

**BEFORE THE WASHINGTON STATE  
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

**MOTION OF LEWIS RIVER TELEPHONE COMPANY D/B/A TDS TELECOM  
FOR SUMMARY DETERMINATION AND SUPPORTING BRIEF**

**MAY 4, 2009**

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## INTRODUCTION

1. This Motion for Summary Determination (“Motion”) is brought by Lewis River Telephone Company d/b/a TDS Telecom (“TDS”) pursuant to the schedule established for this docket. In this pleading, TDS will combine both the Motion and supporting Brief.
2. In this Motion, TDS will demonstrate that Comcast Phone of Washington, LLC (“Comcast Phone”) cannot establish that it qualifies as a telecommunications carrier that offers telecommunications services in its own right for purposes of the ability to seek Section 251<sup>1</sup> interconnection with TDS for the exchange of telecommunication service traffic. TDS will also demonstrate that even if Comcast Phone can somehow qualify as a telecommunications carrier, it is still not entitled to Section 251 interconnection rights in this instance because none of the traffic that Comcast Phone intends to deliver to TDS is classified as telecommunications service traffic and is therefore ineligible for exclusive Section 251 interconnection.

## IDENTIFICATION OF ISSUES

3. Issue 1: Is Comcast Phone a telecommunications carrier entitled to seek interconnection with TDS pursuant to Section 251?
4. Issue 2: Is Comcast Phone entitled to interconnection with TDS under Section 251 if the only traffic Comcast Phone delivers to TDS is information service traffic?

## SUMMARY OF POSITION

5. It is the position of TDS that Comcast Phone cannot establish that it is a telecommunications carrier for the purposes of obtaining interconnection with TDS pursuant to

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<sup>1</sup> 47 U.S.C. § 251. Unless otherwise noted, all references to “Section” refer to a section of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, codified at 47 U.S.C. § 153 *et seq.*, or, as it is referred to in this Motion, the “Act.”

Section 251. In order to do so, Comcast must establish it is acting as a common carrier of telecommunications services in TDS' service area in the State of Washington with the common carriage services, if any, relating to interconnection with TDS.

6. Comcast Phone will argue that it offers three telecommunications services: Local Interconnection Service ("LIS Service"); Access Service; and Schools and Libraries Service. As will be discussed later in this Motion, the LIS Service is, at best, a contract service which is provided in the State of Washington to a single entity, an affiliate of Comcast Phone. The LIS Service is not a common carrier service.

7. Further, the Access Service provided by Comcast Phone is not access service in the usual sense. Comcast Phone asserts that it provides only terminating access service and then only to provide traffic to an information service provider, not a telecommunications carrier. In addition, if Comcast Phone has no retail end user customers due to its withdrawal of its residential and business service offering in 2007, it cannot be a terminating switched access provider. Further, even if this offering is found to be common carriage access service, the Access Service is not provided over the "same arrangements" as Comcast seeks to interconnect with TDS. As discussed below, Federal Communications Commission ("FCC") precedent requires use of the "same arrangements" for a service to be the type of common carriage service that is a precondition to Section 251 interconnection.

8. The Schools and Libraries Service is not provided to any entity in the State of Washington. In addition, it is a service that provides, at the most, T-1 dedicated point-to-point service that is not related to interconnection with TDS for the exchange of telecommunications service traffic. Furthermore, there is no evidence of Comcast Phone offering the Schools and Libraries Service in the State of Washington.

9. Even if Comcast Phone can establish that it is a telecommunications carrier, since the only traffic that will be delivered by Comcast Phone to TDS over the proposed Section 251 interconnection arrangement is what Comcast Phone classifies as information service traffic, Comcast Phone is not entitled to interconnection rights under Section 251 with TDS.

#### APPLICABLE STANDARDS

10. General Standard for Summary Determination: Summary Determination is available where the outcome can be established as a matter of law with no unresolved issues of material fact. In this case, all of the relevant material facts can be determined through the Stipulated Facts and other statements of fact contained in the record. There are no unresolved issues of material fact. TDS is entitled to the issuance of the final determination in this docket as a matter of law.

11. Issue 1: Standard for Determination of Comcast's Status as a Telecommunications Carrier: A telecommunications carrier is defined as "any provider of telecommunications services...A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services...."<sup>2</sup> (Emphasis added.) The term telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."<sup>3</sup> The test to determine whether a provider is offering services "directly to the public" is the "common carrier" test. Under this test, a carrier must have a system that allows customers to transmit intelligence of their own design and choosing and the carrier must hold itself out indiscriminately or indifferently to the public.<sup>4</sup> This test is failed where the carrier's practice "is to make individualized decisions in particular cases whether and

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<sup>2</sup> Section 153(43).

<sup>3</sup> Section 153(46).

