

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between
COMCAST PHONE OF WASHINGTON, LLC,
and
LEWIS RIVER TELEPHONE COMPANY, D/B/A
TDS TELECOM
Pursuant to 47 U.S.C. Section 252.

)
)
) DOCKET NO. UT-083055
)
) COMCAST PHONE MOTION FOR
) SUMMARY DETERMINATION
) AND INITIAL BRIEF ON THE
) MERITS
)
)

1. Pursuant to the procedural schedule established in this proceeding, Comcast Phone of Washington, LLC (“Comcast Phone”) provides the following Motion for Summary Determination and initial brief on the merits in support of its petition for arbitration of an interconnection agreement with Lewis River Telephone Company, d/b/a TDS Telecom (“TDS”).

INTRODUCTION AND SUMMARY

2. Comcast Phone seeks an interconnection agreement with TDS so that it can offer competitive telecommunications services in the TDS incumbent local exchange carrier (“ILEC”) service territory in Washington. TDS – by its claim that Comcast Phone is not a telecommunications carrier entitled to interconnection under the Telecommunications Act of 1996 (“Act”) – is trying to prevent that from happening. Comcast Phone qualifies as a telecommunications carrier because of the authority it has received from the Commission to operate throughout the state of Washington, including in TDS’ service

territories,¹ and because Comcast Phone actually offers and provides telecommunications services. The Commission should reject this anticompetitive attempt to exclude Comcast Phone from TDS's service territory and should approve the interconnection agreement that the parties have negotiated.

BACKGROUND

3. Comcast Phone is a subsidiary of the multi-system cable broadband operator, Comcast Corporation, which has deployed high-capacity, broadband networks in Washington and around the country. Comcast Phone offers competitive telecommunications services to retail and wholesale customers.² Other Comcast affiliates provide high speed Internet access services, Voice over Internet Protocol ("VoIP") service, and video programming using the same network plant.³
4. TDS is an ILEC under Section 251(h)(1) of the Act.⁴
5. 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."⁵ In addition, section 251(b) imposes several mutual and reciprocal obligations on all local exchange carriers,⁶ including the duty to provide for

¹ See Joint TDS and Comcast filing of Stipulated Facts (April 3, 2009) ("Stipulated Facts") ¶ 1.

² See Stipulated Facts ¶¶ 1, 2, 5, 6, & 8; Comcast Phone Response to Bench Request ("BR") No. 4.

³ See Stipulated Facts ¶ 7, 12 & 16.

⁴ 47 U.S.C. § 251(h)(1).

⁵ 47 U.S.C. § 251(a)(1).

⁶ 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 discussion at ¶¶ 15-17, *infra*.

number portability, dialing parity, and “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁷

6. Comcast Phone requested a Section 251 interconnection agreement with TDS in April 2008.⁸ 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 Phone’s telecommunications carrier status. TDS subsequently suspended negotiations and refused to execute the agreement the parties had negotiated.
7. Comcast Phone filed its Petition for Arbitration on November 3, 2008. TDS filed an Answer and propounded data requests, to which Comcast Phone objected and responded as appropriate. TDS sought to compel responses to some of the requests to which Comcast Phone objected and did not respond. At the discovery conference on December 10, 2008, the arbitrator required Comcast Phone to provide additional information in the form of responses to bench requests, as well as in response to some of the data requests TDS propounded. Comcast Phone filed its responses to the bench requests on December 15, 2008, and cooperated with TDS in voluntarily providing additional information, as well as responding to additional data requests TDS propounded. On April 3, 2009, the parties filed with the Commission a Stipulated Statement of Facts that, along with Comcast Phone’s responses to the bench requests, constitutes the factual record in this proceeding. The sole disputed issue in this arbitration is whether Comcast Phone is a telecommunications carrier entitled to interconnection and related rights under Sections 251(a) and (b).

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

⁸ See Comcast Petition for Arbitration ¶ 9.

8. 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.”⁹

ARGUMENT

9. Comcast Phone 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 Washington and because it does, in fact, offer and provide telecommunications services. That is all that is required, as the FCC,¹⁰ the United States Court of Appeals for the District of Columbia Circuit,¹¹ and state regulatory commissions and/or courts in Michigan,¹² Vermont,¹³ Texas,¹⁴ New

⁹ 47 U.S.C. § 252(c)(1).

