

**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, )  
 ) DOCKET NO. UT-083055  
and )  
 )  
LEWIS RIVER TELEPHONE COMPANY, D/B/A )  
TDS TELECOM )  
 )  
Pursuant to 47 U.S.C. Section 252. )

**COMCAST PHONE RESPONSE  
TO TDS MOTION FOR SUMMARY DETERMINATION**

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ATTORNEYS FOR COMCAST  
PHONE OF WASHINGTON, LLC

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**COMCAST PHONE RESPONSE  
TO TDS MOTION FOR SUMMARY DETERMINATION**

1. Comcast Phone of Washington, LLC (“Comcast Phone”) provides the following response to the Motion for Summary Determination and Supporting Brief (“Brief”) filed by Lewis River Telephone Company, d/b/a TDS Telecom (“TDS”).

**INTRODUCTION**

2. Comcast Phone demonstrated in its Initial Brief that it qualifies as a telecommunications carrier entitled to interconnection with TDS because it has received authority from the Washington Utilities and Transportation Commission (“Commission”) to provide telecommunications services in Washington and because it does, in fact, offer telecommunications services. Thus, as the Federal Communications Commission (“FCC”), the United States Court of Appeals for the Eighth Circuit, and the Michigan Public Service Commission have explained, Comcast Phone has “self-certified” as a common carrier.<sup>1</sup> The process of “self-certification” reflects Comcast Phone’s choice to offer its services to the public rather than to just itself or a small number of selected customers.
3. The record demonstrates that Comcast Phone offers three different telecommunications services: (1) Local Interconnection Service (“LIS”) to providers of interconnected voice over Internet protocol (“VoIP”) services, (2) exchange access services offered to interexchange carriers (“IXCs”), and (3) Schools and Libraries Service.<sup>2</sup> TDS, however, contends that none of these is a telecommunications

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<sup>1</sup> See Comcast Phone Motion for Summary Determination and Initial Brief on the Merits (“Comcast Phone Brief”) ¶¶ 9, 18 & 21-23.

<sup>2</sup> Stipulated Facts ¶ 5 & Exhibits 2-4.

service. Its arguments are based on mischaracterizations of the applicable law.

Neither the FCC nor any court has limited common carriage to “the widespread, general solicitation of customers from the general population.”<sup>3</sup> To the contrary, the law requires only that common carriers serve the customers they are best suited to serve.<sup>4</sup> TDS also mischaracterizes Comcast Phone’s service offerings, as explained below.

4. Comcast Phone and its affiliates around the country have entered into more than 100 interconnection agreements with incumbent local exchange carriers (“ILECs”) like TDS, including *five* such agreements in Washington.<sup>5</sup> Ten states – including this Commission in its recent *Whidbey Telephone* decision – have approved arrangements comparable to the one that Comcast Phone seeks here.<sup>6</sup> One of those cases involving Sprint’s to interconnection with an ILEC in Iowa was just affirmed by the Eighth Circuit. In addition to the eight states that have affirmed Sprint’s right to interconnect in order to provide *its* PSTN interconnection offering,<sup>7</sup> Comcast Phone’s telecommunications carrier status has been affirmed by the FCC, the United States Court of Appeals for the D.C. Circuit, the Michigan Public Service Commission and the Vermont Public Service Board.

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<sup>3</sup> TDS Brief ¶ 21.

<sup>4</sup> Comcast Phone currently has interconnection agreements and exchanges telecommunications services traffic with, Qwest, Embarq, Verizon, CenturyTel and YCom. See Stipulated Facts ¶13.

<sup>5</sup> *Id.* ¶ 13.

<sup>6</sup> See Comcast Phone Brief ¶¶ 9 & 14 (and cases cited therein).

<sup>7</sup> See Comcast Phone Brief ¶ 9 nn.14-21 (citing cases).

5. In sum, there is no legal or factual basis for TDS' claim that Comcast Phone is not a telecommunications carrier entitled to Section 251 interconnection. Indeed, TDS does not cite a single case that supports the outcome it seeks. TDS is simply trying to delay Comcast Phone's entry into the market for as long as possible. The Commission should not permit TDS' delay tactics continue one day longer than necessary.

## **ARGUMENT**

### **I. Comcast Phone's Service Offerings Qualify as Telecommunications Services**

#### **A. LIS Is a Telecommunications Service**

6. According to TDS' brief, Comcast Phone's LIS offering does not qualify as common carriage because the terms of the offering are not sufficiently attractive. Other than TDS' unsupported complaints, however, there is no evidence in the stipulated record that supports TDS' contention that the terms of the LIS are so limited that no customer other than Comcast Phone's interconnected VoIP service provider affiliate could use it. Moreover, as explained below, each of the terms about which TDS complains is an industry standard practice that has been approved by regulatory agencies such as the Commission, other state regulators, the FCC, or the courts. Indeed, many of the terms about which TDS complains are found in TDS' own tariffs or in the tariffs of other Washington ILECs.