<sup>4</sup> Nat'l Ass'n of Regulatory Util. Comm'r v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976) ("NARUC I") and Nat'l Ass'n of Regulatory Util. Comm'r v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) ("NARUC II").

on what terms to serve.”<sup>5</sup> As enunciated by the FCC, “we emphasize that the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”<sup>6</sup> Further, the FCC qualified that for Section 251 interconnection rights, the carrier must be “offering telecommunications services through the same arrangement” for which it requests interconnection.<sup>7</sup> This requirement underscores the fact that a carrier can be a common carrier for some purposes, but not for others.<sup>8</sup>

12. Issue 2: Standard on Obtaining Interconnection for Use for Non-Telecommunications

Traffic: Under 47 C.F.R. § 51.100(b), a telecommunications carrier may use Section 251 interconnection for information services “so long as it is offering telecommunications services through the same arrangement as well.” This is the applicable standard for Issue 2.

## ANALYSIS

### A. Statement of Relevant Facts

13. The parties have entered into a set of Stipulated Facts, not all of which are relevant to the issues to be decided by the Commission. This analysis will begin with a statement of the relevant facts.

14. What is relevant is that while Comcast Phone is registered as a telecommunications company with this Commission, Comcast Phone discontinued offering its retail service in Washington on November 28, 2007.<sup>9</sup> In doing so, Comcast Phone represented to the FCC that

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<sup>5</sup> NARUC II at 608-609.

<sup>6</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, WC Docket No. 06-55, Memorandum Opinion and Order, DA 07-709 (rel. March 1, 2007) (“Time Warner”) at ¶ 14 and footnote 39.

<sup>7</sup> Time Warner at footnote 39 quoting 47 C.F.R. § 51.100(b).

<sup>8</sup> NARUC II at 608.

<sup>9</sup> Stipulated Facts 1 and 11.

Comcast Phone “plans to discontinue its provision of telecommunications service in the State of Washington on or after November 28, 2007....”<sup>10</sup> Further, Comcast Phone represented to its customers that Comcast Phone “will no longer be providing its current Digital Phone service in your community.”<sup>11</sup>

15. Comcast Phone asserts that it offers three services that it believes are telecommunications services in Washington. Those are LIS Service, Access Service and Schools and Libraries Service.<sup>12</sup>

16. LIS Service is restricted to “qualifying interconnected Voice over Internet Protocol (‘VoIP’) service providers.”<sup>13</sup> The only recipient of LIS Service in the State of Washington is Comcast IP Phone II, LLC (“Comcast IP”).<sup>14</sup> Comcast IP is not registered as a telecommunications company with the Commission.<sup>15</sup> The LIS Service provided to Comcast IP is pursuant to an agreement that is individualized and not on a common carrier basis.<sup>16</sup> The service offered by Comcast IP uses the brand name “Comcast Digital Voice” or “CDV.”<sup>17</sup>

17. Last mile facilities for the CDV are provided by Comcast Phone’s local franchise cable television operating affiliate.<sup>18</sup> Such affiliate is the only cable service provider in the TDS service area.<sup>19</sup> Comcast Phone seeks an interconnection agreement so that it may offer its LIS Service to Comcast IP so that Comcast IP may in turn offer CDV to end users in the TDS serving area.<sup>20</sup>

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<sup>10</sup> Comcast Phone’s Section 214 filing at the FCC at ¶ 2 attached to Comcast Phone’s response to Bench Request 4 in this docket.

<sup>11</sup> Customer letter attached to Comcast Phone’s response to Bench Request 4 in this docket.

<sup>12</sup> Stipulated Fact 5.

<sup>13</sup> Stipulated Fact 5.

<sup>14</sup> Stipulated Fact 7.

<sup>15</sup> Stipulated Fact 7.

<sup>16</sup> Stipulated Fact 8 and Exhibit C-5.

<sup>17</sup> Stipulated Fact 7.

<sup>18</sup> Stipulated Facts 12 and 16.

<sup>19</sup> *Ibid.*

<sup>20</sup> Stipulated Fact 15.

18. Comcast Phone and Comcast IP classify CDV as an information service.<sup>21</sup> While some limited terms and conditions of LIS Service are posted to the Comcast Phone web site, there is no evidence in the record of Comcast Phone seeking to offer LIS Service to any customer in the State of Washington other than Comcast IP.

19. The terms and conditions for the Schools and Libraries Service are set out in Exhibit 2 to the Stipulated Facts. The Schools and Libraries Service is not provided to any customer in Washington.<sup>22</sup> The terms and conditions for Access Service are set out in Exhibit 3 to the Stipulated Facts. Access Service is provided only as terminating access.<sup>23</sup> Thus, the Access Service is not provided as a mechanism for interconnection with TDS using the facilities sought for interconnection with TDS.

20. As will be demonstrated in the analysis that follows, these facts will demonstrate that Comcast Phone is not a telecommunications carrier for purposes of Section 251 interconnection with TDS. While the analysis focuses on Section 251 interconnection rights, it should be kept in mind that Comcast IP can offer its CDV service in TDS' service territory anytime it wants. What it loses because of the way it has organized, in an apparent attempt to avoid Commission regulation, are the interconnection-associated rights such as local number portability.

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<sup>21</sup> TR 57, l. 11-15 and TR 75, l. 16-18.

<sup>22</sup> Stipulated Fact 10.

<sup>23</sup> Stipulated Facts 1 and 6.