¹⁰ *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 (2008).

¹¹ *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).

¹² *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*”)

¹³ *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*”).

York,¹⁵ Pennsylvania,¹⁶ Iowa,¹⁷ Nebraska,¹⁸ Illinois,¹⁹ and Ohio,²⁰ as well as this Commission,²¹ have determined either specifically for Comcast Phone entities or in analogous circumstances. Indeed, the Michigan Commission issued the most recent decision on this issue and concluded “Comcast’s current license to provide basic local exchange service is dispositive of its right to negotiate or arbitrate an interconnection agreement.”²² This Commission should reach the same conclusion in this proceeding.

A. Comcast Phone Is Authorized to Provide and Offers Telecommunications Services.

10. 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

¹⁴ *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).

¹⁵ *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).

¹⁶ *Sprint Comm. Co LP*, Order, App No. 310183F0002AMA, *et al*, 101 PaPUC 895, 2006 WL 3675279 (Pa PUC, Nov 30, 2006).

¹⁷ *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*”).

¹⁸ *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).

¹⁹ *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill CC, July 15, 2005).

²⁰ *Re The Champaign Tel Co*, Case No. 04-1494-TP-UNC, *et al* (Ohio PUC, Apr. 13, 2005).

²¹ *In re Petition for Arbitration between Sprint Comm. Co. LP and Whidbey Tel. Co.*, Docket No. UT-073031, Order 04 (Jan. 24, 2008).

²² *Comcast-TDS Michigan Decision*, *supra* n.12 at 5.

available directly to the public, regardless of the facilities used.”²³ This definition has been held to be generally consistent with the traditional common law definition of “common carrier.”²⁴

11. 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 choosing.²⁵ Most states, including Washington, impose an additional requirement: the prospective carrier must first obtain authorization from the appropriate regulatory authority before it may provide service.²⁶

12. The Stipulated Facts show that Comcast satisfies these requirements. First, Comcast Phone has authority to operate as a competitively classified local exchange carrier in Washington.²⁷ Second, Comcast Phone has three separate telecommunications service offerings which it makes available to the public pursuant to service schedules posted on its website:

- a. Exchange access service that it makes available to requesting interexchange carrier customers;²⁸
- b. 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;²⁹ and

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

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

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

²⁶ *E.g.*, RCW 80.36.350.

²⁷ Stipulated Facts ¶ 1.

²⁸ Stipulated Facts ¶ 5 & Ex. 3; Comcast Phone Response to BR No. 4.

c. 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.³⁰

13. These services are offered to the public on a common carrier basis. Not *all* members of the public are eligible to purchase them, but that is not the legal standard. All that is required is for a carrier to serve “indiscriminately ... the clientele [it is] ... suited to serve.”³¹ While a carrier may not “make individualized decisions in particular cases” about who and who not to serve,³² 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.”³³ 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.”³⁴ Similarly, as the courts have

²⁹ Stipulated Facts ¶ 5 & Ex. 2; Comcast Phone Response to BR No. 4.

³⁰ Stipulated Facts ¶ 5 & Ex. 4; Comcast Phone Response to BR No. 4. This array of services is frequently referred to as “PSTN interconnection.”

³¹ *Consolidated, supra* n.14, 497 F. Supp.2d at 843 (quoting *NARUC I*, 525 F.2d at 641).

³² *NARUC I*, 525 F.2d at 641.

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

³⁴ *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392, ¶ 20 (2007); *see also* discussion at ¶ 18, *infra*.

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.”³⁵ In other words, Comcast Phone is a common carrier because it has chosen to be one.³⁶

14. The Commission recently confirmed this analysis in the context of an arbitration between Sprint Communications Company, L.P. (“Sprint”) and Whidbey Telephone Company (“Whidbey”). In that case, Whidbey claimed that Sprint was not entitled to negotiate an interconnection agreement because the VoIP provider for whom Sprint would provide PSTN interconnection was not a registered telecommunications company and because Sprint is not a “telecommunications carrier.” The Arbitrator rejected both arguments. The Arbitrator first found that the registration status of the VoIP provider “is simply irrelevant to Whidbey’s obligations to negotiate an ICA with Sprint.”³⁷ The Arbitrator then rejected Whidbey’s contention that Sprint is not a telecommunications carrier, concluding, “a key determinant of common carrier status is whether an entity

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

³⁶ *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 service as a private carrier or common carrier); *Sprint Iowa Order*, *supra* n.17 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”).

