

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 08-162**

**COMCAST PHONE OF NEW HAMPSHIRE D/B/A COMCAST DIGITAL PHONE**

**Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS**

**Final Order**

**ORDER NO. 25,005**

**August 13, 2009**

**APPEARANCES:** Mintz Levin Cohn Ferris Glovsky & Popeo by Paul D. Abbott, Esq. and Davis, Wright, & Tremaine by Michael C. Sloan, Esq. on behalf of Comcast Phone of New Hampshire; Devine, Millimet & Branch by Frederick J. Coolbroth, Esq. on behalf of Kearsarge Telephone Co., Wilton Telephone Co., and Merrimack County Telephone Co. d/b/a TDS Telecom; Stephen Eckberg of the New Hampshire Office of Consumer Advocate on behalf of residential ratepayers; and Robert Hunt, Esq. of the Public Utilities Commission on behalf of Staff.

**I. PROCEDURAL HISTORY**

On December 15, 2008, Comcast Phone of New Hampshire, LLC, d/b/a Comcast Digital Phone (Comcast Phone) filed with the New Hampshire Public Utilities Commission (Commission) a petition for arbitration of rates, terms and conditions of interconnection with Kearsarge Telephone Company (KTC), Merrimack County Telephone Company (MCT), and Wilton Telephone Company (WTC), each doing business as TDS Telecom (collectively, TDS). Comcast Phone's petition was filed pursuant to section 252(b) of the Communications Act of 1934, as amended in 1996 (Telecom Act), 47 U.S.C. § 252(b), and N.H. Code of Admin. R. Puc rules 101, 103, and 203, and was supported by concurrently-filed testimony of Beth Choroser, the Senior Director of Regulatory Compliance for Comcast Cable Communications, LLC.

On January 9, 2009, TDS filed an answer to Comcast Phone's petition (TDS Response) together with prefiled testimony of Douglas Duncan Meredith, Director - Economics and Policy, of John Staurulakis, Inc. (JSI), a telecommunications consulting firm headquartered in Greenbelt, Maryland.

The single issue presented for arbitration before the Commission was TDS's proposed inclusion of a provision in the interconnection agreement that the agreement become effective "only if: (1) the Commission has determined in an arbitration or other appropriate proceeding that COMCAST is a telecommunications carrier in the state of [New Hampshire] entitled to interconnection with TDS TELECOM pursuant to Section 251 of the Act and that the services COMCAST will be providing by way of the interconnection are telecommunications services." Comcast Phone Petition, Exh. C at 14. The disputed clause, upon which the agreement as a whole is contingent, sought a Commission determination regarding Comcast Phone's qualification as a telecommunications carrier to interconnect with an incumbent local exchange carrier (ILEC) under section 251 of the Telecom Act.

On January 28, 2009, the Commission issued an Order of Notice scheduling a prehearing conference for February 6, 2009. On February 5, 2009, the Office of Consumer Advocate (OCA) filed a letter expressing its intent to participate in this docket on behalf of residential utility consumers pursuant to RSA 363:28, II. There were no motions to intervene.

During the prehearing conference, the Commission appointed F. Anne Ross, General Counsel, to act as the hearing examiner for purposes of resolving any discovery disputes. Also discussed at the prehearing conference was the possibility of the Commission deciding this docket based on briefs filed by the parties, without a hearing. Staff filed a report of the technical session on February 18, 2009, and proposed a procedural schedule agreed upon by the parties

and Staff. The Commission approved the procedural schedule on March 11, 2009. On March 26, 2009, Comcast Phone and TDS filed a joint notice of agreement on a proposed briefing schedule and, on April 1, 2009, the Commission approved the briefing schedule to govern the remainder of the proceeding.

In order to streamline the proceeding, Comcast Phone and TDS developed agreed-upon facts, and filed their stipulated facts on April 6, 2009. Initial briefs were filed by TDS and Comcast Phone on April 20 and 21, 2009; reply briefs were filed by TDS and Comcast Phone on May 15 and 18; and sur-reply briefs were filed by TDS and Comcast Phone on May 22 and 26.