B. The Offering of LIS Service by Comcast Phone Does Not Qualify Comcast Phone as a Telecommunications Carrier

21. It is the widespread, general solicitation of customers from the general population, i.e., the indiscriminate offering of service on generally applicable terms, that constitutes common carriage.<sup>24</sup> In NARUC I, the court described several factors that would tend to preclude status as a common carrier. These include: 1) a relatively stable clientele, with terminations and new clients the exception rather than the rule, 2) methods of operation that may be highly individualized and comprise grounds for accepting or rejecting an applicant, and 3) an operator that would desire and expect to negotiate with and select future clients on a highly individualized basis.<sup>25</sup>

22. The description of the LIS Service offered by Comcast Phone is set out in Exhibit 4 to the Stipulated Facts. Further, the implementation of the LIS Service for Comcast IP, Comcast Phone's only customer, is set out in a contract, Exhibit C-5 to the Stipulated Facts. In fact, LIS Service is only available under a commercial contract.<sup>26</sup> LIS Service is an extremely limited offering and, as a practical matter, only a Comcast affiliate would purchase the LIS Service.

23. The LIS Service is available only to providers of retail interconnected VoIP service.<sup>27</sup> The service is not available for nomadic VoIP services.<sup>28</sup> To use the service, a customer must have facilities that "consist of an IP-based, broadband network that uses a Cable Modem Termination System (CMTS) employing the Network-based Call Signaling specified by Cable Television

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<sup>24</sup> Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("Southwestern Bell").

<sup>25</sup> NARUC I at 643.

<sup>26</sup> Exhibit 4, p. 1, Section 1.C.

<sup>27</sup> Exhibit 4, p. 1, Section 2.B.

<sup>28</sup> Exhibit 4, p. 1, Section 1.F.



Laboratories, Inc. (CableLabs®).”<sup>29</sup> The service is not available to anyone “using a different format.”<sup>30</sup>

24. The pricing for the service is not stated by Comcast Phone in the posted terms and conditions (Exhibit 4). Rather, Exhibit 4 states “recurring and non-recurring costs will be developed on a case-by-case basis in response to a bona fide request...to develop a competitive bid for service.”<sup>31</sup> Thus, the only way prices are provided are on a “case-by-case basis.” Further, those prices are only provided in response to a bona fide request (“BFR”) for a “competitive bid for service.” Requiring a BFR and stating that Comcast Phone will submit prices only as a bid for service certainly sounds like contract or private service, not common carriage. This is precisely the making of “individualized decisions in particular cases whether and on what terms to serve” found in NARUC II to disqualify a service from common carriage.

25. In fact, the LIS Service description goes on to state that the parties are expected to “negotiate in good faith...to enter into an agreement that effectuates the terms and conditions set forth in this [LIS] Guide.”<sup>32</sup> The contract carriage nature of the LIS Service is further underscored by Exhibit C-5. First, Comcast Phone has designated the entire contract as confidential. If this were really a form of common carriage, most, if not all, of those terms and conditions should be public. However, they are not.

26. For a service to qualify as common carriage, it must be offered on a non-discriminatory

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<sup>29</sup> Exhibit 4, p. 2, Section 3.A.

<sup>30</sup> Ibid.

<sup>31</sup> Exhibit 4, p. 1, Section 1.B.

<sup>32</sup> Exhibit 4, p. 1, Section 1.C.

basis.<sup>33</sup> The confidential nature of the entire agreement underscores that the assertion by Comcast Phone that LIS Service is offered on a non-discriminatory, common carriage basis is a sham.

27. It is absolutely clear that no company would enter into an agreement for LIS Service other than a Comcast Phone affiliate. There are a multitude of facts in the LIS Service terms and conditions that lead to this conclusion. First, LIS Service is only available for a term of three years.<sup>34</sup> No carrier other than an affiliate of Comcast Phone could afford to make the necessary investments to provide service under an arrangement that may last no more than three years.

28. While interconnection agreements nominally have relatively short terms, the reality is far different. Interconnection agreements are generally written with “evergreen” provisions which allow the agreements to remain in place indefinitely. The agreements continue until replaced by another interconnection agreement or, practically, are terminable only on a material breach by the party which sought interconnection. The ILEC cannot refuse to enter into an interconnection agreement if the requesting carrier qualifies for Section 251 interconnection. By contrast, what Comcast Phone offers is a commercial contract that Comcast Phone controls and executes only on its own terms.

29. The manner and frequency with which prices and terms may be varied means that only an affiliate of Comcast Phone would subscribe to LIS Service. [BEGIN CONFIDENTIAL DISCUSSION]

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<sup>33</sup> Iowa v. FCC, 218 F.3d 756 (D.C. Cir. 2000); Virgin Island Tel. Corp. v. FCC, 198 F.3d 921, 926-27 (D.C. Cir. 2000).

<sup>34</sup> Exhibit 4, p. 4, Section 5.A.

<sup>35</sup>

[END CONFIDENTIAL DISCUSSION] That is an entirely unacceptable situation for anyone other than a Comcast Phone affiliate.

30. Further, Comcast Phone states that "The charges for LIS may be revised from time to time on one month's notice."<sup>37</sup> No one other than an affiliate of Comcast Phone would agree to such a term.

