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080731-TP

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Subject: Docket No. 080731-TP
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Docket No. 080731-TP - Petition of 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.

This is being filed on behalf of Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone

Total Number of Pages is 23

Comcast Phone of Florida, LLC's Post-Hearing Brief

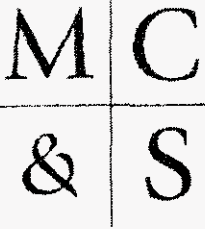
The document is also attached in MS Word format.

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August 20, 2009

ELECTRONIC FILING

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
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Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 080731-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone ("Comcast") is Comcast Phone of Florida, L.L.C. d/b/a Comcast Phone of Florida, LLC's Post-Hearing Brief in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,


Floyd R. Self

FRS/amb

Enclosure

cc: Sam Cullari, Esq.
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of Comcast Phone of Florida, LLC For)
Arbitration of Rates, Terms and Conditions of)
Interconnection with Quincy Telephone Company,) DOCKET NO. 080731
Inc. d/b/a TDS Telecom Pursuant to) Filed: August 20, 2009
Communications Act of 1934, as Amended.)

**COMCAST PHONE OF FLORIDA, LLC
POST-HEARING BRIEF**

Comcast Phone of Florida, LLC ("Comcast") submits this Brief in support of its petition for arbitration of an interconnection agreement between itself and Quincy Telephone Company, Inc. d/b/a TDS Telecom ("TDS"), pursuant to Sections 251-252 of the Communications Act of 1934, as amended (the "Act").

INTRODUCTION AND SUMMARY

Comcast seeks an interconnection agreement so that it can offer competitive telecommunications services in the TDS incumbent local exchange carrier ("ILEC") service territory in Florida. TDS has refused to sign the agreement the parties negotiated, claiming that Comcast is not a "telecommunications carrier" under the Act and, therefore, not entitled to interconnection.

TDS is wrong. Comcast qualifies as a telecommunications carrier because of the authority it has received from the Commission to operate throughout the state of Florida as a telecommunications carrier and because Comcast actually offers and provides telecommunications services. That is all that is required, as the FCC,¹ the United States Court of

¹ *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 (2008) ("*Bright House*").

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Appeals for the District of Columbia Circuit,² the United States Court of Appeals for the Eighth Circuit,³ and state regulatory commissions and reviewing courts in Michigan,⁴ Vermont,⁵ Texas,⁶ New York,⁷ Pennsylvania,⁸ Iowa,⁹ Nebraska,¹⁰ Illinois,¹¹ Indiana,¹² North Carolina,¹³ Ohio¹⁴

² *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009), *aff'g Bright House, supra*.

³ *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743 (8th Cir. 2009), *aff'g Sprint-Iowa Order, infra* note 9.

⁴ *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, LLC d/b/a Comcast Digital Phone*, Order, Case No. U-15725, U-15730 (Mich. PSC, March 5, 2009) (“*Comcast-TDS Michigan Order*”).

⁵ *Petitions of Vermont Telephone Company, Inc. and Comcast Phone of Vermont, LLC d/b/a Comcast Digital Phone, for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws*, Final Order, Docket No. 7469 (Vt. PSB, Feb. 2, 2009) (“*Comcast-VTel Vermont Board Order*”).

⁶ *Consolidated Comm Of Fort Bend Co v Public Utility Commission of Texas*, Memorandum Opinion and Order, 497 F.Supp.2d 836 (W.D. Tex 2007), *aff'g Petition of Sprint Comm Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006).

⁷ *Berkshire Tel Corp v Sprint*, Case No. 05-CV-6502, 2006 WL 3095665 (WDNY, Oct. 30, 2006), *aff'g Order Resolving Arbitration Issues*, Cases 05-C-0170, -0183 (NY PSC, May 24, 2005) and *Order Denying Rehearing*, Cases 05-C-0170, -0183 (NY PSC, Aug 24, 2005).

⁸ *Sprint Comm. Co LP*, Order, App No. 310183F0002AMA, *et al*, 101 PaPUC 895, 2006 WL 3675279 (Pa. PUC, Nov 30, 2006).