## **II. STIPULATED FACTS**

1. Comcast Phone was certified by the Commission in Order No. 23,088, DE 98-208 (NH PUC Dec. 15, 1998) with authority to provide telecommunications services in the service territory of Northern New England Telephone Operations LLC, d/b/a FairPoint Communications - NNE ("FairPoint").<sup>1</sup> That authority was extended to cover the service territories of the TDS Companies in Order No. 24,938 issued by the Commission on February 6, 2009. KTC and MCT have filed a motion for rehearing with respect to that Order.

2. Comcast Phone is a 100% indirectly owned subsidiary of Comcast Corporation.

3. In April of 2008, Comcast Phone requested interconnection with the TDS Companies. In the period between April and July 2008, Comcast Phone's affiliates in five other states requested interconnection with TDS affiliates in those five states.

4. Comcast Phone affiliates currently have interconnection agreements with the TDS Companies' affiliates in Vermont (effective May 1, 2008), Tennessee (effective May 1, 2006), Indiana (effective October 1, 2006) and the Parties executed an agreement for Michigan on April 2, 2009.

5. Comcast Phone files with the Commission and posts on its web site (Comcast.com) an Exchange Rate Schedule that includes the following service offerings: Single Line Business Service, Schools and Libraries Network Service, and an Access Service Guide for interexchange carriers. (Currently effective copies of both schedules are attached to the Stipulated Facts as Exhibits 1 and 2 respectively.)

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<sup>1</sup> Order No. 23,088 authorized MediaOne Telecommunications of New Hampshire, Inc. to provide service in the Bell Atlantic service territory. By letter dated April 17, 2001, MediaOne Telecommunications of New Hampshire, Inc. notified the Commission of a name change to AT&T Broadband Phone of New Hampshire, LLC, which in February 2003 changed its name to Comcast Phone of New Hampshire, LLC d/b/a Comcast Digital Phone.

6. Comcast Phone offers Local Interconnection Service ("LIS") in New Hampshire to interconnected Voice over Internet Protocol ("VoIP") providers. The terms and conditions of the LIS offering are available for public inspection on the Comcast Phone web site (Comcast.com). (A copy of the current LIS service guide is attached to the Stipulated Facts as Exhibit 3.)

7. Comcast Phone averages approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills ("CABS bills") each month for terminating traffic.

8. Comcast Phone's affiliate, Comcast IP Phone II, LLC ("Comcast IP"), provides retail, interconnected VoIP service as that term is defined by the Federal Communications Commission (see 47 C.F.R. § 9.3) to residential and business end user customers in New Hampshire. The service is marketed to the public under the brand names "Comcast Digital Voice" ("CDV") and Comcast Business Class Digital Voice ("BCDV"). Comcast IP is not registered as a telecommunications company with the Commission. Comcast IP is a 100% indirectly-owned subsidiary of Comcast Corporation.

9. Comcast Phone provides LIS service to Comcast IP pursuant to an agreement, which includes an amendment. A copy of that agreement, including the amendment, is attached to the Stipulated Facts as Exhibit C-4 (the "C" designation is to denote the document is to be treated as confidential pursuant to the protective order issued in this Docket).

10. Comcast IP is currently the only customer receiving LIS service from Comcast Phone in the state of New Hampshire.

11. Comcast Phone does not currently provide Schools and Libraries service to any customers in New Hampshire.

12. Comcast Phone is not currently providing Single Line Business Service to any customers in New Hampshire.

13. Comcast Phone previously offered a retail, circuit switched telephone service offering in the FairPoint service territory in New Hampshire, which was marketed to the public under the brand-name Comcast Digital Phone ("CDP"). Comcast Phone discontinued CDP on or about May 15, 2008, but retained its authority to provide other telecommunications services in the state.

14. CDV customers access the service using the "last mile" broadband facilities provided by Comcast Phone's local franchise cable television operating affiliate.

15. In New Hampshire, Comcast Phone currently has a Commission-approved interconnection agreement with FairPoint as Verizon New England Inc.'s successor in interest.

16. Pursuant to this interconnection arrangement, Comcast Phone exchanges locally-rated traffic with FairPoint, and this agreement requires the payment of reciprocal compensation for the transport and termination of locally rated traffic.