31. The terms for renewal of the agreement also demonstrate that no one other than an affiliate would take the service. [BEGIN CONFIDENTIAL DISCUSSION]

<sup>38</sup> [END CONFIDENTIAL  
DISCUSSION]

32. Further, early termination is subject to one hundred percent termination liability.<sup>39</sup> This is yet another provision that is designed to limit the available customer base to only Comcast Phone affiliates.

33. In addition, it appears that anyone using LIS Service must use Comcast Phone (or yet another Comcast affiliate) for long distance service. The reason that this appears to be the case is that Comcast Phone charges only for terminating access.<sup>40</sup> If a customer could use another carrier other than Comcast Phone or its affiliate, Comcast Phone would be charging originating access.<sup>41</sup>

[BEGIN CONFIDENTIAL DISCUSSION]

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<sup>37</sup> Exhibit 4, p. 12, Section 11.B.

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<sup>39</sup> Exhibit 4, p. 4, Section 5.B.

<sup>40</sup> Stipulated Facts 2 and 6.

<sup>41</sup> Indeed, Exhibit 3 to the Stipulated Facts contemplates originating access, yet no originating access is assessed.

<sup>44</sup> [END CONFIDENTIAL DISCUSSION]

These are not conditions that anyone other than a Comcast Phone affiliate would accept.

34. Yet another indication that the LIS Service is available only to affiliates of Comcast Phone is found in a provision in Section 5.7 of Exhibit C-5. [BEGIN CONFIDENTIAL DISCUSSION]

[END CONFIDENTIAL DISCUSSION]

35. Comcast Phone may argue that some components of its LIS Service are consistent with common carriage. It may be true that a few of the components are also found in common carriage. However, the critical analysis is not each component of the service on a stand-alone

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<sup>44</sup> Further, the fact that Comcast Phone does not assess originating access coupled with [BEGIN CONFIDENTIAL DISCUSSION] [END CONFIDENTIAL DISCUSSION] suggests that Comcast Phone is bypassing intrastate access for the traffic it provides (or its affiliate provides). If it was not engaged in intrastate bypass, there would be rates for intrastate service.

basis. The critical analysis is the service taken as a whole. When taken as a whole, the LIS Service is not an offering by a carrier holding itself out indiscriminately or indifferently to the public. This is clearly a situation in which Comcast Phone is making individualized decisions in particular cases whether and on what terms to serve. Comcast Phone's LIS Service offering fails to meet the standards of NARUC I and NARUC II.

36. As demonstrated above, the LIS Service is not a common carriage telecommunications service. Even if the Commission classifies the LIS Service as a common carriage telecommunications service, it is not being provided through the same arrangement that is sought with TDS. The LIS Service requires specialized equipment, as is made perfectly clear by Exhibit 4. That specialized equipment has nothing to do with delivery of traffic to TDS. It is not the "same arrangement" sought for interconnection as required by the FCC.

37. Finally, Comcast Phone represented to the FCC that it would be discontinuing "its provision of telecommunications service in Washington on or after November 28, 2007...."<sup>45</sup> By Comcast Phone's own statement, the LIS Service cannot be a telecommunications service since Comcast Phone sought and was granted permission to discontinue the offering of telecommunications service in the State of Washington. As further stated by Comcast Phone in the same 214 filing, it was seeking authority to discontinue "local exchange and interexchange telephone service."<sup>46</sup> If the LIS Service is not a local exchange service nor an interexchange telephone service, what is it? The conclusion must be that it is not a telecommunications service.

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<sup>45</sup> Comcast Phone's Section 214 filing at the FCC attached to Comcast Phone's response to Bench Request 4 in this docket.

<sup>46</sup> Comcast Phone's Section 214 filing at ¶ 4, attached to Comcast Phone's response to Bench Request 4 in this docket.

C. Brighthouse and Time Warner Do Not Lead to a Conclusion that Comcast Phone Is a Common Carrier for Purposes of Interconnection with TDS

38. It can be expected that Comcast Phone will argue that the FCC's decisions in Brighthouse<sup>47</sup> and Time Warner, mean that Comcast Phone is acting as a telecommunications carrier for purposes of Section 251 when it offers the LIS Service. However, that is not the case.

39. First, Brighthouse on its own terms does not apply. The issue in Brighthouse was the extent to which one carrier may use the proprietary information of another carrier (or CPNI) without running afoul of Section 222 restrictions on use of CPNI. It did not decide if a carrier was a common carrier for Section 251 purposes. The FCC made it very clear that Brighthouse has limited applicability:

We stress, however, that our holding is limited to the particular facts and the particular statutory provision at issue in this case...Here, section 222(b) has a different purpose – privacy protection – than many other provisions of the Communications Act, and we believe that this purpose argues for a broad reading of the provision. As a result, our decision holding the Competitive Carriers to be ‘telecommunications carriers’ for purposes of section 222(b) does not mean they are necessarily ‘telecommunications carriers’ for purposes of all other provisions of the Act. We leave those determinations for another day.<sup>48</sup> (Emphases added.)