**1. The Relatively Narrow Potential Customer Base for LIS Does Not Undermine its Status as a Telecommunications Service Offering**

7. LIS is currently offered to facilities-based interconnected VoIP service providers only. TDS claims that this is unreasonably narrow.<sup>8</sup> But there is no record basis for TDS' claim that there is only one potential customer for LIS. Pursuant to the Comcast Phone Service Guide, LIS is available to any qualified, facilities-based interconnected VoIP service provider in Washington. Thus, by definition, it is *not* only available to Comcast Phone's affiliate. Moreover, as a legal matter, a provider's offerings need not be widely and indiscriminately marketed, as TDS contends. Comcast Phone's LIS offering is suited to serve a particular class of users, *i.e.*, retail interconnected VoIP service providers capable of offering their own last-mile facilities that require or desire Comcast Phone's interconnection service. Comcast Phone is not required to expand the scope of the offering.
8. The Act defines "telecommunications service" not just as "the offering of telecommunications for a fee directly to the public," but also (in the alternative) "to such class of users as to be effectively available directly to the public, regardless of the facilities used."<sup>9</sup> In *Sprint Comm. Co LP v ACE Comm Group*, the Iowa Utilities Board found that Sprint, which offered wholesale interconnection service in Iowa, was a common carrier because it offered PSTN interconnection to "that class [of

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<sup>8</sup> TDS Brief at 7-8.

<sup>9</sup> 47 U.S.C. § 153(46).

potential customers] consisting of entities capable of offering their own last-mile facilities.”<sup>10</sup>

9. That order was just recently affirmed by the Eighth Circuit, which specifically noted, “We are not troubled by the fact that Sprint serves only [one customer]. If a similarly situated last-mile provider were looking for the wholesale services Sprint provides, Sprint would be an obvious choice.”<sup>11</sup> Although Comcast Phone currently has only one LIS customer, there is no requirement under federal or Washington law that Comcast Phone secure a particular number of customers in order to be deemed a common carrier.<sup>12</sup> Indeed, as Comcast Phone noted in its opening brief, a service provider may be deemed a common carrier “even where it is not yet actually supplying service to *any* customers” in a particular area, and can be a common carrier even if it intends “to serve only a single customer.”<sup>13</sup>
10. There is no requirement that an entity secure a certain number of customers before it can gain status as a common carrier. All that is required is that it serve

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<sup>10</sup> Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Util. Bd., Nov 28, 2005).

<sup>11</sup> *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 750 n.6 (8th Cir. 2009) (citing *Verizon Cal., Inc. v. F.C.C.*, 555 F.3d 270, 276 (D.C. Cir. 2009)).

<sup>12</sup> Moreover, although LIS is currently only offered to interconnected VoIP service providers, those providers, in turn, offer their services directly to the public. *See Arbitration between Sprint Comm. Co. LP and Whidbey Tel. Co.*, Washington Utilities and Transportation Commission Docket No. UT-073031, Order 04 (Jan. 24, 2008).

<sup>13</sup> *See* Comcast Phone Brief at 7 (quoting *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392, ¶ 20 (2007)); *see also Michigan Final Order* at 3 (“To hold that a LEC has no right to negotiation and arbitration of an interconnection agreement unless it is serving customers currently would effectively end adding new entrants to the telecommunications market”).

“indiscriminately ... the clientele [it is] ... suited to serve.”<sup>14</sup> While a carrier may not “make individualized decisions in particular cases” about who and who not to serve,<sup>15</sup> that “does not mean that the particular services offered must actually be available to the entire public. A specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.”<sup>16</sup> As the courts have recognized, moreover, common carriers routinely offer service packages that “are based on contractual negotiations with a single customer and are specifically designed to meet the needs of only that customer.”<sup>17</sup> Thus, TDS’ contention that Comcast Phone must first have multiple customers before it will enter into an interconnection agreement is illogical and contradicts the pro-competitive policies of the Washington legislature, this Commission, and the federal Act.<sup>18</sup>

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<sup>14</sup> *Consolidated Comms. of Fort Bend Co. v. Public Util. Comm’n of Texas*, 497 F.Supp.2d 836, 845 (W.D. Tex. 2007) (quotation omitted).

<sup>15</sup> *NARUC I*, 525 F.2d at 641

<sup>16</sup> *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*).