17. Comcast Phone seeks an interconnection agreement with the TDS Companies pursuant to Section 251 of the Communications Act of 1934, as amended. With this interconnection agreement in place, Comcast Phone would offer its LIS service to Comcast IP so that Comcast IP may offer CDV to end user customers in the TDS Companies' service territories. Specifically, the interconnection agreement would make it possible for CDV end-users to place calls to the TDS Companies' end-users within the TDS Companies' local calling areas, and *vice versa*.

18. An affiliate of Comcast Phone offers cable television service in the TDS Companies' service territory.

### **III. POSITIONS OF THE PARTIES**

#### **A. Comcast Phone**

Comcast Phone stated that it seeks an interconnection agreement with the TDS entities pursuant to Section 251 of the Federal Communications Act and the Commission's practices and procedures. Comcast Phone stated that it has been authorized by the Commission to, and does offer and provide, telecommunications services in New Hampshire. Comcast Phone asserted that it has substantially similar agreements with FairPoint-NH and with TDS affiliates in Vermont, Tennessee, and Indiana; agreements that are, in turn, substantially similar to agreements that its affiliates have in 38 other states around the country with more than 150 other incumbent carriers for the purposes of exchanging traffic. According to Comcast Phone, it exchanges millions of minutes of telecommunications services traffic with these carriers, pays and receives access charges for the termination of toll traffic and pays and receives reciprocal compensation for local traffic where appropriate. Comcast Phone stated that it pays into universal service and 911 funds, pays regulatory surcharges, and complies with all other obligations of telecommunications carriers where applicable.

Comcast Phone asserts that TDS's suggestion that it is not a telecommunications carrier

entitled to interconnection is unsupported Comcast Phone maintained that every day that it is denied an interconnection agreement and the opportunity to serve customers is another day that an incumbent carrier maintains its monopoly status and extracts monopoly rents from captive customers. Comcast Phone claimed it is entitled to interconnection because it is a telecommunications carrier under §251(a) of the Telecom Act, and is entitled to certain rights under §251(b). It pointed out that §153 (44) of the Telecom Act defines a “telecommunications carrier” broadly to include “any” provider that furnishes “telecommunications.” It alleged that telecommunications is 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, pursuant to 47 U.S.C. § 153(43).

Comcast Phone asserted that it 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. While not all members of the public are eligible to purchase its offerings, Comcast Phone observed that is not the legal standard. Comcast Phone contended that, in order to be a common carrier, a carrier need only serve indiscriminately the clientele that it is suited to serve and to whom it offers services, *citing Consolidated Comm of Fort Bend Co. v. Utility Commission of Texas*, Memorandum Opinion and Order, 497 F Supp 2d 836 at 843 (W.D. Tex 2007). Although a carrier may not make individualized decisions in particular cases about whom and whom not to serve, according to Comcast Phone, that does not mean that the particular services offered must actually be available to the entire public. Relying on *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 525 F.2d 630, 640-42 (D.C.Cir.1976) (“*NARUC I*”) Comcast Phone cited *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 533 F.2d 601, 608-10 (D.C.Cir.1976) (“*NARUC II*”) Comcast averred that a specialized carrier whose service is of

possible use to only a fraction of the population may nonetheless be a common carrier if it holds itself out to serve indifferently all potential users. Comcast Phone stated that, based on an FCC order in *Fiber Technologies Networks, LL.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 para. 20 (2007), 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. It also claimed it is a common carrier because it has chosen to be one. (Comcast Phone Brief, p.7.)

Comcast Phone maintained that it also qualifies as a LEC by virtue of its exchange access service offerings to interexchange carriers (IXCs). Stip. at 5&7.<sup>2</sup> According to Comcast Phone, it currently provides exchange access service when it receives an incoming toll call and then switches it to its LIS customers – for example, Comcast IP - for delivery to the end user. Comcast Phone purported to offer the same service to interexchange carriers seeking to route calls to its retail Schools and Libraries customers and reported it has approximately 25 exchange access customers in New Hampshire in a typical month. It cited Order No. 24,938 (Feb. 6, 2009), Docket No. DT 08-013, indicating that the Commission determined that Comcast offers exchange access or telephone exchange services and thus qualifies as a local exchange telecommunications carrier.