³⁷ *In re Arbitration between Sprint and Whidbey*, Docket No. UT-073031, Order 04, ¶ 18.

holds itself out to serve indiscriminately,”³⁸ and finding that Sprint had demonstrated that it intended to do just that. Comcast Phone has more than adequately made a comparable demonstration here.

15. Comcast Phone 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.³⁹ Comcast Phone offers a local calling capability to customers of its Schools and Libraries Service and LIS. Evidence that Comcast Phone facilitates the origination and termination of locally rated telecommunications services traffic is found in its Commission-approved interconnection and reciprocal compensation arrangements with seven other ILECs in Washington.⁴⁰

16. Comcast Phone also qualifies as a LEC by virtue of its exchange access service offerings to interexchange carriers.⁴¹ “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.”⁴² Comcast Phone currently performs this service when it receives an incoming toll call and then routes 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 Phone offers the same service to

³⁸ *Id.* ¶ 25

³⁹ *See* 47 U.S.C. § 153(47) (defining “telephone exchange service”)

⁴⁰ Stipulated Facts ¶¶ 13-14.

⁴¹ Stipulated Facts ¶ 5 & Ex. 3; Comcast Phone Response to BR 4.

⁴² 47 U.S.C. § 153(16).

interexchange carriers (“IXCs”) in conjunction with Comcast Phone’s retail Schools and Libraries service offering.

17. Comcast Phone currently averages approximately 12-18 IXC customers of its exchange access service in Washington per month, as its Carrier Access Billing (“CABs”) records reflect.⁴³ In addition, Comcast Phone has remitted a substantial amount in exchange access surcharges to the Washington Universal Service Fund pursuant to Comcast Phone’s agreement with the Washington Exchange Carrier Association (“WECA”).⁴⁴ Comcast Phone’s agreement with WECA – of which TDS is a member – expressly defines Comcast Phone as a Local Exchange Company.⁴⁵ TDS cannot plausibly contend that Comcast Phone is not a local exchange company providing exchange access service to IXCs in Washington under these circumstances.

B. Other State Commissions and the FCC Have Concluded that Comparable Comcast Phone Affiliates Are Telecommunications Carriers.

18. As noted above, several different authorities have found that service offerings that are the same as, or comparable to, those offered by Comcast Phone satisfy the “common carrier test” and entitle those companies to Section 251(a)-(b) interconnection and related rights. The most recent such decision was in the case in which Comcast Phone’s affiliate sought an interconnection agreement with the TDS affiliate in Michigan. The circumstances in that case were identical to those presented here. The sole issue was the TDS affiliate’s contention that Comcast Phone of Michigan was not a telecommunications carrier. The Michigan Commission found otherwise. In particular,

⁴³ Stipulated Facts ¶ 6.

⁴⁴ See Stipulated Facts ¶ 2 & Ex. 1.

⁴⁵ Stipulated Facts Ex. 1 at II.I (definition of “Local Exchange Company”).

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.⁴⁶ 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 provider."⁴⁷ If a carrier were 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 Michigan Commission thus ruled that all the Comcast Phone entity needs is the proper authority from the Commission.⁴⁸ As to the challenges the Michigan TDS affiliate raised to the kind of traffic proposed to be exchanged, and to the terms and conditions of the Comcast Phone entity's service offerings, the Michigan Commission ruled that a Section 252 interconnection arbitration was not the appropriate place to consider such claims.⁴⁹

19. Almost contemporaneous with the Michigan order, a Comcast Phone affiliate obtained a similarly favorable result from the Vermont Public Utility Board, which rejected the ILEC's challenge to the Comcast Phone affiliate'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

⁴⁶ *Michigan Arbitrator Recommendation, supra* n.12 at 20.

⁴⁷ *Comcast-TDS Michigan Decision, supra* n.12 at 3 (emphasis supplied).

