appl No. C-3429, 2005 WL 3824447 (Neb PSC, Sept 13, 2005).

<sup>20</sup> *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill CC, July 15, 2005).

<sup>21</sup> *Re The Champaign Tel Co*, Case No. 04-1494-TP-UNC, *et al* (Ohio PUC, Apr. 13, 2005).

<sup>22</sup> *Re Sprint Comm. Co. LP*, Order No. 4, Docket UT-073031, 2008 WL 227939 (WUTC, Jan. 24, 2008).

<sup>23</sup> 47 U.S.C. § 153(43) (defining “telecommunications”), *id.* § 153(44) (defining “telecommunications carrier”), *id.* § 153(46) (defining “telecommunications service”).

<sup>24</sup> *See Virgin Islands Telephone v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

choosing.<sup>25</sup> Most states, including New Hampshire, impose an additional requirement: the prospective carrier must first obtain authorization from the appropriate regulatory authority before it may provide service.

The Stipulated Facts show that Comcast satisfies these requirements. First, Comcast has authority to “operate as a competitive local exchange carrier ... in the TDS Companies’ franchise area[s] ....”<sup>26</sup> Second, Comcast has four separate telecommunications service offerings which it makes available to the public pursuant to service schedules filed with the Commission or posted on its website:

1. Exchange access service which it makes available to requesting interexchange carrier customers;<sup>27</sup>
2. Schools and Libraries Network Service offering to qualified school and library customers that includes both networking as well as local and long-distance calling services;<sup>28</sup>
3. Business Local Service, which offers a traditional local exchange calling services to business customers;<sup>29</sup>
4. Local Interconnection Service (“LIS”) offering to providers of interconnected voice over Internet protocol (“VoIP”) services. LIS provides a local and long-distance calling capability, as well as access to telephone numbers, emergency calling (“E-911”) capabilities, and related services necessary for interconnected VoIP service providers to serve their customers.<sup>30</sup>

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<sup>25</sup> *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC I*”).

<sup>26</sup> Stipulated Facts ¶ 1; *see also* *Order Granting Authority* at 23.

<sup>27</sup> Stipulated Facts ¶¶ 5, 7.

<sup>28</sup> *Id.* ¶ 5. The terms of the Schools and Libraries Network Service offering is found at p. 12 of the Competitive Local Exchange Service Schedule (Exhibit 2 to the Stipulated Facts).

<sup>29</sup> Stipulated Facts ¶ 5. The terms of the Business Local Service is found at p. 6 of the Competitive Local Exchange Service Schedule (Exhibit 2 to the Stipulated Facts).

<sup>30</sup> Stipulated Facts ¶ 6. This array of services is frequently referred to as “PSTN interconnection.” The LIS service schedule is Exhibit 3 to the Stipulated Facts.

These services are offered to the public on a common carrier basis. While not *all* members of the public are eligible to purchase them, that is not the legal standard. All that is required is for a carrier to serve “indiscriminately ... the clientele [it is] ... suited to serve.”<sup>31</sup> While a carrier may not “make individualized decisions in particular cases” about who and who not to serve,<sup>32</sup> that “does not mean that the particular services offered must actually be available to the entire public. A specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.”<sup>33</sup> Indeed, a service provider may be deemed a common carrier “even where it is not yet actually supplying service to *any* customers” in a particular area, and can be a common carrier even if it intends “to serve only a single customer.”<sup>34</sup> Likewise, as the courts have recognized, 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>35</sup> In other words, Comcast is a common carrier because it has chosen to be one.<sup>36</sup>

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<sup>31</sup> *Consolidated*, *supra* n.15, 497 F. Supp.2d at 843 (quoting *NARUC I*, 525 F.2d at 641).

<sup>32</sup> *NARUC I*, 525 F.2d at 641.

<sup>33</sup> *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“*NARUC II*”).

<sup>34</sup> *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392, ¶ 20 (2007)

<sup>35</sup> *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990).