Comcast Phone stated that at least a dozen different authorities have found that its offerings satisfy the common carrier test and entitle it to Section 251 (a)-(b) interconnection and related rights, including the public utility boards of Michigan, Vermont, Ohio, New York, and six other states, as well as the FCC in *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

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<sup>2</sup> IXCs provide long distance service within or between states. To complete long distance calls, the IXC must rely on – and pay – the local exchange carrier that provides the end user with access to the public switched telephone network.

Comcast Phone alleged that TDS's real complaint is that Comcast Phone serves interconnected Voice over Internet Protocol (VoIP) service providers through its local interconnection service. To rebut TDS, Comcast Phone cited eight state decisions affirming CLEC interconnection rights for CLECs providing wholesale service to interconnected VoIP providers. Comcast Phone claimed that such rulings are in keeping with the FCC's determination that CLECs like Comcast Phone 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 Telecom Act. It argued that such CLECs have these rights regardless of the classification of interconnected VoIP as either an information service or a telecommunications service.<sup>3</sup> Comcast Phone stated that the FCC expressly ruled in *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) 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.

Comcast Phone urged that this Commission determine that it is a telecommunications carrier in the state of New Hampshire entitled to interconnection with TDS pursuant to Section 251 of the Telecom Act, determine that the services Comcast Phone will be providing by way of the interconnection are telecommunications services, and order that TDS enter into an interconnection agreement with Comcast Phone.

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<sup>3</sup> The question of whether fixed interconnected Voice over Internet Protocol is a telecommunications service or information service is not at issue and will not be decided in this docket.

## **B. TDS Companies**

TDS stated that, pursuant to 47 U.S.C. § 251(a), its duty to execute an interconnection agreement with Comcast Phone is conditioned on Comcast Phone's status as a telecommunications carrier as defined by the Telecom Act. TDS argued that a review of Comcast Phone's services and an analysis of legal precedent on this subject (including cases that Comcast Phone relied on in its Petition) clearly establish that Comcast Phone is not a telecommunications carrier. TDS stated that Comcast Phone has not demonstrated that it qualifies as a telecommunications carrier under the Telecom Act. It proffered that the terms "telecommunications carrier" and "common carrier" are interchangeable; and asserted that the FCC held that in passing the Telecommunications Act of 1996 Congress intended to clarify that "telecommunications services" are "common carrier services." Furthermore, according to TDS, an appeals court upheld a statement by the FCC that the term "telecommunications carrier" means essentially the same as common carrier citing *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C.Cir.1999)). TDS asserted that there is a considerable amount of authority on the subject of "common carriers" that can be referenced to support the conclusion that Comcast Phone is not a telecommunications carrier. TDS claimed that a number of decisions have held that a key feature of common carriage is that the service provider undertakes to provide service indifferently to all potential customers, whereas a non-common carrier make[s] individualized decisions, in particular cases, whether and on what terms to deal with customers. In short, according to TDS, the widespread, general solicitation of customers from the general population, i.e., the indiscriminate offering of service on generally applicable terms, constitutes common carriage. Additionally, TDS contended, citing *NARUC II* and subsequent FCC orders, that courts

have described, and the FCC has accepted, several factors that would preclude status as a common carrier, including: 1) establishment of medium-to long-term contractual relations; 2) a relatively stable clientele, with terminations and new clients the exception rather than the rule; 3) methods of operation that may be highly individualized and comprise grounds for accepting or rejecting an applicant; and 4) an operator that would desire and expect to negotiate with and select future clients on a highly individualized basis.

TDS alleged that Comcast Phone does not have the characteristics of a telecommunications carrier based on the services it will offer: Single Line Business Service, Schools and Libraries Network Service, LIS and exchange access service. TDS claimed that since Comcast did not request language in the interconnection agreement regarding resale or switched access, that Single Line Business Service and exchange access should not be considered service offerings. TDS argued that Comcast Phone has had the authority and the means to offer Single Line Business Service and Schools and Libraries Network Service for some time in the FairPoint footprint, a much richer potential market, but the fact that it had not obtained any customers is a clear indication that these services are not true offerings, but merely ink on paper; a sham to establish Comcast Phone's bona fides as a telecommunications carrier.