<sup>17</sup> *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990).

<sup>18</sup> See, e.g., *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶ 13 (2007) (“*Time Warner Declaratory Ruling*”) (concluding that wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas); *Consolidated Comm Of Fort Bend Co v Public Utility Commission of Texas*, Memorandum Opinion and Order, 497 F Supp 2d 836 (WD Tex 2007), *aff’g Petition of Sprint Comm Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex PUC, Aug 14, 2006) (citing FCC reliance on competitive policies of Communications Act).



## 2. Confidential and ICB Contracts Are Standard Industry Practice

11. TDS complains that Comcast Phone provides LIS pursuant to a confidential agreement and notes that the LIS Guide provides that the “recurring and non-recurring charges ... will be developed on a case-by-case basis in response to a bona fide request ... to develop a competitive bid for service.”<sup>19</sup> TDS then claims that “[r]equiring 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.”<sup>20</sup>
12. There is no legal or factual basis for TDS’ assertion. As a matter of law, it is well accepted that “common carriers do not have to offer standardized contracts.”<sup>21</sup> Indeed, common carriers routinely offer service packages that “are based on contractual negotiations with a single customer and are specifically designed to meet the needs of *only that customer*.”<sup>22</sup> Services offered on an “individual case basis” (“ICB”), with material terms left open for negotiations, are not only well accepted, they are the *norm* for offerings such as LIS. Given that every potential customer’s network will, presumably, be different, every contract might have to be different, as well. Accordingly, it is not surprising that different contracts have “different pricing,”<sup>23</sup> as the Iowa Utility Board explained in the order which the Eighth Circuit recently affirmed:

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<sup>19</sup> TDS Brief at 8 (quoting LIS Guide, § 1.B).

<sup>20</sup> TDS Brief at 8.

<sup>21</sup> *Sprint Comm. Co LP v ACE Comm Group, et al*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405, at 14-15 (Iowa Util. Bd., Nov 28, 2005) (“*Sprint-Iowa Decision*”).

<sup>22</sup> *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990) (emphasis supplied).

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

[I]t should be no surprise that each contract has different provisions, including different prices. The fact is that the business of selling these wholesale services has not evolved into a standardized offering. Sprint is offering numerous different wholesale services and different last-mile providers will purchase different pieces to create their own distinct bundles. When each contract is for a different set of services, it should be no surprise that each contract has different pricing.<sup>24</sup>

13. Moreover, pursuant to TDS' own Commission-filed tariffs, TDS offers many of its services on an ICB basis, including local transport services such as DS3 entrance facility, DS3 direct trunked transport, and DS3 to DS1 multiplexing.<sup>25</sup> Qwest, likewise offers ICB pricing for network interconnection services to other LECs in Washington,<sup>26</sup> including custom routing,<sup>27</sup> advanced intelligent network,<sup>28</sup> and certain collocation services.<sup>29</sup> In sum, ICB pricing in contracts does not change the nature of a telecommunications service being provided.
14. Nor does the fact that contracts are kept confidential undermine the common carrier status of the LIS offering, either. The Texas commission, for example, has explained that "a common carrier does not lose its common-carrier status merely by entering into private contractual relationships with its customers."<sup>30</sup> The Eighth Circuit has

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<sup>24</sup> *Sprint-Iowa Decision* at 14-15.

<sup>25</sup> Lewis River Telephone Company, Inc., WN-U tariff, Network Access and Toll Service, Schedule 18, Third Revised Sheet S-31.

<sup>26</sup> Qwest Corporation, WN U-44 tariff, Interconnection Services, Section 1, 1st Revised Sheet 1.

<sup>27</sup> Qwest Corporation, WN U-42 tariff, Interconnection Services, Section 3, Original Sheet 14.12.

<sup>28</sup> *Id.*, Original Sheet 14.14.

<sup>29</sup> *Id.*, Original Sheet 25, 26.1.

<sup>30</sup> *Petition of Sprint Comm. Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex PUC, Aug 14, 2006), *aff'd by 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).

ruled likewise, explaining that “no case . . . holds that a carrier must publicize its rates and contracts in order to be deemed a telecommunications carrier, and thus a common carrier.”<sup>31</sup>