40. Even if the FCC had not clearly limited the reach of Brighthouse, the facts in Brighthouse do not provide support for Comcast Phone's position in this docket. The FCC found in the Brighthouse case that both of the VoIP providers had obtained certificates of public convenience and necessity from the states in which they operated and the FCC further found that Verizon as the LEC had entered into Section 251 interconnection agreements with the VoIP providers. The FCC then held that “[t]hese facts, in combination, establish a prima facie case that the Comcast and Brighthouse Competitive Carriers are indeed telecommunications carriers for purposes of

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<sup>47</sup> In re Brighthouse Networks, LLC et al. v. Verizon California, Inc., 23 FCC Rcd 10704 (rel. June 23, 2008); affirmed as Verizon v. FCC, Docket No. 08-1234 (D.C. Cir. Feb. 10, 2009).

<sup>48</sup> Brighthouse at ¶ 41.

section 222(b).”<sup>49</sup> By contrast, in this docket, Comcast IP does not have status as a telecommunications carrier in the State of Washington. Further, here there is, obviously, no existing interconnection agreement between Comcast IP, or even Comcast Phone, and TDS.

41. Like Brighthouse, when Time Warner is read in context it does not support the finding that Comcast Phone is a common carrier for purposes of Section 251 interconnection with TDS. In Time Warner, the FCC found that the rights of telecommunications carriers to Section 251 interconnection are limited “to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.”<sup>50</sup> In addition, the FCC found that the telecommunications carrier must also be “offering telecommunication services through the same arrangement” as it seeks for interconnection.<sup>51</sup> Thus, under Time Warner, a factual analysis of the offerings must be undertaken. See, also, Consolidated Comm’ns of Fort Bend Co. v. Public Util. Comm’n of Texas, 497 F. Supp. 2d 836 (W.D. Tex. 2007) (individual analysis of offering required to determine if it is private or common carriage). Time Warner is not precedent which may be read as entitling those who work with VoIP providers carte blanche Section 251 interconnection rights.

42. In the Time Warner proceeding, the wholesale providers of telecommunications services to Time Warner were MCI Worldcom (“MCI”) and Sprint Communications Company (“Sprint”). In Time Warner, it was a given that MCI and Sprint are telecommunications carriers. It was never a disputed issue in the Time Warner proceeding whether Sprint and MCI were (or were not) CLECs entitled in their own right to Section 251 interconnection. The question presented was whether these entities could use their Section 251 rights, not only in their own right, but also to

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<sup>49</sup> Brighthouse at ¶ 39.

<sup>50</sup> Time Warner at ¶ 14 and footnote 39.

<sup>51</sup> Time Warner at footnote 39 quoting 47 C.F.R. § 51.100(b).

provide a wholesale service to an entity that was not a telecommunications carrier. Time Warner did not establish that MCI and Sprint were telecommunications carriers because they were offering a particular service – it established that they could obtain Section 251 interconnection because they were first telecommunications carriers.

43. Time Warner is inapplicable to the present proceedings because it was predicated on the fact that the parties were telecommunications carriers. Time Warner did not address the qualities of a telecommunications carrier, and actually disclaimed any pretensions that it did:

In making this clarification, we emphasize that the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis. We do not address or express any opinion on any state Commission’s evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service.<sup>52</sup>

The issue here is whether Comcast Phone is a telecommunications carrier. Time Warner did not address this issue.

44. Finally, Time Warner was explicit that Section 251 interconnection is available only to those telecommunications carriers who “seek interconnection in their own right.”

Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection in their own right for the purpose of transmitting traffic to or from another service provider. To address concerns from commenters about which parties are eligible to assert these rights, we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are acting as telecommunications carriers for purposes of their interconnection request...<sup>53</sup>

As explained throughout this Motion, Comcast Phone fails to meet this test.

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<sup>52</sup> Time Warner at ¶ 14 (emphasis added).

<sup>53</sup> Time Warner at ¶ 16 (emphasis added).



D. The Schools and Libraries Service Does Not Support a Conclusion that Comcast Phone is a Common Carrier

45. The terms and conditions for the Schools and Libraries Service are set out in Exhibit 2 of the Stipulated Facts. Most critically for Comcast Phone, there is absolutely no evidence in the record that Comcast Phone is offering this service in the State of Washington. While the terms and conditions are posted to Comcast's web site, that posting, by itself, is hardly sufficient evidence of offering the service in the State of Washington. Comcast Phone admits it is not providing the Schools and Libraries Service to any customer in Washington.<sup>54</sup>

46. Further, very little of the Schools and Libraries Service has anything to do with providing a telecommunications service. The first element of the Schools and Libraries Service is entitled "Network Service for E-Rate Eligible Institutions."<sup>55</sup> This section of Exhibit 2 describes the service as "a high-speed data service that uses point-to-point T1 circuits for the interconnection of Local Area networks (LANs) across the customer's physical locations."<sup>56</sup> The Schools and Libraries Service is "exclusively available to primary and secondary educational institutions, corresponding municipal libraries and other 'e-rate eligible' institutions."<sup>57</sup> The service is not available for resale.<sup>58</sup> What this service offering boils down to is essentially an offer to construct links for a school or library's internal communications. This is a type of construction service that any contractor with experience in handling copper or fiber optic cable could provide. It is not a telecommunications service. There is no communication with the outside world or use of the public switched telecommunications network ("PSTN").

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<sup>54</sup> Stipulated Fact 10.