TDS maintained that this leaves only local interconnection service to consider, and that Comcast Phone is not a telecommunications carrier for LIS. According to TDS, this service offering is not widely and indiscriminately marketed and Comcast Phone has one customer in New Hampshire for its LIS service. TDS also contended the potential market for LIS is one customer – Comcast IP. Thus, TDS argued that it can hardly be said that Comcast Phone actively solicits customers on a widespread, general and indiscriminate basis. Furthermore, TDS asserts, the Comcast Phone LIS offering adheres closely to the other common law factors that are

indicative of a non-common carrier. First, TDS claimed that LIS is only offered on a long term basis; purchasers of LIS must commit to an initial term of three years, with harsh penalties for breaching that term length. In addition to enforcing a lengthy term, TDS asserted that the provisions also ensure a relatively stable clientele, with terminations the exception rather than the rule. TDS stated that another aspect of this stability is that new clients are also the exception rather than the rule. It asserted that Comcast Phone has not identified any entities which made bona fide inquiries to purchase the service, nor the substance of any discussions regarding the service.

TDS argued that, as a practical matter, LIS is only available to Comcast Phone affiliates who provide unregulated voice service to customers in the State of New Hampshire. TDS pointed out that providers of traditional landline service and providers of nomadic VoIP service cannot purchase services under the LIS Guide. The only providers who can purchase services under the LIS Guide, as TDS puts it, are those whose facilities consist of an IP-based broadband network. TDS indicated that the network must employ a Cable Modem Termination System, that it must use network-based call signaling devices specified by Cable Television Laboratories, Inc., and that only traffic in time division multiplex protocol will be accepted and delivered. Consequently, TDS claimed, Comcast Phone has created a situation in which it negotiates with and selects future clients on a highly individualized basis, i.e., that the only customer who can use LIS to reach an end user's premise, other than Comcast Phone's affiliate, is a cable television provider who overbuilds the facilities of Comcast Phone's affiliated provider of IP-based voice service. TDS hypothesized that the situation would rarely, if ever, exist since the recurring and non-recurring charges for LIS are determined by Comcast Phone on an individual case basis in

response to a bona fide request. In addition, TDS theorized that an unaffiliated customer would most likely not agree to conditions that significantly favored Comcast Phone.

TDS asserted that Comcast Phone has not established that it is offering a telecommunications service. Even assuming for the sake of argument that LIS is a telecommunications service, according to TDS, Comcast Phone is providing no other telecommunications service in its own right, separate and distinct from LIS provided to its affiliates. TDS maintained that it has never disputed that Comcast Phone is offering a wholesale service. The issue, stated TDS, is whether Comcast Phone is a telecommunications carrier.

TDS maintained that there is no doctrine of self-certification for common carriers and that an operator is a common carrier instead on the basis of what it does, not what it says. TDS argued that Comcast Phone has not, therefore, met the burden of proof that it qualifies as a telecommunications carrier under the Telecom Act. It urged that the decisions in *Time Warner* and *Brighthouse* cited by Comcast Phone do not apply.

TDS denied that it has waived its rights to claim or assert that Comcast Phone does not qualify as a telecommunications carrier under the Act and denied that it has acknowledged Comcast Phone to be a telecommunications carrier under the Act. According to TDS, from the beginning of negotiations with Comcast Phone, it has been understood that neither party waived any rights on account of having negotiated unrelated interconnection agreements. TDS asserted that Comcast Phone has been on notice for some time that its status as a telecommunications carrier was an issue. TDS stated that it had no choice but to accept Comcast Phone's initial representations on faith, given that FCC rules require ILECs to negotiate the terms of an interconnection agreement before a prospective carrier has even obtained state certification. TDS urged the Commission to carefully examine the actual business models of putative CLECs,

warning of the potential for corporations to establish CLEC affiliates solely to reduce their own internal telephone costs as “profoundly disturbing.”

TDS concluded that it is well within its rights under the Telecom Act to insist that only those who have assumed the obligations of legitimate telecommunications carriers can obtain rights under Section 251. It contended that nothing bars TDS from questioning Comcast Phone’s status as a telecommunications carrier or whether Comcast Phone provides telecommunications services as defined under the Telecom Act.