**3. The Three Year Term Commitment and Early Termination Provisions Are Not Unreasonable**

15. TDS also complains that the three-year term provision in the LIS Guide is too short and the early termination provision potentially penal.<sup>32</sup> The first complaint is ironic, given that TDS’ affiliate in New Hampshire made exactly the *opposite* argument to the New Hampshire Public Utilities Commission. In a brief it filed just a few weeks ago in its interconnection arbitration with Comcast Phone’s affiliate there, TDS argued that LIS “is only offered on a long term basis,” which it claimed was evidence that Comcast Phone (in New Hampshire) sought to lock it into long term contract.<sup>33</sup> Here, by contrast, TDS contends that no carrier would consider entering into a contract of only three years because it could not recover its investment in that period.<sup>34</sup>
16. Whether three years is too long, too short, or just right depends on the facts and circumstances of a particular case, and cannot be evaluated in the abstract in a proceeding such as this. As a legal matter, the FCC has specifically affirmed the

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<sup>31</sup> *Iowa Telecomms. Servs.*, 563 F.3d at 749. Washington law precludes competitively classified companies from filing contracts or price lists with the Commission, and Commission rules permit companies that are not competitively classified to file service contracts as confidential as long as the essential terms are publicly available. *E.g.*, WAC 480-80-142.

<sup>32</sup> TDS Brief at 9.

<sup>33</sup> *See* TDS-New Hampshire Brief at 7 (excerpts attached as Exhibit 1).

<sup>34</sup> TDS Brief at 9.

reasonableness of three-year terms in similar contracts.<sup>35</sup> The LIS agreement states that the term and termination provisions are included to reduce the risk of potential “stranded investment,”<sup>36</sup> which indicates that the drafters of the LIS Guide believed that three years was sufficient to reduce that risk. TDS notes that ILEC-CLEC interconnection agreements commonly have terms that are three years or less, but there is no evidence whether such arrangements require more or less investment than LIS.

17. TDS’ concern that Comcast may not renew a LIS contract is misplaced. Just as an incumbent LEC cannot refuse to negotiate a successor interconnection agreement, Comcast Phone could not refuse to negotiate a service arrangement with an existing customer consistent with its obligations as a regulated telecommunications carrier. The Commission is available in both cases to ensure that the service provider fulfills its legal obligations and continues to provide the regulated services it must provide.
18. TDS also claims that no customer other than an affiliate would agree to an early termination liability provision. The claim fails for at least *four* separate reasons. First, there is no evidence in the record to support TDS’ claims regarding the deterrent effect of such a provision one way or the other. Second, it conflicts with TDS’ simultaneous contention that a three-year term is not long enough. Third, the LIS Guide states only that Comcast Phone *may* assess such termination liability if necessary for Comcast Phone to fully recover costs associated with providing LIS;<sup>37</sup>

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<sup>35</sup> *Philippine Long Distance Telephone Co., v. Int’l Telecom, Ltd.*, 12 FCC Rcd. 15001 (1997).

<sup>36</sup> Stipulated Facts, Ex. 4 (LIS Guide) § 1.B.

<sup>37</sup> See Stipulated Facts, Ex. 4 (LIS Guide), § 5.B (“In the event of early termination of service by the Customer before the expiration of the Term, the Company *may* assess a termination

such charges are not required in all circumstances. Fourth, early termination clauses such as that found in LIS are standard industry practice. The FCC has found that early termination clauses are “typically found in fixed term contracts” and constitute an “accepted commercial practice, both inside and outside of the telecommunications industry.”<sup>38</sup>

19. Thus, it should not be surprising that many carriers have early termination charge provisions in their Commission-filed tariffed offerings. For example, Qwest imposes a charge for early termination of its access service, which can include the total monthly charges for the remainder of the term for such service.<sup>39</sup> Similarly, AT&T applies a charge for early termination of local exchange service to business customers that includes all non-recurring charges reasonably expended by AT&T to establish service, any disconnection, early cancellation, or termination charges paid to third parties by AT&T, all recurring charges owed for the balance of the current term, and any other early cancellation or termination charges required under AT&T’s service guide.<sup>40</sup>

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liability equal to 100% of all monthly recurring rates multiplied by the number of months left in the contract. Such early termination charges do not constitute a penalty under this Guide but are assessed in order for the Company to fully recover costs associated with providing LIS”). (emphasis added).

<sup>38</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 692, 698 (2003).

<sup>39</sup> Qwest Corporation, WN U-44 tariff, Access Service, Section 2, Original Sheet 36.

<sup>40</sup> AT&T Communications of the Pacific Northwest, Inc., Business Local Exchange Services, General Information, Pages 22.

**4. Comcast Phone Has Reasonably Reserved the Right to Change Rates During the Course of the Contract Term**

20. TDS contends that no customer other than an affiliate would agree to be bound by rates, terms, and conditions in documents other than the agreement that are subject to Comcast Phone's unilateral ability to modify, which the agreement between Comcast Phone and its affiliate requires. The short response, of course, is that a different customer could negotiate a different agreement that does not include such a provision. In addition, interconnection agreements frequently incorporate tariffs, product catalogs, technical publications, and other documents under the incumbent LEC's exclusive control and ability to change. Again, a customer can always seek Commission intervention if Comcast Phone attempts to impose unreasonable terms or conditions on its customers, or seeks to apply the terms of an agreement in an unreasonable way.