<sup>55</sup> Exhibit 2 at p. 1.

<sup>56</sup> Exhibit 2, p. 1, Section 9.1.1.A.1.

<sup>57</sup> Exhibit 2, p. 1, Section 9.1.1.A.3.

<sup>58</sup> Exhibit 2, p. 1, Section 9.1.1.A.4.

47. Exhibit 2 also describes what is labeled as a “Point-To-Point Service.”<sup>59</sup> This again is simply a means of provisioning a school or library’s internal communications. It is not a common carriage telecommunications service. Please note that by its own terms, it is subject to an individualized contract based upon a BFR and an issued competitive bid for an exclusive subset of the population (E-rate qualifying institutions).<sup>60</sup> Thus, it again looks like the making of individualized decisions of who to serve, not the offer to serve indiscriminately. If this is a telecommunications service, which it is not, it would be contract carriage, not common carriage.

48. The third aspect of the Schools and Libraries Service description in Exhibit 2 is entitled “Channelized Exchange Service.”<sup>61</sup> While this element of the Schools and Libraries Service involving Channelized Exchange Service does, in theory, involve calling through the PSTN, it again appears that this is a private or contract service, not a common carriage service. The rates for construction of the service facilities are set forth on a case-by-case basis “in response to a bona fide request from a customer or prospective customer to develop a competitive bid for service.”<sup>62</sup> This appears to be an individualized contract that sets forth specific terms and conditions for one customer, not a common carriage offering.

49. Comcast Phone describes the Channelized Exchange Service as providing “the functional equivalent of twenty-four voice grade facilities...”<sup>63</sup> Given that Comcast Phone has discontinued its retail local exchange and interexchange telephone services in Washington, the use of the term “functional equivalent” must be a euphemism for providing a Voice over Internet Protocol style of service. Thus, this would be the same type of information service that Comcast IP provides.

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<sup>59</sup> Exhibit 2, p. 2.

<sup>60</sup> Exhibit 2, p. 2, Section 9.1.2.B.1.a.

<sup>61</sup> Exhibit 2, p. 3.

<sup>62</sup> Exhibit 2, p. 3, Section 9.1.3.B.1.a.

<sup>63</sup> Exhibit 2, p. 3, Section 9.1.3.A.1.

Comcast Phone cannot be heard to claim that Comcast IP's service is an information service on one hand and that the VoIP based Schools and Libraries Service is a telecommunications service on the other hand.

50. Further, as stated above, it is not evident that this service is offered anywhere in the State of Washington. Even if the Schools and Libraries Service were found to be offered in the State of Washington and, additionally, were found to be a common carriage service, the service appears to be individualized to schools and libraries' own networks and does not involve the same arrangements that would be involved in interconnection with TDS, which must underlie the triggering of Section 251 interconnection rights.<sup>64</sup>

51. Finally, the description of the Channelized Exchange Service states that it provides "local and long distance dialing capability through the [PSTN]."<sup>65</sup> How can Comcast Phone offer this service in the State of Washington (and since it has no customers, it does not appear to be offering the service) when it has represented to the FCC that it has discontinued the provision of "local exchange and interexchange telephone services"?<sup>66</sup> The answer to the question is that it cannot.

E. Access Service as Provided by Comcast Does Not Support a Conclusion that Comcast Phone is a Common Carrier Entitled to Interconnection Rights with TDS

52. Exhibit 3 to the Stipulated Facts sets out the terms and conditions for Comcast Phone's provision of Access Service. On its face, the terms of Exhibit 3 look relatively similar to the terms of local exchange companies offering Access Service to interexchange carriers. However, the type of service that Comcast Phone offers is unusual, to say the least.

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<sup>64</sup> See, e.g., 47 C.F.R. § 51.100(b).

<sup>65</sup> Exhibit 2 at p. 3, Section 9.1.3.A.1.

<sup>66</sup> Comcast Phone Section 214 Application at ¶ 4, attached to Comcast Phone's response to Bench Request 4 in this docket.

53. While Comcast Phone bills interexchange carriers for Access Service, it is only for terminating access.<sup>67</sup> That means, only interexchange carriers that are delivering traffic for termination to Comcast Phone's information service provider affiliate, Comcast IP, are billed for this "access service." In every other situation of which TDS is aware, a telecommunications access service runs in both the originating and terminating directions, not just the terminating direction. Further, in normal circumstances the access service is offered by the entity providing local service (i.e., Comcast IP), not an intervening entity (i.e., Comcast Phone). Nor is the recipient of the traffic an information service provider. All of these elements raise questions as to whether the "Access Service" provided by Comcast Phone is truly a telecommunications service.

54. It is also apparent that what Comcast Phone is doing when it bills interexchange carriers for traffic that is delivered to the information service provider affiliate, Comcast IP, is not the "Access Service" described in Exhibit 3. The reason this is the case is that Exhibit 3 describes service that Comcast Phone would provide to interexchange carriers when Comcast Phone has retail customers. Exhibit 3 does not describe Comcast Phone's relationship with Comcast IP where one carrier provides access service to allow interexchange carriers to reach the end users of another carrier.

