

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone for arbitration of an interconnection agreement with Quincy Telephone Company d/b/a TDS Telecom, pursuant to Section 252 of the Federal Communications Act of 1934, as amended, and Sections 120.57(1), 120.80(13), 364.012, 364.15, 364.16, 364.161, and 364.162, F.S., and Rule 28-106.201, F.A.C.

DOCKET NO. 080731-TP  
ORDER NO. PSC-09-0494-PHO-TP  
ISSUED: July 9, 2009

PREHEARING ORDER

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on June 18, 2009, in Tallahassee, Florida, before Commissioner Nancy Argenziano, as Prehearing Officer.

APPEARANCES:

NORMAN H. HORTON, ESQUIRE on behalf of FLOYD R. SELF, ESQUIRE, Messer, Caparello & Self, P.A., P.O. Box 15579, Tallahassee, Florida 32317, and MICHAEL C. SLOAN, ESQUIRE and BRIAN J. HURH, ESQUIRE, Davis Wright Tremaine LLP, 1919 Pennsylvania Avenue, Washington, DC 20006 (APPEARING TELEPHONICALLY)  
On behalf of COMCAST PHONE OF FLORIDA, L.L.C. D/B/A COMCAST DIGITAL PHONE (Comcast).

J. JEFFRY WAHLEN, ESQUIRE and OPAL MCKINNEY-WILLIAMS, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32301  
On behalf of QUINCY TELEPHONE COMPANY, D/B/A TDS TELECOM/QUINCY TELEPHONE (TDS).

TIMISHA J. BROOKS, ESQUIRE and CHARLIE MURPHY, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Florida Public Service Commission (Staff).

MARY ANNE HELTON, Deputy General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
Advisor to the Florida Public Service Commission.

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FPSC-COMMISSION CLERK

## **PREHEARING ORDER**

### **I. CASE BACKGROUND**

On December 29, 2008, Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast") filed a Petition to arbitrate with Quincy Telephone Company d/b/a TDS Telecom ("TDS"), pursuant to Section 252(b) of the Communications Act of 1934, as amended (the "Act") and Sections 120.57(1) , 120.80(13), 364.012, 364.15, 364.16, 364.161, and 364.162, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, an Interconnection Agreement negotiated between the parties.

On January 22, 2009, TDS filed its Response to Comcast's Petition for Arbitration. An issue identification meeting was held on February 11, 2009.

### **II. CONDUCT OF PROCEEDINGS**

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

### **III. JURISDICTION**

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapters 120 and 364, Florida Statutes (F.S.). This hearing will be governed by said Chapters and Chapters 25-22, and 28-106, Florida Administrative Code, as well as any other applicable provisions of law.

### **IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION**

Information for which proprietary confidential business information status is requested pursuant to Section 119.07(1), F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, F.S.. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, F.S., to protect proprietary confidential business information from disclosure outside the proceeding.

Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

#### V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

The parties shall avoid duplicative or repetitious cross-examination. Further, friendly cross-examination will not be allowed. Cross-examination shall be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Any party conducting what appears to be a friendly cross-examination of a witness should be prepared to indicate why that witness's direct testimony is adverse to its interests.

VI. ORDER OF WITNESSES

Each witness whose name is preceded by a plus sign (+) will present direct and rebuttal testimony together.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
+Beth Choroser	Comcast	1
+Douglas D. Meredith	TDS	1

VII. BASIC POSITIONS

**COMCAST:** The Commission should grant Comcast's Petition and require TDS to enter into a Section 251 interconnection agreement with Comcast. Comcast clearly qualifies as a "telecommunications carrier" pursuant to 47 USC § 153(44). The Commission has issued Comcast a Certificate of Public Convenience and Necessity to provide telecommunications services in Florida and Comcast does, in fact, provide such services pursuant to its Florida service guides and price lists. TDS' contention that Comcast is not a telecommunications carrier is simply an attempt to keep Comcast out of TDS' local markets for as long as possible.

**TDS:** Comcast Phone is not eligible for interconnection under federal or state law due to the technology it uses, the nature of the services it provides, how it provisions those services and the intended use of the interconnection which does not meet the requirements of 47 CFR 51.100. These factors show that Comcast Phone is not a common carrier eligible for interconnection with TDS.

**STAFF:** Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

**ISSUE 1:** IS TDS REQUIRED TO OFFER INTERCONNECTION TO COMCAST UNDER SECTION 251 OF THE TELECOMMUNICATIONS ACT OF 1996 AND/OR SECTIONS 364.16, 364.161, AND 364.162, FLORIDA STATUTES?