⁹ *Sprint Comm. Co LP v ACE Comm Group, et al.*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Utils Bd., Nov 28, 2005) (“*Sprint-Iowa Order*”), *aff'd by Iowa Telecom. Services, Inc. v. Iowa Utils. Bd.*, 545 F.Supp.2d 869 (S.D. Iowa 2008), *aff'd by Iowa Telecom. Services, Inc. v. Iowa Utils. Bd.*, 563 F.3d 743 (8th Cir. 2009).

¹⁰ *Sprint Comm. Co. LP v. Nebraska Pub. Serv. Co.*, Case No. 4:05CV3260, 2007 WL 2682181 (D. Neb., Sept. 7, 2007).

¹¹ *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill Commerce Comm., July 13, 2005).

¹² *Sprint Communications Co. L.P.'s Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Ligonier Telephone Company, Inc.*, Order, Cause No. 43052-INT-01, 2006 WL 2663730 (consolidated with 43053-INT-01 and 43055-INT-01) (Indiana Util. Reg. Comm., Sept. 6, 2006) (“*Sprint-Indiana Order*”).

Washington¹⁵ and, most recently, New Hampshire,¹⁶ have determined either specifically for Comcast affiliates seeking Section 251 interconnection or in analogous circumstances in cases involving other carriers (mainly Sprint).

Comcast's interconnection rights are especially clear in Florida in light of the recent enactment of Senate Bill 2626, which became effective July 1, 2009.¹⁷ This new law clarifies that:

a competitive local exchange telecommunications company *is entitled to interconnection* with a local exchange telecommunications company to transmit and route voice traffic between both the competitive local exchange telecommunications company and the local exchange telecommunications company *regardless of the technology by which the voice traffic is originated by and terminated to an end user.*¹⁸

Consistent with this mandate from the Legislature and federal law, the Commission should reject TDS' anticompetitive attempt to exclude Comcast from its service territory.

BACKGROUND

Comcast is a subsidiary of the multi-system cable broadband operator, Comcast Corporation. Various Comcast Corp. affiliates have built and deployed high-capacity, broadband

¹³ *Sprint Comm. Corp. LP*, Recommended Arbitration Order, Docket No. P-294, Sub 30, 2008 WL 4123656 (North Carolina Util. Comm., Aug. 29, 2008), *aff'd* by Order Ruling on Objections and Requiring the Filing of a Composite Agreement, Docket No. P-294, Sub 30, 2008 WL 5456090 (North Carolina Util. Comm., Dec. 31, 2008).

¹⁴ *The Champaign Tel Co*, Case No. 04-1494-TP-UNC, *et al* (Ohio PUC, Apr. 13, 2005).

¹⁵ *Comcast Phone of Washington, LLC*, Arbitrator's Report and Decision, Order No. 05, Docket UT-083055 (Wash. UTC, July 20, 2009) ("*Comcast-TDS Washington Arbitrator's Report*"); *Sprint Comm. Co. LP*, Order No. 4, Docket UT-073031, 2008 WL 227939 (Wash. UTC, Jan. 24, 2008).

¹⁶ *Comcast Phone of New Hampshire, Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS*, Final Order, Docket No. 08-162 (Aug. 13, 2009) ("*Comcast-TDS New Hampshire Order*").

¹⁷ Chapter No. 2009-226, Laws of Florida.

¹⁸ *Id.*, amending § 364.013, Florida Statutes (emphasis added); *see also* Hearing Transcript ("Tr.") at 178:10-25.

networks in Florida and around the country, which they use to offer a variety of services, including video programming (*i.e.*, cable TV), high-speed Internet access, interconnected voice over Internet protocol (“VoIP”) services, and various telecommunications services. Comcast Phone of Florida, LLC – the Comcast Corp. affiliate that is the petitioner in this proceeding – offers competitive telecommunications services to retail and wholesale customers.¹⁹ TDS is an ILEC under Section 251(h)(1) of the Act.²⁰

Section 251(a)(1) of the Act requires all telecommunications carriers, including ILECs, to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”²¹ Section 251(b) imposes several mutual and reciprocal obligations on all local exchange carriers, including the duty to provide for number portability, dialing parity, and “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”²²

Comcast first requested a Section 251 interconnection agreement with TDS April 2008. During the subsequent negotiations the parties managed to resolve all of the technical issues related to interconnection, including all the terms and conditions of the interconnection agreement itself. In October 2008, however, TDS announced that it would no longer acknowledge Comcast’s telecommunications carrier status and refused to execute the agreement the parties had negotiated.²³

¹⁹ Tr. 24-25 (Direct Testimony of Beth Choroser (“Choroser Dir.”) at 3:17-4:4).