<sup>36</sup> *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1474, 1481 (D.C. Cir. 1994) (holding that whether a carrier is “common carrier” or “private carrier” ultimately turns on what the carrier “chooses” to be); *NARUC II*, 533 F.2d at 608 (explaining that “the primary sine qua non of common carrier status ... arises out of the undertaking ‘to carry for all people indifferently ...’”) (citation omitted); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 91 (2005) (confirming that facilities-based providers of broadband Internet access may declare whether they will provide the “telecommunications” underlying their broadband



Comcast also qualifies as a “local exchange carrier” (“LEC”) and is therefore entitled to the mutual and reciprocal obligations provided by Section 251(b). A LEC is a special class of telecommunications carrier that offers either “exchange access or telephone exchange services.” In plain terms, “telephone exchange service” is the ability to make and receive local calls.<sup>37</sup> Comcast offers a local calling capability to its Business Service, Schools and Libraries, and LIS customers. Evidence that Comcast facilitates the origination and termination of locally rated telecommunications services traffic is found in its reciprocal compensation billing records, which payments Comcast makes and receives pursuant to an interconnection agreement with Fairpoint *already* approved by the Commission.<sup>38</sup>

Comcast also qualifies as a LEC by virtue of its exchange access service offerings to interexchange carriers.<sup>39</sup> “Exchange access” is defined by the Act as the offering of access to “telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.”<sup>40</sup> Comcast currently performs this service when it receives an incoming toll call and then switches it to its LIS customers for delivery to the end user. In that case, it is using its “telephone exchange facilities” to help terminate a toll call. Comcast offers the same service to interexchange carriers seeking to route calls to Comcast’s retail Schools and Libraries

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service as a private carrier or common carrier); *Sprint Iowa Order*, *supra* n.18 at 5 (determining that Sprint is a common carrier because “Sprint is willing to provide wholesale service to any last-mile retail service provider that wants Sprint’s services in Iowa”).

<sup>37</sup> See 47 U.S.C. § 153(47) (defining “telephone exchange service”)

<sup>38</sup> Stipulated Facts ¶ 16.

<sup>39</sup> Stipulated Facts ¶¶ 5 & 7.

<sup>40</sup> 47 U.S.C. § 153(16).

customers. Comcast currently has approximately 25 exchange access customers in New Hampshire, as its Carrier Access Billing (“CABs”) records reflect.<sup>41</sup>

Moreover, the Commission has already determined that Comcast offers “exchange access or telephone exchange services” and, thus, qualifies as a local exchange telecommunications carrier.<sup>42</sup> And the Commission made that finding based exclusively on its Business, and Schools and Libraries, and exchange access service offerings.<sup>43</sup> The LIS offering was not part of the Commission’s analysis.

As noted above, at least a dozen different authorities have found that the foregoing offerings satisfy the “common carrier test” and entitle Comcast to Section 251(a)-(b) interconnection and related rights. One of those cases involved Comcast’s attempt to obtain an interconnection agreement with the TDS affiliate in Michigan. That case was a carbon copy of this one. TDS argued that Comcast was not a telecommunications carrier. The Commission found otherwise. In particular, the Arbitrator in the case found that the local calling capabilities of the Schools and Libraries and the LIS offerings qualified as local exchange services.<sup>44</sup> The full Michigan Commission adopted the Arbitrator’s recommendation, but added the following: “Whether [Comcast] *currently* provides regulated basic local exchange service is not dispositive of its right to negotiate an interconnection agreement with another telecommunications

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<sup>41</sup> Stipulated Facts ¶ 7.

<sup>42</sup> *See Order Granting Authority* at 8 (identifying Comcast’s offerings for purposes of the decision as being to “small businesses and schools and libraries”), and 19 (“find[ing]” that Comcast “offer[s] both regulated and unregulated services ...”); *see also* Comcast Petition for Arbitration in this proceeding at 11, ¶ 25 and 17, ¶ 35 (explaining the record before the Commission in the certification case (DT 08-13)).

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

<sup>44</sup> *Michigan Arbitrator Recommendation*, *supra* n.13 at 20.

provider.”<sup>45</sup> If a carrier was required to *already have* traffic before it could be entitled to an interconnection agreement, then no interconnection agreements would ever be granted to new entrants. The Commission thus ruled that all Comcast needed is the proper authority from the Commission.<sup>46</sup> As to the challenges TDS raised to the kind of traffic that Comcast proposed to exchange with TDS, and to the terms and conditions of Comcast’s service offerings, the Michigan Commission ruled that a Section 252 interconnection arbitration was not the appropriate place to consider such claims.<sup>47</sup>