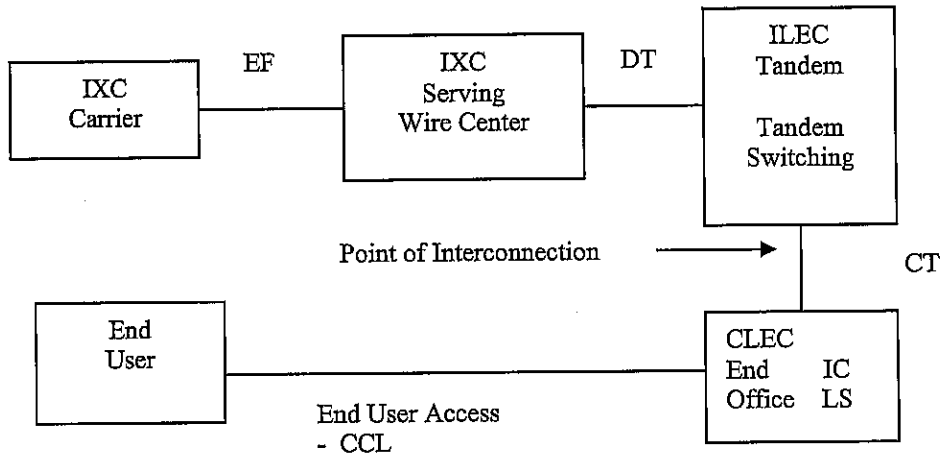
55. This can be best seen from the diagram that is set out on Page 51 of Exhibit 3 which is meant to depict the Access Service described in Exhibit 3. The following is an excerpt from Page 51.<sup>68</sup>

The following diagram depicts a generic view of the components of Switched Access Service and the manner in which the components are combined to provide a complete access service.

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<sup>67</sup> Stipulated Facts 2 and 6.

<sup>68</sup> Due to format restrictions, this diagram has slight variations from the diagram contained in Exhibit 3. A copy of the diagram contained in Exhibit 3 is attached as Attachment 1 for comparison purposes. The differences are not material.



ILEC bills:

EF – Entrance Facility  
 DTT – Direct Trunk Transport  
 Tandem Switching

Company bills

CT – Common Transport  
 IC – Interconnection Charge  
 LS – End Office/Local Switching  
 CCL – Carrier Common Line

Under this diagram, Qwest is the ILEC tandem and Comcast Phone is the CLEC. The remainder of the service description contained in Exhibit 3 is consistent with this diagram. This means that under Exhibit 3, an interexchange carrier would purchase access to Comcast Phone’s end office for delivery of traffic to Comcast Phone’s end use customers. Thus, Exhibit 3 on its own terms has nothing to do with traffic delivered to Comcast IP from the interexchange carriers.<sup>69</sup>

56. Even if the Access Service of Comcast Phone is considered to be a common carriage form of telecommunications service, it is clear that that service has absolutely nothing to do with TDS. The Access Service is provided in the terminating direction for traffic headed to Comcast IP, not from Comcast IP. As admitted by Comcast Phone, it is seeking interconnection with TDS “so that Comcast IP may offer CDV [Comcast Digital Voice] to end user customers in the TDS

<sup>69</sup> Further, as set out in Exhibit 3, Comcast Phone’s Access Service is an interexchange service. Yet, Comcast Phone has represented to the FCC that it has discontinued “interexchange telephone services” in the State of Washington. Comcast Phone’s Section 214 filing to the FCC at ¶ 4, attached to Comcast Phone’s response to Bench Request 4 in this docket.

serving area. Specifically, the interconnection agreement would make it possible for CDV end-users to place calls to TDS end-users within the TDS local calling areas.”<sup>70</sup> The interexchange Access Service has absolutely nothing to do with local interconnection with TDS. This is true whether Comcast Phone seeks indirect interconnection for the local traffic with TDS or direct connection for the local traffic with TDS. The interconnection sought by Comcast Phone is for local traffic (and it turns out – information service traffic, not telecommunications traffic) that would use different facilities than the Access Service facilities for interexchange carriers to reach Comcast IP.

57. Therefore, the Access Service can have absolutely nothing to do with any arrangements between Comcast Phone and TDS for which Comcast Phone seeks interconnection. Under Time Warner, the test for interconnection rights is whether the carrier is offering telecommunications service through the same arrangement for which it seeks interconnection. Thus, under the Time Warner standard, the Access Service cannot be used to demonstrate that Comcast Phone is a common carrier for purposes of seeking local interconnection with TDS.

F. A Carrier May Not Self-Certify That it is a Common Carrier

58. It can be expected that Comcast Phone will argue that simply self-certifying as a common carrier is enough to qualify Comcast Phone for Section 251 interconnection with TDS. That is clearly not the case. As long as seventy years ago, the Supreme Court held that: “[w]hether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does.”<sup>71</sup> The court in NARUC 1 reached the same conclusion when it

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<sup>70</sup> Stipulated Fact 15.

<sup>71</sup> US v. California, 297 US 175, 181 (1936).

stated that a “particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”<sup>72</sup> Thus, it is action, not words, that control.