²⁰ See 47 U.S.C. § 251(h)(1).

²¹ *Id.* § 251(a)(1).

²² *Id.* § 251(b)(2), (3) and (5), respectively.

²³ Tr. 25 (4:10-15).

Comcast filed its Petition for Arbitration on December 29, 2008.²⁴ TDS filed an Answer and propounded data requests, to which Comcast objected and responded as appropriate. The sole disputed issue in this arbitration is whether Comcast is a telecommunications carrier entitled to interconnection and related rights under Sections 251(a) and (b) of the Act. This arbitration is governed by the substantive and procedural requirements set forth in the Act and applicable Federal Communications Commission (“FCC”) and this Commission’s implementation authority.²⁵

ARGUMENT

I. Comcast Is Entitled To Interconnection Because It Is Authorized To Provide, And Does Offer And Provide, Telecommunications Services.

The Act defines “telecommunications carrier” broadly to include “any” provider that furnishes “telecommunications” – *i.e.*, the transport of information as directed by the customer – “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²⁶ This definition has been held to be generally consistent with the traditional common law definition of “common carrier.”²⁷ In the well-known *NARUC* cases, the DC Circuit established the following test for evaluating whether a carrier qualifies as a common carrier: the carrier must (1) allow customers to transmit information of their choosing without change in the format or content of the message as sent and received, and

²⁴ Tr. 25 (4:15-16).

²⁵ 47 U.S.C. § 252(c)(1); § 120.80(13)(d) and § 364.012, Florida Statutes.

²⁶ See 47 U.S.C. § 153(43) (defining “telecommunications”), *id.* § 153(44) (defining “telecommunications carrier”), *id.* § 153(46) (defining “telecommunications service”).

²⁷ See *Virgin Islands Telephone v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

(2) offer its services “indifferently” to all potential users.²⁸ Most states, including Florida, also require the prospective carrier to obtain authorization from the appropriate regulatory authority.²⁹

Comcast satisfies each of these requirements. First, Comcast has authority to operate as a local exchange carrier (“LEC”) and interexchange carrier in Florida.³⁰ Second, Comcast has three separate telecommunications service offerings, each of which it offers to the public pursuant to price lists and service guides filed with the Commission and posted on its website:

- Local Interconnection Service (“LIS”) offering to providers of interconnected voice over Internet protocol (“VoIP”) services. LIS provides a local and long-distance calling capability, as well as access to telephone numbers, emergency calling (“E-911”) capabilities, and related services that interconnected VoIP service providers need to serve their customers.³¹ (This array of services is referred to herein as “PSTN interconnection.”)
- Schools and Libraries Network Service, offered to qualified school and library customers. This service includes both point-to-point networking as well as local and long-distance calling services.³²
- Exchange access service, which Comcast provides to requesting interexchange carriers (“IXCs”) who wish to route toll calls to and from Comcast customers.³³

²⁸ *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC*”).

²⁹ See, e.g., § 364.33, Florida Statutes (requiring a certificate of necessity in order to provide “telecommunications services to the public”).

³⁰ Comcast is authorized to provide local exchange telecommunications services pursuant to authority granted by the Commission in Certificate No. 4404 and interexchange telecommunications services pursuant to Certificate No. 7834. Tr. 24-25 (Choroser Dir. at 3:19-4:1); Tr. 60:21-24.