**5. TDS' Long-Distance Service Claims Are Inapplicable**

21. TDS's most baffling allegation is that "anyone using LIS Service must use Comcast Phone (or yet another Comcast Phone affiliate) for long distance service" because "Comcast Phone charges only for terminating access."<sup>41</sup> The LIS guide imposes no such requirement, and the provisions to which TDS refers are simply not susceptible to TDS's contrary interpretation. As discussed in more detail below, moreover, Comcast Phone offers both originating and terminating access service and charges for both types of service. TDS thus has pointed to no provision of Comcast Phone's LIS that would in any way preclude a finding that it is a telecommunications service.

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<sup>41</sup> TDS Brief ¶ 33.

**6. The Discontinuance of the Comcast Digital Phone Service Has No Bearing on Comcast Phone’s Telecommunications Carrier Status**

22. Finally, TDS argues that LIS and the other Comcast Phone services cannot be considered telecommunications services because Comcast Phone represented to the FCC that Comcast Phone was discontinuing its provision of telecommunications services in Washington in November 2007. This argument disregards the record and relies on an unreasonable interpretation of the notice Comcast Phone filed with the FCC. As Comcast Phone represented to the Commission in response to a bench request (as well as in Docket No. UT-072024), the FCC “filing discontinued circuit-switched local voice telephony service, but Comcast Phone entities retained their state certification and continued to provide other telecommunications services”<sup>42</sup> – including the three telecommunications services that Comcast Phone currently offers. The FCC filing thus has no bearing on the nature of the services Comcast Phone *currently* offers in Washington. The Michigan commission likewise rejected the identical argument.<sup>43</sup>
23. Comcast Phone’s LIS is a telecommunications service and provides more than sufficient evidence to support Comcast Phone’s position that it holds itself out as a common carrier in Washington and thus is a telecommunications carrier entitled to interconnection rights under Sections 251 and 252 of the Act.

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<sup>42</sup> Comcast Phone Response to BR 4(a); *see also* filings in Docket No. UT-072024.

<sup>43</sup> *See 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), slip op. at 3 (“As noted by Comcast Phone, although it did submit a discontinuance of service for regulated basic local exchange service in Michigan, it did not surrender its license”).*

**B. Schools and Libraries Service Is a Telecommunications Service.**

24. Schools and Libraries Service is among the telecommunications services that Comcast Phone offers in Washington and provides additional factual support for Comcast Phone's status as a telecommunications carrier. TDS argues otherwise but does so based on fundamental mischaracterizations that do not withstand even the slightest scrutiny.
25. First, TDS incorrectly states that, "there is absolutely no evidence in the record that Comcast Phone is offering this service in the State of Washington."<sup>44</sup> But this assertion is contradicted by TDS' acknowledgement that Comcast Phone maintains terms and conditions for this service on its website, a copy of which is part of the record in this proceeding, which is evidence that Comcast Phone offers the service in Washington.<sup>45</sup> TDS also ignores Comcast Phone's representation to the Commission in response to a bench request that Comcast Phone offers this service in Washington.<sup>46</sup> TDS cannot truthfully contend that there is no evidence in the record demonstrating that Comcast Phone offers Schools and Libraries Service in Washington.
26. TDS also claims that "very little of the Schools and Libraries Service has anything to do with providing a telecommunications service."<sup>47</sup> One basis for this claim is that

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<sup>44</sup> TDS Brief ¶ 45.

<sup>45</sup> Stipulated Facts No. 5 & Ex. 2. TDS claims that this posting "is hardly *sufficient* evidence of offering the service in the State of Washington." TDS Brief ¶ 45 (emphasis added). TDS' view of the "sufficiency" of this evidence is irrelevant. It is the only evidence in the stipulated record and is *prima facie* evidence that the service is offered to the public on a common carrier basis.

<sup>46</sup> Comcast Phone Response to BR 4(b).

<sup>47</sup> TDS Brief ¶ 46.



the service is “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,” which TDS asserts is not a telecommunications service.<sup>48</sup> That will certainly be news to the Commission and the FCC, which have been regulating this same service provided by other carriers as “special access” services for decades. TDS cannot plausibly maintain that such service is not a telecommunications service.

