

ATTACHMENT 1

**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

BRIEF OF LEWIS RIVER TELEPHONE
COMPANY d/b/a TDS TELECOM

1. Lewis River Telephone Company, d/b/a TDS Telecom (“TDS”), by and through its attorney, Richard A. Finnigan, Attorney at Law, hereby submits its Brief on the issues in arbitration. This Brief accompanies TDS’ Answer in this docket in compliance with WAC 480-07-630(7)(f)(ii).

2. On October 28, 2008, TDS, in conjunction with the Washington Independent Telecommunications Association, filed a Petition for Declaratory Ruling seeking an answer to the question of whether Comcast Phone of Washington, LLC (“Comcast Phone”) has the ability to demand Section 251 interconnection rights allowing Comcast Phone, or an affiliate, interconnection when offering communications service through a Voice over Internet Protocol (VoIP) technology. On November 3, 2008, Comcast Phone filed a Petition for Arbitration seeking to arbitrate an interconnection agreement under Section 251 and Section 252 with TDS.

3. As part of Comcast Phone’s Petition for Arbitration, Comcast Phone attached the TDS template interconnection agreement advocated by Comcast Phone, the template that TDS had provided to Comcast Phone. Comcast Phone did not identify any issues related to the language of the ICA in its Petition for Arbitration, which it must do under WAC 480-07-630(5)(b) if it has any issues. Thus, it must be assumed that Comcast Phone is willing to sign the agreement that TDS has proposed. This makes the one and only issue in this proceeding the question of whether Comcast has Section 251 rights to negotiate (and arbitrate) an interconnection agreement for services to be potentially rendered by its affiliate. Thus, at issue in this docket is the question of whether Comcast Phone should be treated as a “telecommunications carrier”¹ providing a

¹ 47 U.S.C. § 153(44), which defines a “telecommunications carrier,” in relevant part, as “...any provider of telecommunications services....”

“telecommunications service”² which is subject to regulation for the purported VoIP services that Comcast Phone, or its affiliate, proposes to introduce into TDS’ service territories. This is the same issue pending before the Commission in the Petition for Declaratory Ruling. TDS respectfully submits that the appropriate process to resolve this issue is in the Petition for Declaratory Ruling. In that way, policy can be established that guides all rural incumbent local exchange carriers that receive an interconnection request from Comcast Phone, and, perhaps, other VoIP providers.

4. Attached to Comcast Phone’s Answer to the Petition for Declaratory Ruling is a Declaration from Ms. Beth Choroser on behalf of Comcast Phone. Prior to receipt of that Declaration, TDS was not certain if Comcast Phone was the retail service provider of VoIP services or if the retail service provider was an affiliate of Comcast Phone. Ms. Choroser appears to clarify that an affiliate of Comcast Phone, which she states is Comcast IP Phone II³ (“Comcast II”), is the retail provider of VoIP services to end users.

5. Comcast Phone has allegedly ceased the provision of telecommunications services in Washington and other states.⁴ For example, in an FCC filing related to the Comcast

² 47 U.S.C. § 153(46), which defines a “telecommunications service” 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.” “Telecommunications” is defined as “...the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). In addition, the FCC has determined that telecommunications services “are intended to encompass only telecommunications provided on a common carrier basis.” *Time Warner* at ¶ 12 citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776, 9177-8, ¶ 785 (1997).

³ From the Secretary of State’s records, it appears that the full legal name is Comcast IP Phone II, LLC.

⁴ See, Section 63.71 Application of Comcast Phone of Washington, LLC, WC Docket No. 02242 (filed October 9, 2007) (“Washington 63.71”); see also Section 63.71 Application of Comcast Phone of Illinois, LLC, WC Docket No. 08-41 (filed March 6, 2008) (Illinois); Section 63.71 Application of Comcast Phone of Massachusetts, Inc., et al, WC Docket Nos. 08-45 and 08-52 (filed February 20, 2008 and April 3, 2008, respectively) (Massachusetts, New Hampshire, Ohio and Pennsylvania); Section 63.71 Application of Comcast Phone of Virginia, Inc., WC Docket No. 08-42 (filed February 20, 2008) (Virginia); Section 63.71 Application of Comcast Phone of California, LLC, WC Docket No. 08-35 (filed February 16, 2008) (California); Section 63.71 Application of Comcast Phone of Maryland, LLC, WC Docket No. 07-276 (filed November 19, 2007) (Maryland); Section 63.71 Application of Comcast Phone of Minnesota, LLC, WC Docket No. 07-277 (filed November 20, 2007) (Minnesota); Section 63.71 Application of Comcast Phone of Oregon, LLC, WC Docket No. 07-228 (filed September 28, 2007) (Oregon); Section 63.71