Almost contemporaneous with the Michigan order, Comcast obtained a similarly favorable result from the Vermont Public Utility Board. The Vermont Board emphatically rejected the ILEC’s challenge to Comcast’s common carrier status:

In view of the *Bright House* decision, Comcast's offering of the LIS service to all eligible customers (not merely its affiliates), and the obligations of Comcast Phone under Vermont law not to engage in unjust discrimination with respect to its offering of wholesale local interconnection services, it is difficult not to conclude that Comcast Phone is a telecommunications carrier for purposes of Section 251 of the Act.<sup>48</sup>

Like the Michigan Commission, the Vermont Board focused on Comcast’s status as a licensed carrier in the state and the rights and responsibilities associated with that status. New Hampshire law imposes similar obligations. For example, PUC Rule 431.06 requires that Comcast offer services at just and reasonable rates, terms, and conditions. The public (and other carriers) may challenge a regulated carrier’s offerings by complaining to the Commission.<sup>49</sup>

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<sup>45</sup> *Comcast-TDS Michigan Decision*, *supra* n.13 at 3 (emphasis supplied).

<sup>46</sup> *Id.* at 5 (“Comcast’s current license to provide basic local exchange service is dispositive of its right to negotiate or arbitrate an interconnection agreement”).

<sup>47</sup> *Id.* at 3-4.

<sup>48</sup> *Comcast-VTel Vermont Board Order*, *supra* n.14 at 18 (internal citation omitted).

<sup>49</sup> NH PUC Rule 431.19.

Thus, if TDS challenges the reasonableness of the terms and conditions of Comcast's service offerings, as we expect, then the Commission can have confidence that there is an appropriate forum and process to hear those complaints. This Section 252 interconnection arbitration, however, is not the appropriate setting to consider those claims.

The Vermont Board also focused on the FCC's *Bright House* decision.<sup>50</sup> That case arose from claims by a Comcast affiliate that Verizon was violating Section 222(b) of the Act, which requires that proprietary customer information provided by one carrier to another not be used by the receiving carrier to market its own services. Verizon attempted (unsuccessfully) to defend its conduct on the merits. It also argued that Comcast (and co-complainant, Brighthouse Networks) were not entitled to the Section 222(b) protections in the first place because, Verizon contended, Comcast and Bright House were not telecommunications carriers.<sup>51</sup>

The FCC rejected Verizon's claim. The FCC found particularly relevant that Comcast and Brighthouse "self-certify that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally."<sup>52</sup> As the FCC explained,

We give significant weight to these attestations because being deemed a "common carrier" (i.e., being deemed to be providing "telecommunications services") confers substantial responsibilities as well as privileges, and we do not believe these entities would make such statements lightly. Further supporting our conclusion are the public steps the Comcast and Bright House Competitive Carriers have taken, consistent with their undertaking to serve the public indifferently. Specifically, each of the Comcast and Bright House Competitive Carriers has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates. Moreover, each of the

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<sup>50</sup> *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

<sup>51</sup> *Id.* ¶ 38 (finding that "Verizon's argument boil[ed] down to an assertion that" Comcast was not "engage[d] in offering telecommunications directly to the public, or to such classes of users as to be effectively available directly to the public") (internal citation omitted) (internal punctuation altered).

<sup>52</sup> *Id.* ¶ 39.

Comcast and Bright House Competitive Carriers has entered into a publicly-available interconnection agreement with Verizon, filed with and approved by the relevant state commission pursuant to sections 251 and 252 of the Act. These facts, in combination, establish a prima facie case that the Comcast and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of section 222(b).<sup>53</sup>

The *Bright House* decision was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit.<sup>54</sup> Among other things, the court stated that “[l]ike the [FCC], we are not troubled by the fact that Bright House and Comcast-affiliated carriers are currently serving only their own affiliates.”<sup>55</sup> There was “not any evidence,” the court explained that Comcast “would turn away” a prospective customer. Accordingly, there was no reason to question Comcast’s self-certification as a common carrier. If TDS makes similar claims here, they should be rejected for the same reasons.