27. Finally, TDS argues that while the Channelized Exchange Service portion of Comcast Phone’s Schools and Libraries Service provides connectivity to the PSTN, Comcast Phone’s description of the service as “providing ‘the functional equivalent of twenty-four voice grade facilities’ . . . must be a euphemism for providing a Voice over Internet Protocol style of service,” which TDS claims would be an information service, not a telecommunications service.<sup>49</sup> TDS’s supposition on how Comcast Phone would provision this service is not evidence and has no basis in fact. It is also irrelevant. Comcast Phone offers Schools and Libraries Service as a telecommunications service in Washington, and TDS has presented absolutely no factual or legal grounds for the Commission to find otherwise.

**C. Comcast Phone’s Exchange Access Service Is a Telecommunications Service.**

28. Comcast Phone explained in its Motion that even the Washington Exchange Carrier Association (“WECA”), of which TDS is a member, agrees that Comcast Phone is a local exchange carrier based on its provision of exchange access service.<sup>50</sup> TDS,

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<sup>48</sup> *Id.* (quoting Stipulated Facts, Ex. 2, Section 9.1.1.A.1); *accord id.* ¶ 47.

<sup>49</sup> *Id.* ¶ 49 (quoting Stipulated Facts, Ex. 2, Section 9.1.3.A.1).

<sup>50</sup> Comcast Phone Brief ¶ 17.

while apparently happy to accept its share of the universal service surcharges Comcast Phone remits to WECA on the switched access service that Comcast Phone provides to IXCs, nevertheless contends that the service is sufficiently “unusual”<sup>51</sup> as to not be “truly a telecommunications service.”<sup>52</sup> Again, TDS makes this claim by distorting the factual record.

29. TDS first observes that Comcast Phone is currently providing only terminating switched access service. TDS’ claim has no bearing on whether the service is a telecommunications service. It is also false. Comcast Phone offers both terminating and originating switched access service, as its access service offering makes plain.<sup>53</sup> TDS also claims that “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).”<sup>54</sup> But this claim once again distorts the facts and industry practice. Comcast Phone is the carrier providing local telecommunications service, not Comcast IP. Comcast Phone thus is the appropriate carrier to provide the switched access service to IXCs seeking to terminate calls to Comcast IP’s VoIP subscribers, just as Qwest, Verizon, Sprint, or any other local exchange carrier provides such service with respect to interexchange traffic to and from the VoIP provider customers that they serve. There is nothing at all abnormal about such an arrangement. Indeed,

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<sup>51</sup> TDS Brief ¶ 52.

<sup>52</sup> *Id.* ¶ 53.

<sup>53</sup> *See, e.g.*, Stipulated Facts Ex. 3 (Access Service Guide) at 50, § 3.1 (“Switched Access Service provides for the ability to originate calls from an end user’s premises to a Customer’s premises, and to terminate calls from a Customer’s premises to an end user’s premises in the LATA where it is provided”); *id.* at 59, § 3.4.4.A.1 (Local Switching rates for Originating Access) and § 3.4.4.A.2 (Local Switching rates for Terminating Access).

<sup>54</sup> TDS Brief ¶ 53.

TDS argument completely overlooks “jointly provided switched access services,” in which one LEC provides tandem switching and the other end-office switching.<sup>55</sup> In such an arrangement, the LEC that provides tandem switching component of the access service is not is not the same as the “entity providing local service.”

30. Finally, TDS incorrectly asserts that the exchange access service Comcast Phone provides is not the service described in its Access Service guide because a diagram allegedly depicts service to Comcast Phone retail customers, not to wholesale customers. The referenced diagram, however, expressly “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.”<sup>56</sup> The diagram thus simply illustrates the elements of the service that Comcast Phone will charge its IXC customers. The diagram is not intended to depict how Comcast Phone routes traffic to and from actual customers. For these purposes, therefore, “End User” in the diagram can be either a Comcast Phone retail customer (of Schools and Libraries Service) or wholesale customer (of LIS) because Comcast Phone bills the IXC for a single “End User Access – CCL” component of Switched Access Service, regardless of whether the “End User” is a retail or wholesale customer.

31. The exchange access service that Comcast Phone provides to IXCs thus is indistinguishable from the access service that any other LEC provides in Washington. The service is a telecommunications service and the fact that Comcast Phone offers

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<sup>55</sup> See, e.g., *In re Level 3 Communications, LLC*, Docket No. UT-063006, Order 12 (June 7, 2007), 2007 WL 1724506, at \*4, n.23 (defining jointly provided switched access).

<sup>56</sup> Stipulated Facts, Ex. 3 (Access Service Guide), Section 3.3 (emphasis added).

and provides such service further supports a finding that Comcast Phone is a telecommunications carrier.