#### **IV. COMMISSION ANALYSIS**

##### **A. Burden of Proof**

Comcast Phone is the petitioner seeking relief in this docket. Pursuant to Puc 203.25, Comcast bears the burden of proving the truth of any fact or proposition by a preponderance of the evidence. In addition, we may take administrative notice of certain facts pursuant to Puc 203.27. Finally, in this case specific facts have been agreed upon, and certain exhibits admitted as evidence, by agreement of the parties.

##### **B. Statutory Standards for Interconnection with Telecommunications Carriers**

The Telecom Act established a framework of rights and obligations for telecommunications carriers in order to promote competition for local exchange service. Under the Telecom Act, telecommunications carriers, including both ILECs (TDS) and CLECs (Comcast Phone) have the obligation to interconnect either directly or indirectly with the facilities and equipment of all other carriers. *See* 47 U.S.C. § 251 (a). Local exchange carriers, including ILECs and CLECs also have duties to allow resale of services, to port telephone numbers to other carriers, to provide dialing parity, to afford access to rights of ways and to establish reciprocal compensation arrangements for the transport and termination of

telecommunications. *See* 47 U.S.C. § 251 (b). ILECs generally have additional duties, including among others, providing competitors with access to certain unbundled network elements (UNEs) and allowing competitors to collocate within ILEC facilities for the purpose of interconnection. *See* 47 U.S.C. § 251 (c). Certain rural ILECs, like the TDS Companies, are exempt from 251 (c) obligations, including UNEs and collocation, until their exemption from these requirements is terminated. *See* 47 U.S.C. § 251 (f).

In addition to allowing the development of competition for local exchange services, the Telecom Act prohibits states from taking any actions that create barriers to competitive entry into the telecommunications markets. “No State or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253 (a).

### **C. Interconnection with Telecommunication Carriers**

Because each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, Comcast Phone’s right to interconnect with the facilities and equipment of TDS is contingent upon Comcast Phone’s status as a telecommunications carrier.<sup>4</sup> Although Comcast Phone argued that TDS had waived its right to challenge Comcast Phone’s status as a telecommunications carrier, we find no support for this argument in the record and we decline to find any such waiver. We therefore proceed with our analysis as to whether Comcast Phone is a telecommunications carrier.

The term “telecommunications carrier” is defined in 47 U.S.C. § 153 (44) as “any provider of telecommunications services” and further states that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in

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<sup>4</sup> There is no dispute that TDS is a telecommunications carrier.

providing telecommunications services.” The term “telecommunications service” is defined in Section 153 (46) 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.”

The Federal Communications Commission (FCC) has interpreted the term “telecommunications service” to mean telecommunications provided on a common carrier basis, and its interpretation has been explicitly accepted by both the District of Columbia Circuit Court of Appeals, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C.Cir.1999), and the United States District Court, District of New Hampshire, *The Destek Group, Inc., d/b/a The Destek Networking Group v. Verizon New England, Inc., d/b/a Verizon New Hampshire, et al* (2001 WL 873067 (D.N.H.)).

To determine whether Comcast Phone is a telecommunications carrier, we must therefore determine whether it is offering telecommunications on a common carrier basis for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.

#### **D. Common Carrier Status**

The term “common carrier” is defined in 47 U.S.C. § 153 (10), in relevant part, as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio.” The federal courts have established a two-prong test to determine whether a particular company is a common carrier and the Federal Communications Commission has accepted this test. *See Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 533 F.2d 601, 608-10 (D.C.Cir.1976) (“*NARUC I*”); *Nat'l Ass'n of Regulatory Utility Comm'rs. v. FCC*, 525 F.2d 630, 640-42 (D.C.Cir.1976) (“*NARUC I*”); *In re Cable & Wireless, PLC*, FCC 97-204, 1997 WL 339269, at ¶¶ 13-17 (applying the test set forth in *NARUC I*); *see also FCC v. Midwest Video*

*Corp.*, 440 U.S. 689, 701, 701 n. 10 (1979) (citing *NARUC I*). The first prong requires an evaluation of whether the company holds itself out indifferently to the public. *NARUC I*, at 641. The second prong requires a determination as to whether the company is legally compelled to do so. *Id.* at 642. If either prong of the test proves true, the company is a common carrier.