⁴⁸ *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").

⁴⁹ *Id.* at 3-4.

conclude that Comcast Phone is a telecommunications carrier for purposes of Section 251 of the Act.⁵⁰

20. Like the Michigan Commission, the Vermont Board focused on the Comcast Phone entity's status as a licensed carrier in the state and the rights and responsibilities associated with that status. Washington law imposes similar obligations. For example, RCW 80.36.080 requires that Comcast Phone 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.⁵¹ Thus, if TDS is legitimately concerned with the reasonableness of the terms and conditions of any of Comcast Phone's service offerings, TDS can initiate a separate proceeding. This Section 252 interconnection arbitration, however, is not the appropriate setting to consider those claims.

21. The Vermont Board also focused on the FCC's *Bright House* decision.⁵² That case arose from claims by a Comcast affiliate that Verizon was violating Section 222(b) of the Act, which requires that certain proprietary 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, Bright House 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.⁵³

⁵⁰ *Comcast-VTel Vermont Board Order*, *supra* n.13 at 18 (internal citation omitted).

⁵¹ RCW 80.04.110.

⁵² *Bright House Networks, LLC v Verizon California, Inc*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

⁵³ *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

22. The FCC rejected Verizon's claim. The FCC found particularly relevant that Comcast and Bright House "self-certify that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally."⁵⁴ 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 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).⁵⁵

Indeed, the FCC observed that it "know[s] of no case in which a provider has chosen to act as a common carrier and yet ultimately has been found not to meet the test."⁵⁶

23. The federal Court of Appeals subsequently affirmed the *Bright House* decision.⁵⁷ 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

classes of users as to be effectively available directly to the public") (internal citation omitted) (internal punctuation altered).

⁵⁴ *Id.* ¶ 39.

⁵⁵ *Id.*

⁵⁶ *Id.* n.90.

⁵⁷ *Verizon Calif. Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009).

own affiliates.”⁵⁸ 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.

24. 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.⁵⁹ 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 [Act].”⁶⁰ CLECs have such rights *regardless* of the classification of interconnected VoIP as either an information service or a telecommunications service.⁶¹

25. 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

⁵⁸ *Id.* at 275.

⁵⁹ *See supra* n.14-21.

⁶⁰ *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”).

⁶¹ *Id.* ¶¶ 15-16.

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.⁶²

26. Similarly, 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).⁶³

27. Finally, to the extent that the Commission has any doubt about Comcast Phone's telecommunications carrier status, it should give the benefit of that doubt to Comcast Phone, the new entrant seeking to bring the benefits of competition and lower cost innovative communications services to Washington consumers in TDS' service territory. The "holding out indifferently" standard for defining a common carrier 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

⁶² Ohio Order, *supra* n.20, ¶ 5.

⁶³ *New York Commission Sprint Order, supra* n.15, at 5.

provide wholesale services to VoIP providers as telecommunications carriers, in part, because that treatment is necessary to “advance the [FCC’s] goals in promoting facilities-based competition as well as broadband deployment.”⁶⁴

28. Second, both Washington 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.⁶⁵ 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 Phone’s registered status is the dispositive fact in this case. In order to obtain the rights of a carrier, Comcast Phone has subjected itself to oversight by this Commission. The Commission has the authority to oversee Comcast Phone and to assure its compliance with those obligations.

REQUEST FOR RELIEF

29. WHEREFORE, Comcast Phone requests the following relief:
- A. That the Commission find that Comcast Phone is a telecommunications carrier entitled to interconnection under the Act;
 - B. That the Commission order TDS to execute the agreement that the parties have negotiated and that is attached as Exhibit B to Comcast Phone’s Petition; and

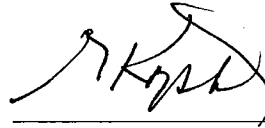
⁶⁴ *Time Warner Declaratory Ruling* ¶ 13; *see also id.* (finding that CLEC common carrier rights are “a critical component for the growth of facilities-based local competition”).

⁶⁵ *E.g.*, RCW 80.36.090.

C. Such other or further relief as the Commission finds fair, just, reasonable,
and sufficient.

Dated this 4th day of May 2009.

Respectfully submitted:



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