## **II. TDS Misinterprets the Case Law That Definitively Establishes Comcast Phone's Telecommunications Carrier Status**

32. TDS also misconstrues the FCC's *Time Warner Declaratory Ruling*, as well as the numerous other state commission decisions that affirmed the right of telecommunications carriers to obtain Section 251 interconnection in order to provide PSTN interconnection to VoIP providers.<sup>57</sup> TDS claims that *Time Warner* is inapplicable because "[i]t was never a disputed issue ... whether MCI and Sprint were (or were not) [telecommunications carriers] entitled in their own right to Section 251 interconnection."<sup>58</sup>
33. While the FCC did not undertake a factual inquiry into whether Sprint qualified as a telecommunications carrier in *Time Warner*, it did not need to. The disputed issue was whether Sprint was entitled to Section 251 interconnection in order to provide wholesale PSTN interconnection to interconnected VoIP service providers. The answer was an emphatic "yes." Sprint's telecommunications carrier status, on the other hand, was not at issue. The FCC presumably assumed that Sprint was a telecommunications carrier by virtue of its certificated status and its actual offering of telecommunications services, as the FCC went on to squarely hold in *Bright House*.

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<sup>57</sup> "PSTN interconnection" is the suite of services, including telephone exchange, exchange access, numbering resources, and other telecommunications services that that make it possible for interconnected VoIP service providers to serve their customers. The FCC has characterized such arrangements as a "partnership" between the telecommunications carrier and the VoIP provider. *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, ¶¶ 12,17 (2007). Comcast's LIS service is an example. See Stipulated Facts ¶¶ 7-8, 15.

<sup>58</sup> TDS Brief at 14.

34. In any event, even if the FCC did not address the issue in *Time Warner*, at least ten states have. In each, Sprint's or Comcast Phone's PSTN interconnection service offering was found to qualify as common carrier offering *in its own right*. In Illinois, for example, the commission did not find Sprint's telecommunications services offerings in other parts of the state relevant.<sup>59</sup> Indeed, the ILEC seeking to prevent Sprint from interconnecting in that case specifically argued that Sprint's other telecommunications services did *not* entitle it to interconnection "for all purposes."<sup>60</sup> The Illinois commission agreed, explaining that "[t]o determine if [ILECs] have a duty to negotiate interconnection with Sprint, the Commission must first evaluate whether Sprint, *for purposes of its arrangement with MCC*, is a telecommunications carrier as defined by federal law."<sup>61</sup>
35. Likewise, the Texas case that TDS cites makes no mention of Sprint's other telecommunications service offerings.<sup>62</sup> Rather the sole issue was whether Sprint's "PSTN interconnection" service qualified as a common carrier offering for which Sprint was entitled to interconnection.<sup>63</sup> The court affirmed the Public Utility Commission's finding that "Sprint will be operating as a common carrier with respect to its interconnection," not because of the other services it provided.<sup>64</sup>

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<sup>59</sup> *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill CC, July 15, 2005).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> See TDS Brief at 14, ¶ 41 (citing *Consolidated Comm Of Fort Bend Co v Public Utility Commission of Texas*, 497 F. Supp2d 836 (W.D. Tex 2007)).

<sup>63</sup> See *Consolidated Comm.*, 497 F. Supp2d at 841-42.

<sup>64</sup> *Petition of Sprint Comm Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006)).

36. Similarly, the Iowa Utilities Board (“IUB”), in the order just recently affirmed by the Eighth Circuit, acknowledged that “[t]he major issue at this time is whether Sprint’s proposed activities in the RLEC exchanges will support a finding that Sprint will be a ‘common carrier’ in those exchanges.”<sup>65</sup> The IUB’s determination that Sprint was a common carrier was therefore based on Sprint’s PSTN interconnection services *only*.
37. TDS also misconstrues the FCC’s observation in *Time Warner* regarding the right of carriers to exchange information services traffic over interconnection facilities established pursuant to Section 251.<sup>66</sup> In *Time Warner*, the FCC noted that its existing rules authorize a carrier to exchange information service traffic through the same arrangement as it exchanges telecommunications traffic to illustrate that “the fact that a telecommunications carrier is also providing a non-telecommunications service is not dispositive of its rights.”<sup>67</sup> This observation by the FCC is inapplicable here, however, because Comcast Phone does not seek to exchange information service traffic with TDS. Regardless of whether the interconnected VoIP service provided to end-users is considered to be an information service or a telecommunications service, the wholesale PSTN interconnection that Comcast Phone provides to its interconnected VoIP service provider customers is a telecommunications service.<sup>68</sup> Indeed, Comcast Phone pays and receives reciprocal

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<sup>65</sup> *Sprint Comm. Co LP v ACE Comm Group, et al*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405, at 1 (Iowa Utils Bd, Nov 28, 2005).