### 1. Offering Services Indifferently to the Public

The first prong of the test in determining common carrier status was established in the *NARUC II* decision. The “primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently” *NARUC II*, at 608 (internal quotations omitted). “[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.” *Id.*<sup>5</sup> The primary issue in finding common carriage is whether the carrier offers “indiscriminate services to whatever public its service may legally and practically be of use.” *United States Telecom Ass’n*, 295 F.3d at 1334 (quoting *NARUC I*, at 642).

Factors to consider in determining whether a carrier is offering services indiscriminately to its public include:

- a. Whether the services necessarily require medium to long-term contractual relations;
- b. Whether the carrier’s clientele is likely to remain relatively stable;
- c. Whether terminations and new clients are the exception rather than the rule; and
- d. Whether the carrier is likely to negotiate with and select customers on a highly individualized basis. *See NARUC I*, 525 F.2d at 643.

Additionally, “[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.” *NARUC I*, at 644.

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<sup>5</sup> In the context of telecommunications, a further prerequisite to common carrier status is “that the system be such that customers transmit intelligence of their own choosing.” *NARUC II*, at 609 (internal quotations omitted) There is no dispute that this prerequisite has been satisfied; the services being offered by Comcast Phone are such that customers would transmit intelligence of their own choosing.

Comcast Phone offers four services to the public including exchange access service, Schools and Libraries Network Service, Business Local Service and Local Interconnection Service (LIS). Upon review of the stipulated facts, we find that Comcast Phone is offering Exchange Access Services, Single Line Business Service and the Schools and Libraries Network Service services indiscriminately to the public. Because we find that Comcast Phone is entitled to interconnection based on these services alone, we do not reach the issue of whether Comcast Phone is offering Local Interconnection Service on a common carrier basis.

Comcast Phone averages approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills each month for terminating traffic. Pursuant to 47 U.S.C. § 153(16), the term “exchange access” means “the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services.” Comcast Phone files with the Commission and posts on its website an Exchange Rate Schedule that includes an Access Service Guide for interexchange carriers. Stip. at Exh. 2. Nothing in the Exchange Rate Schedule or the Access Service Guide requires a medium-to-long-term contractual relationship with prospective customers, nor does any provision therein suggest that clientele will remain stable, that terminations and new clients are the exception rather than the rule, or that selection of customers is highly individualized. Indeed, IXC's purchase exchange access services from a particular LEC on a telephone call by telephone call basis, dictated by the changing patterns of their own customers.

One of the services Comcast Phone purportedly seeks to sell through interconnection with TDS's facilities would provide schools and libraries that are located in the exchanges now served by TDS's Public Switched Telephone Network with an option that does not now exist. Presently, TDS is the only wireline telecommunications carrier providing such service in its

territory. Upon interconnection with TDS, Comcast Phone would be able to provide these prospective school and library customers with a local loop connection from the customer to Comcast Phone's network facilities and with a connection from Comcast Phone's network facilities to TDS's network facilities. Any outgoing transmissions from schools and libraries that subscribed to Comcast Phone's service could then reach end users through the same route.

TDS has not identified any evidence that Comcast Phone will offer such service only to certain schools or libraries within each exchange, nor has any reason for such a limitation been made apparent. The eligible user public for this service includes all of the schools and libraries in the TDS territory. In other words, the nature of the Schools and Libraries Network Service that Comcast Phone plans to offer provides a reason to expect an indifferent holding out to the eligible user public; the public to which its services may be legally and practically of use. The same analysis holds true for the Business Line Service offering.

TDS argues that, because there is no reference in the draft interconnection agreement it negotiated with Comcast Phone to resale service or to exchange access service, these services are not subject to consideration in this matter. We reject TDS's argument. There is no requirement that such an interconnection agreement refer to particular services to be offered by Comcast, in order for such services to be evaluated to determine common carrier status. Furthermore, Comcast could purchase retail service from TDS' existing retail tariff for resale. Likewise, TDS has a tariff in place for exchange access service, alleviating the need to include it in an interconnection agreement.