Phone services in Washington, Comcast Phone stated it “plans to discontinue its provision of telecommunications service in Washington on or after November 28, 2007.”⁵ Thus, based on this and other similar filings in at least seventeen other states, it is apparent that Comcast Phone has ceased the provision of what it considers as telecommunications service pursuant to state rules and regulations in states where Comcast Phone has been registered or certified as a telecommunications carrier.

6. Further, it appears that Comcast Phone is asserting the retail VoIP service offered by Comcast II is not a telecommunications service under federal and state law.⁶ As explained below, if Comcast Phone intends to transmit only “non-telecommunications” traffic over interconnection facilities, it is not entitled to Section 251 interconnection.

7. In order to be able to request interconnection for transmission of non-telecommunications traffic, Comcast Phone must first demonstrate it will provide telecommunications service traffic.

8. In *Time Warner*, the FCC concluded that a telecommunications carrier must use its Section 251 interconnection rights to actually provide a telecommunications service.⁷ The FCC quoted 47 C.F.R. § 51.100(b):

A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, *so long as it is offering telecommunications services through the same arrangement as well.* (Emphasis in original.)

Application of Comcast Phone of Colorado, LLC, WC Docket No. 07-231 (filed October 1, 2007) (Colorado); Section 63.71 Application of Comcast Phone of Connecticut, LLC, WC Docket No. 07-200 (filed August 6, 2007) (Connecticut); Section 63.71 Application of Comcast Phone of Georgia, LLC, WC Docket No. 07-187 (filed August 8, 2007) (Georgia); Section 63.71 Application of Comcast Phone of Florida, LLC, WC Docket No. 07-189 (filed August 20, 2007) (Florida); Section 63.71 Application of Comcast Phone of Utah, LLC, WC Docket No. 07-185 (filed August 20, 2007) (Utah); Section 63.71 Application of Comcast Phone of Michigan, WC Docket No. 07-177 (filed August 2, 2007) (Michigan).

⁵ *Washington 63.71* at ¶ 2. See, also, UT-072024, Comcast Phone notice to the Commission of its FCC filing.

⁶ See, Appendix 1, portions of Comcast’s 2007 Annual Report in its 10-K filing with the Securities and Exchange Commission (“SEC”). The entire SEC filing is available for viewing at <http://www.sec.gov/Archives/edgar/data/1166691/000119312508034239/0001193125-08-034239-index.htm>.

⁷ *Time Warner* at ¶ 14 and fn 39.

Thus, the FCC made it clear that a telecommunications carrier must have telecommunications service over the Section 251 facilities that it has obtained if it also wants to have non-telecommunications service over the same facilities.⁸

9. This means that under the terms of 47 C.F.R. § 51.100(b), Comcast Phone may not obtain interconnection exclusively for traffic that is non-telecommunications in nature. It must exchange telecommunications service traffic over the requested trunks and facilities before it can use the same interconnection arrangement to exchange information services traffic.⁹ Comcast Phone must use the requested interconnection arrangement in accordance with Section 51.100(b) of the FCC's rules for the exchange of telecommunications service traffic and not simply as a pretense to justify the provision of non-telecommunications service traffic.¹⁰ Thus, if this Commission determines that Comcast Phone will use the requested interconnection arrangement exclusively for the transmission of VoIP service traffic, which Comcast Phone apparently claims is a non-telecommunications service, then Comcast Phone is not meeting the requirements of section 51.100(b) and this Commission should find that Comcast Phone does not have rights to Section 251 interconnection.

10. Comcast Phone has stated that "we plan to phase out our circuit-switched phone service in 2008...."¹¹ Further, Comcast noted that the uncertainty of the applicability of interconnection rules for interconnected VoIP providers and stated "We have arranged for such interconnection

⁸ *Time Warner* at fn 39.