In addition to these Comcast interconnection cases, eight other states have affirmed CLEC interconnection rights where the analysis focused exclusively on the CLEC’s right to serve interconnected VoIP service providers.<sup>56</sup> Such rulings are in keeping with the FCC’s determination that CLECs like Comcast that provide wholesale telecommunications services to interconnected VoIP service providers are “entitled to interconnect and exchange traffic with [ILECs] when providing services ... pursuant to sections 251(a) and (b) of the [Act].”<sup>57</sup> CLECs

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<sup>53</sup> *Id.*

<sup>54</sup> *Verizon Calif. Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009).

<sup>55</sup> *Id.* at 275.

<sup>56</sup> *See supra* n.15-22.

<sup>57</sup> *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶ 1 (2007) (“Time Warner Declaratory Ruling”).

have such rights *regardless* of the classification of interconnected VoIP as either an information service or a telecommunications service.<sup>58</sup>

The FCC's order affirming the telecommunications service status of the "PSTN interconnection" services that CLECs provide to interconnected VoIP service providers was in keeping with the numerous state orders that have reached the same result. The Ohio Commission's reasoning is illustrative:

MCI is a certificated carrier in the state of Ohio. As such, MCI is a provider of telecommunications services and is qualified to submit an interconnection request to Applicants. Further, the Commission finds that MCI is acting in a role no different than other Telecommunications Carriers whose network could interconnect with Applicants so that traffic is terminated to and from each network and across networks. Therefore, the Commission disagrees with Applicants that MCI is not a telecommunications carrier and that Applicants have no duty to interconnect with MCI.<sup>59</sup>

Likewise, the New York Commission found that:

Sprint's agreement to provide Time Warner Cable with interconnection, number portability order submission, intercarrier compensation for local and toll traffic, E911 connectivity, and directory assistance, for Time Warner to offer customers digital phone service, meets the definition of 'telecommunications services.' Sprint's arrangement with Time Warner enables it to provide service directly to the public. While Sprint may act as an intermediary in terminating traffic within and across networks, the function that Sprint performs is no different than that performed by other competitive local exchange carriers with networks that are connected to the independents. Sprint meets the definition of 'Telecommunications Carrier' and, therefore, is entitled to interconnect with the independents pursuant to § 251(a).<sup>60</sup>

While the LIS offering itself establishes Comcast's telecommunications and local exchange carrier status, there is no reason for the Commission to focus exclusively on that one offering. In its recent *Order Granting Authority*, the Commission ruled that the Business Local

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<sup>58</sup> *Id.* ¶¶ 15-16.

<sup>59</sup> Ohio Order, *supra* n.21, ¶ 5.

<sup>60</sup> *New York Commission Sprint Order*, *supra* n.16; at 5.

Services and Schools and Libraries Network Service Comcast Phone proposes to offer in the TDS territories are regulated telecommunications services and that Comcast has met the requirements of the Commission's CLEC registration rules.<sup>61</sup> The Commission therefore already has ruled that Comcast Phone is providing common carrier services under New Hampshire law.

Finally, to the extent that the Commission has any doubt about Comcast's telecommunications carrier status, it should give the benefit of that doubt to Comcast, the new entrant seeking to bring the benefits of competition and lower cost innovative communications services to New Hampshire consumers in TDS' service territory. The "holding out indifferently" standard is, by design, not hard to satisfy for at least two reasons. First, many of the rights (and corresponding duties) that make local competition possible are available only to telecommunications carriers, a narrow reading would impair competition in violation of the public policy that animates the Act. Indeed, the FCC expressly ruled that it is critical to treat those who provide wholesale services to VoIP providers as telecommunications carriers, in part, because that treatment is necessary to "advance the Commission's goals in promoting facilities-based competition as well as broadband deployment."<sup>62</sup>

Second, both New Hampshire and federal law require telecommunications carriers to serve the public in ways that private carriers need not, including the duty to provide service upon request. Common carriers are subject to enforcement action by regulators and claims for damages in the courts if they fail to fulfill those obligations. That is why Comcast's certificated status is the dispositive fact in this case. In order to obtain the rights of a carrier, Comcast has

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<sup>61</sup> See *Order Granting Authority*, *supra* n.1 at 19.

<sup>62</sup> *Time Warner Declaratory Ruling* ¶ 13; see also *id.* (finding that CLEC common carrier rights are "a critical component for the growth of facilities-based local competition").

subjected itself to oversight by this Commission. The Commission has the authority to oversee Comcast and to assure its compliance with those obligations.

### 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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