<sup>66</sup> See TDS Brief ¶¶ 36, 50, 56-57.

<sup>67</sup> *Time Warner Declaratory Ruling* ¶ 14, n.39.

<sup>68</sup> Information services are provided via telecommunications, but they are mutually exclusive statutory categories, as the FCC has long recognized. This is clear from the statute, which defines “information service ... as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

compensation and access charge payments for this traffic.<sup>69</sup> Moreover, as the FCC also explained in *Time Warner*, the “regulatory classification of the [interconnected VoIP] service provided to the ultimate end user *has no bearing*” on the right to provide the *wholesale* telecommunications PSTN interconnection service that interconnected VoIP service providers require in order to serve their end-user customers.<sup>70</sup>

38. Nor is there any truth in TDS’ claimed that Comcast Phone is not seeking interconnection in order to provide its services.<sup>71</sup> Comcast IP’s interconnected VoIP service customers will be making calls to, and receiving calls from, TDS’ customers over the interconnection arrangement between Comcast Phone and TDS. The arrangement is functionally comparable to that approved by the Commission in *Whidbey Telephone*. Thus, Comcast Phone will be providing “telecommunications services through the same arrangement” for which it seeks interconnection.<sup>72</sup> The same is true of Comcast Phone’s Schools and Libraries service, to the extent that customers choose to purchase local and long-distance calling capabilities in addition to network services.<sup>73</sup>

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telecommunications ....” 47 U.S.C. § 153(20). *See also Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, 11 FCC Rcd 21905, ¶ 103 (1997).

<sup>69</sup> Stipulated Facts ¶¶ 2, 6, 14.

<sup>70</sup> *Time Warner Declaratory Ruling*, ¶ 15 (emphasis added); *see also id.* ¶¶ 9, 16.

<sup>71</sup> *See* TDS Brief at 12, ¶ 36.

<sup>72</sup> *See Id.* at 14, ¶ 41.

<sup>73</sup> While the parties will not exchange access (i.e., long-distance) traffic directly, exchange access is not a stand-alone service. End-users that make and receive long-distance calls also make and receive local calls. Comcast Phone, therefore, requires interconnection with TDS

39. TDS similarly misconstrues the FCC's *Bright House* decision in a vain attempt to distinguish it from the circumstances of this case. TDS first attempts to claim that the decision is inapplicable on legal grounds because it was decided under Section 222 not Section 251. TDS, however, ignores the "normal rule of statutory interpretation" under which "identical words used in different parts of the same statute are generally presumed to have the same meaning."<sup>74</sup> TDS offers no explanation for why a carrier should be a telecommunications carrier under one section of the Act but not another. Indeed, the Eighth Circuit relied on the D.C. Circuit's opinion affirming *Bright House* to reach its conclusion that Sprint is a telecommunications carrier in Iowa for purposes of Section 251.<sup>75</sup>
40. TDS also mischaracterizes the facts in *Bright House*. It is simply *not true* that the FCC found in *Bright House* 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."<sup>76</sup> To the contrary, the FCC found that the Comcast Phone's interconnected VoIP service affiliates "rely[] on wholesale competitive local exchange carriers ('Competitive Carriers') to interconnect with incumbent LECs and to provide transmission services, local

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to exchange the locally-rated traffic that is originated by the same end-users that receive long distance calls from interexchange carriers.

<sup>74</sup> *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005); *see also State v. Roggenkamp*, 153 Wn.2d 614, 626, 106 P.3d 196, 202 (2005).

<sup>75</sup> *Iowa Telecomms. Servs.*, 563 F.3d at 749.

<sup>76</sup> TDS Brief ¶ 40.



number portability ('LNP') functions, and other functionalities."<sup>77</sup> The FCC found that the Comcast-affiliated *Competitive Carriers*, not the VoIP providers, self-certified as common carriers, had certificates of public convenience and necessity, and entered into interconnection agreements, and accordingly the *Competitive Carriers*, not the VoIP providers, were common carriers.<sup>78</sup> This case presents the same facts, as TDS has stipulated.<sup>79</sup>

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<sup>77</sup> *Bright House Networks, LLC v. Verizon Cal., Inc.*, 23 F.C.C. Rcd 10704 ¶ 3 (2008).

<sup>78</sup> *Id.* ¶ 39.

<sup>79</sup> Stipulated Facts ¶ 7.

**CONCLUSION**

41. For the foregoing reasons, and the reasons discussed in Comcast Phone's Motion, the Commission should deny the TDS Motion and grant the Comcast Phone Motion.

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