⁹ See, e.g., *F. Cary Fitch D/B/A/ Fitch Affordable Telecom Petition For Arbitration Against SBC Texas Under § 252 of the Communications Act*, Proposal for Award, Texas PUC Docket No. 29415, p. 20 (Jun. 2005) ("*Fitch Arbitration*"), *aff'd*, *F. Cary Fitch v. Public Utility Commission of Texas*, No. 07-50088 (5th Cir. 2008) ("*Fitch v. TX PUC*"). The Fifth Circuit Court of Appeals described section 51.100(b) on appeal as being "the heart of this dispute" on the issue of the use of interconnection facilities to carry information service traffic. *Fitch v. TX PUC* at p. 7. The Fifth Circuit Decision is attached as Appendix 2.

¹⁰ See, *Fitch Arbitration*, p. 21, stating "47 C.F.R. § 51.100(b), by allowing delivery of information service over interconnection facilities, does not change the purpose of interconnection facilities. That is, a carrier may only obtain interconnection facilities for telecommunications purposes. Otherwise, a carrier could obtain interconnection facilities unnecessary for telecommunications service and instead use them for information service."

¹¹ See, Appendix 1.

rights through our own CLECs and through third party CLECs.”¹² However, in order for this statement to be carried into effect, if Comcast Phone is proposing to offer a wholesale service to Comcast II or another affiliate in an ILEC service area, Comcast Phone must demonstrate that it is a telecommunications carrier providing a telecommunications service.

11. Only if Comcast Phone meets the following two conditions would it qualify as a telecommunications carrier offering a telecommunications service in a wholesale setting: (1) Comcast Phone must meet the FCC’s rule governing access to interconnection facilities codified at 47 C.F.R. § 51.100(b), discussed above, and (2) Comcast Phone must provide its wholesale service on a common carrier basis. If Comcast Phone is not meeting these standards, Comcast Phone is not a telecommunications carrier providing a telecommunications service and TDS is not required to negotiate interconnection terms pursuant to Section 251 of the Act.

12. Comcast Phone must provide its wholesale service on a common carrier basis pursuant to generally available rates, terms and conditions for Comcast Phone to have Section 251 interconnection rights for the wholesale service. A telecommunications carrier is offering its telecommunications services on a common carrier basis¹³ when it “hold[s] oneself out indiscriminately” to the public; “But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”¹⁴ Furthermore, a carrier can be a common carrier with respect to some of its activities and not with respect to others.¹⁵ For example, if Comcast Phone were offering local exchange services on a

¹² *Id.*

¹³ See, e.g., *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“NARUC I”); see, also, *Southwestern Bell Telephone Company v. Federal Communications Commission*, 19 F.3d 1475 (D.C. Cir. 1994) (“*Southwestern Bell Decision*”).

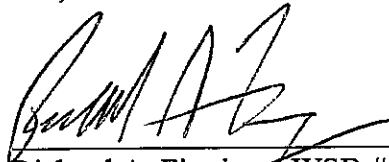
¹⁴ NARUC I at 641.

¹⁵ *Southwestern Bell Decision* at 1481: “[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others,” quoting *National Ass’n of Regulatory Util. Comm’ers v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

common carrier basis in other parts of Washington, it does not follow necessarily that Comcast Phone is offering its wholesale services in, for example, the TDS service areas on a common carrier basis.

13. Thus, if Comcast Phone has not offered its wholesale services to other similarly-situated VoIP or other providers, it is not offering its services on a common carrier basis. This is a factual question. TDS has provided a series of questions which it will ask the Arbitrator to propound to Comcast Phone, if Comcast Phone does not voluntarily comply with its discovery obligations, so this question may be addressed. If Comcast Phone is offering its wholesale services pursuant to a private agreement with its affiliate VoIP provider, then Comcast Phone's wholesale arrangement is a private arrangement. Thus, to the extent that Comcast Phone is providing a wholesale service to its VoIP affiliate, if this Commission determines that Comcast Phone is not providing such services on a common carrier basis, then Comcast Phone does not have rights to Section 251 interconnection.

Respectfully submitted this 1st day of December, 2008.


Richard A. Finnigan, WSB #6443
Attorney for Lewis River Telephone
Company, d/b/a TDS Telecom