59. The concept that actions speak louder than words is carried forward in the Southwestern Bell case. In that case, the court stated as follows:

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case ‘whether and on what terms to serve’ and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.<sup>73</sup>

Self-certification does not result in classification as a common carrier. The self-serving ipse dixit assertion cannot lead to the conclusion that one is a common carrier.

G. Under the Terms of 47 C.F.R. § 51.100(b), Comcast Phone is Not Entitled to Interconnection with TDS for the Delivery of Information Service Traffic

60. It is unquestioned that Comcast Phone and Comcast IP assert that the service offered by Comcast IP is that as an information service provider.<sup>74</sup> This, in turn, means that all of the traffic that originates from Comcast IP that would be delivered to TDS by Comcast Phone for interconnection purposes is information service traffic.

61. The FCC has a clear rule that telecommunications traffic must be the focus of interconnection and only when there is telecommunications traffic can a carrier then deliver information service traffic for interconnection purposes.<sup>75</sup> Comcast Phone, by its own admission, will not be providing what it considers as telecommunications traffic to TDS.<sup>76</sup>

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<sup>72</sup> NARUC 1 at 644.

<sup>73</sup> Southwestern Bell at 4181, citing NARUC 1 and NARUC 2.

<sup>74</sup> TR 57, l. 11-15; TR 75, l. 16-18.

<sup>75</sup> 47 C.F.R. § 51.100(b).

<sup>76</sup> Comcast Phone and Comcast IP assert that Comcast IP is an information service traffic provider. Since the Commission has not instituted a show cause action as to why Comcast IP should not register as a telecommunications company, TDS has no choice for purposes of this docket but to accept the assertion by Comcast Phone and Comcast IP.

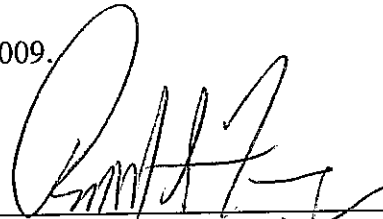
62. Under the terms of 47 C.F.R. § 51.100(b), Comcast Phone may not seek interconnection for the delivery of nothing but information service traffic.

#### MOTION AND CONCLUSION

63. Comcast Phone may argue that TDS waited until late in the process to raise the question as to whether Comcast Phone is entitled to Section 251 interconnection with TDS. However, it took quite some time to obtain information which would allow TDS to begin to understand the relationship between Comcast Phone and Comcast IP. The relationship between Comcast Phone and Comcast IP appears to be a deliberate splitting of corporate functions in an effort to avoid the consumer protections and light handed regulation of a CLEC for the provision of end user services. Apparently, Comcast IP wants all the interconnection rights of a telecommunications carrier without having any of the responsibilities. Once the relationship between Comcast Phone and Comcast IP began to come into focus, it appeared to be appropriate to raise the question whether, under the circumstances present, Comcast Phone is entitled to interconnection rights under Section 251 with TDS.

64. TDS moves the Commission for an order of summary determination. For the reasons set forth above, Comcast Phone cannot establish that it is entitled to interconnection with TDS. Therefore, TDS respectfully requests that the Commission dismiss this arbitration proceeding.

Respectfully submitted this 4th day of May, 2009.



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Attorney for Lewis River Telephone  
Company, d/b/a TDS Telecom



# **ATTACHMENT 1**

Access Service

Issued September 27, 2007

Effective October 12, 2007

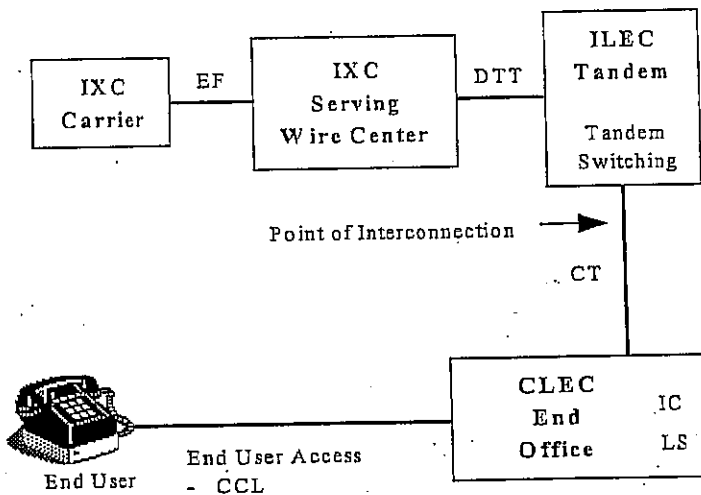
3. SWITCHED ACCESS SERVICE

3.3. SWITCHED ACCESS RATE CATEGORIES

The rate categories that apply to Switched Access Service are as follows:

- Carrier Common Line
- Transport (includes Common Transport, Direct Trunk Transport and Local Channel/Entrance Facilities)
- Local Switching
- 8XX Toll-Free Access Service

The following diagram depicts a generic view of the components of Switched Access Service and the manner in which the components are combined to provide a complete access service.



ILEC bills:

EF - Entrance Facility  
DTT - Direct Trunk Transport  
Tandem Switching

Company bills:

CT - Common Transport  
IC - Interconnection Charge  
LS - End Office/Local Switching  
CCL - Carrier Common Line

Switched Access rates are as set forth in Section 3.4, following.