**POSITIONS**

**COMCAST:** TDS is required to provide Comcast with an interconnection agreement pursuant to Section 251 of the Communications Act of 1934, as amended (“Act”), because Comcast is a telecommunications carrier under to Section 3(44) of the Act. 47 USC § 153(44). Comcast is therefore entitled to interconnection under Section 251. Comcast qualifies as a telecommunications carrier because it has received authority from the Commission to provide telecommunications services in Florida, and because it does, in fact, offer such services to the public. Comcast is authorized to provide local exchange, interexchange and other telecommunications services in Florida pursuant to Certificates 4404 and 7834. The Commission has recognized Comcast’s telecommunications carrier status through its approval of Section 251 interconnection agreements with five other ILECs: AT&T/BellSouth, Embarq, Northeast Florida Telephone Company, Inc., Verizon, and Windstream. Pursuant to these interconnection agreements, Comcast exchanges non-toll, locally rated traffic on a “bill-and-keep basis” pursuant with these and other local exchange carriers in Florida.

Among the services that Comcast offers to the public on a common carrier basis pursuant to its Florida price list is Comcast’s Local Interconnection Service (“LIS”). LIS consists of a suite of wholesale services, including two-way interconnection with the public switched telephone network (“PTSN”) for exchange of local and long-distance traffic (which qualify as local exchange carrier services under 47 U.S.C. § 153(26)), administration of numbering resources, local number portability, operator services, 911 emergency calling services, and directory listing and directory assistance services.

Comcast also offers a Schools and Libraries service to qualifying schools and libraries, which provides both networking services (which have been deemed “special access” services by the FCC) and local and long-distance calling capabilities that qualify as local exchange carrier services under the Act. Comcast also provides exchange access services to approximately 35 interexchange carrier (“IXC”) customers in the state, including TDS, to whom it provides either intrastate or interstate access services and to whom it pays and receives access charges.

In arguing that Comcast is not a telecommunications carrier TDS focuses solely on Comcast’s LIS offering. TDS claims that the offering is too narrow, such that

it is only available to Comcast's affiliates. TDS also claims that the service itself is an information service and that Comcast seeks to change exclusively information services traffic, contrary to applicable FCC regulations. There is no truth to either contention. Numerous federal and state decisions support Comcast's position in this matter. In the FCC's *Time Warner* decision, the FCC affirmed that telecommunications carriers have a right to interconnection regardless of whether the carrier provides wholesale or retail services, and regardless of the nature of the service provided to the ultimate end user. In its *Bright House* decision, the FCC specifically found that identically situated Comcast affiliates are telecommunications carriers. Moreover, regulators and courts in at least ten states have specifically confirmed competitive carriers' right to interconnection in similar circumstances.

TDS' complaints about the terms and conditions of Comcast's offerings are likewise misplaced. The terms about which TDS complains are common ones found in many telecommunications carrier offerings, including TDS'. Moreover, as a regulated telecommunications carrier, prospective customers and other carriers are free to complain to the Commission if they believe that Comcast has violated its statutory obligation to provide services at just, reasonable and nondiscriminatory rates, terms and conditions.

**TDS:** No. Interconnection rights under Section 251 of the Communications Act of 1934, as amended ("Act"), are only available to common carriers providing telecommunications services. Comcast Phone is seeking to be an intermediary for the provision of VoIP service offered by an affiliated entity and does not provide telecommunications services to any retail customers. While the FCC permits intermediaries to offer services to interconnected VoIP providers, Comcast Phone does not satisfy the conditions imposed by the FCC in *Time Warner*, which requires (1) offering telecommunications services in its own right and (2) abiding by 47 CFR § 51.100(b). Comcast Phone has not and cannot show that it (1) meets the definition of a "telecommunications carrier" as defined in Section 3 (49) of the Act or (2) is operating as a "telecommunications company" as defined in Section 364.02(14), Florida Statutes. All of the negotiations between the parties have been for an agreement under federal law; Comcast Phone has not requested or negotiated an interconnection agreement under state law.

**STAFF:** Staff has no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Beth Choroser	Comcast	BAC-1 (Composite)	Comcast Price List Pages; NH Order Granting Authority; NH Order Denying Motion For Rehearing; FPSC CLEC Questionnaire; Michigan Arbitration Decision; BellSouth Tariff Pages
Douglas D. Meredith	TDS	DDM-01	Comcast Phone Discovery Responses (56 pages)
Douglas D. Meredith	TDS	DDM-02	Comcast Phone Application to Terminate Exchange Services in Florida (10 pages)
Douglas D. Meredith	TDS	DDM-03	Comcast Phone Florida Price List Sections 3 & 4 (68 pages)
Douglas D. Meredith	TDS	DDM-04	Comcast Phone Florida Price List Sections 7 & 14 (7 pages)

TDS is amenable to treating Exhibit Nos. DDM-1 through 4 as a composite exhibit. Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

There are no pending motions at this time.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. POST-HEARING PROCEDURES

If no bench decision is made, each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of this Prehearing Order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time.

XIV. RULINGS

Opening statements, if any, shall not exceed five minutes per party.

It is therefore,

ORDERED by Commissioner Nancy Argenziano, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Nancy Argenziano, as Prehearing Officer, this 9th day of July, 2009.



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NANCY ARGENZIANO  
Commissioner and Prehearing Officer

( S E A L )

TJB



NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.