TDS also asserts that Comcast Phone has had the authority and the means to offer the same services for some time in another ILEC's territory in New Hampshire and has not done so. TDS argues that this is a clear indication that these services are not true offerings and are a sham

to establish Comcast Phone's bona fides as a telecommunications carrier. On the other hand, TDS asserts that even if Comcast Phone were offering services on a true common carrier basis in other parts of New Hampshire, it would have no bearing on this arbitration since a carrier can be a common carrier with respect to some of its activities and not with respect to others. Because we have determined that Comcast Phone's Exchange Access, Schools and Libraries and Single Line Business services are or would be offered on a common carrier basis in TDS territory, we need not consider what Comcast Phone has done in other territories with regard to these services.<sup>6</sup>

## **2. Legal Compulsion to Offer Services Indifferently to the Public**

The alternative prong of the test in determining common carrier status established in *NARUC II*, is whether the carrier is legally compelled to offer services indifferently to the public. Comcast Phone is not only offering to provide telecommunications services indifferently to the public in TDS's territory, it is legally compelled to offer those services indiscriminately by virtue of its status as an authorized New Hampshire CLEC. Puc 430.02(a) requires all CLECs to comply with the provisions of Puc 430 through 449. Pursuant to Puc 402.11 a CLEC is a "telecommunications carrier...authorized by the commission....to provide telecommunications service *to the public* in a particular area which an ILEC was authorized to serve...." (emphasis added) Given the services that Comcast Phone holds out as those it intends to offer in TDS's territory, it will be subject to this mandate for every service it offers. In other words, Comcast Phone has no choice but to offer its services indiscriminately to similarly situated customers in

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<sup>6</sup> We note, however, that TDS stipulated that Comcast Phone averages approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills each month for terminating traffic. Given the reference to carrier access bills, we infer that those customers are wholesale customers. Whether a telecommunications service is offered on a retail or wholesale basis is not determinative as to whether it is offered on a common carrier basis. *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007)

TDS's territory as long as it seeks to retain the authority to offer local exchange services therein. *See* Puc 431.01(a).

With regard to TDS's argument that a company should not be deemed a common carrier merely by virtue of being an authorized CLEC due to the potential for "profoundly disturbing" consequences, we are aware of no evidence that companies are forming affiliates to apply for CLEC status for questionable purposes in New Hampshire under the current application process. We will continue to examine each CLEC application and request for arbitration of interconnection according to our rules and applicable law.

TDS also argued, in essence, that Comcast Phone has no intention of offering any services to customers in TDS territory except to the extent necessary to allow Comcast Phone to permit its affiliate, Comcast IP, to provide Voice over Internet Protocol service. TDS deems this situation to be unfair because, at this time, such services are not subject to the regulations that govern ILECs. TDS, however, cites no legal authority explicitly prohibiting such an arrangement, and we find none. So long as Comcast Phone continues to be a telecommunications carrier, offering telecommunications on a common carrier basis, it has a right to interconnection with TDS, pursuant to 47 U.S.C. § 251(a), and may, therefore, permit its affiliate to provide Voice over Internet Protocol services to customers in TDS's territory. In fact, the introduction of such potentially competitive services in TDS territory is consistent with the overarching policy of reducing barriers to competition in ILEC territories. *See Sprint Communications Company, L.P. v. Nebraska Public Service Commission, et al*, 2007 WL 2682181 (D.Neb.)

Nothing in this Order should be construed, however, to suggest that Comcast Phone's status as a common carrier is immune to future challenge. Comcast Phone's actions in TDS's

service territory over time may demonstrate that, although Comcast Phone initially offered certain services indiscriminately to the public, it ceased to do so subsequent to interconnection. In other words, the offering and provisioning of services post-interconnection, or absence thereof, could affect Comcast Phone's status as a common carrier and thus its right to interconnection in the future.

**Based upon the foregoing, it is hereby**

**ORDERED**, that Comcast Digital Phone is a telecommunications carrier in the state of New Hampshire entitled to interconnection with TDS Telecom pursuant to Section 251 of the Telecommunications Act; and it is

**FURTHER ORDERED**, that the interconnection agreement as agreed to by TDS Telecom and Comcast Digital Phone is approved.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of August, 2009.

  
Thomas B. Getz  
Chairman

  
Clifton C. Below  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director & Secretary