³¹ Tr. 27-28 (Choroser Dir. at 6:13-7:3. A copy of the LIS price list (“LIS Price List”) was admitted as Exhibit 2 (Composite Rebuttal Exhibit BAC-1, Exhibit A), and is available for inspection on Comcast’s web site at: <http://www.comcast.com/MediaLibrary/1/1/About/PhoneTermsOfService/PDF/DigitalPhone/StateTariffs/Florida/FL%20Exchange%20Section%207.pdf>).

³² Tr. 27 (Choroser Dir. at 6:4-10. A copy of the Schools and Libraries Price List (“S&L Price List”) was admitted as Exhibit 2 (Composite Rebuttal Exhibit BAC-1, Exhibit A), and is available for inspection at: <http://www.comcast.com/MediaLibrary/1/1/About/PhoneTermsOfService/PDF/DigitalPhone/StateTariffs/Florida/FL%20Exchange%20Section%206.pdf>).

Third, these services all involve the transmission of customer information “without change in the form or content of the information as sent and received,”³⁴ and therefore qualify as telecommunications services under the Act. As the LIS Price List explains, LIS “provides a connection between a Customer’s facilities and the public switched telephone network.”³⁵ And under LIS, Comcast will only “accept and deliver traffic in time division multiplex (‘TDM’) protocol.”³⁶ Thus, LIS is clearly a telecommunications service, as it provides for the routing of customers’ telecommunications traffic to a point of the customers’ choosing in the same format in which it is “sent and received.”

LIS qualifies Comcast as a local exchange carrier (“LEC”), as well. A LEC is a special class of telecommunications carrier that offers either “exchange access or telephone exchange services.”³⁷ “Telephone exchange service” is the ability to make and receive local calls,³⁸ which Comcast does through its *five* Commission-approved interconnection agreements with ILECs in Florida. As Ms. Choroser testified, Comcast currently exchanges significant volumes of traffic with carriers in Florida pursuant to these agreements.³⁹ Comcast also offers local calling capabilities to its Schools and Libraries Service customers.⁴⁰

³³ Tr. 28 (Choroser Dir. at 7:12-14. A copy of the Access Service Guide (“Access Guide”) was admitted as Exhibit 2 (Composite Rebuttal Exhibit BAC-1, Exhibit A), and is available for inspection at: <http://www.comcast.com/corporate/about/phonetermservice/circuit-switched/statetariffs/florida.html>).

³⁴ 47 U.S.C. § 153(43) (defining “telecommunications”).

³⁵ LIS Price List § 7.1.3.A.

³⁶ *Id.*, § 7.1.3.B.

³⁷ *See* 47 U.S.C. § 153(26) (defining “local exchange carrier”).

³⁸ *See* 47 U.S.C. § 153(47) (defining “telephone exchange service”).

³⁹ Tr. 25; 29 (Choroser Dir. at 4:1-4; 8:2-4; Tr. 40 (Rebuttal Testimony of Beth Choroser (“Choroser Rebuttal”) at 6:11-17 (as corrected by Tr. 21:3-8)).

⁴⁰ S&L Price List § 6.1.3.A.1.

Both LIS and Schools and Libraries utilize Comcast's "exchange access" services, as well. Under the Act, "exchange access" is the offering of access to "telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."⁴¹ Comcast performs this service, pursuant to its publicly posted Access Service Guide, when it receives an incoming toll call from an IXC and then routes it to its customers for delivery to the end user, or vice-a-versa. Comcast averages over 35 IXC customers of its exchange access service in Florida per month, as its Carrier Access Billing ("CABs") records reflect.⁴²

All of the aforementioned services (LIS, Schools and Libraries, and exchange access) are offered to the public on a common carrier basis. Comcast's price lists and service guides are the dispositive evidence of those offerings, as is Ms. Choroser's un rebutted testimony that Comcast will provide its services to any qualified customer that may request them.⁴³ Comcast is thus a telecommunications carrier entitled to interconnection with TDS under the Act.

II. Policy Considerations Support Comcast's Interconnection Request

Under the plain requirements of the Act, Comcast qualifies as a telecommunications carrier entitled to interconnection under Sections 251(a)-(b). Policy considerations also favor Comcast's interconnection request. As noted earlier, Florida has declared that Comcast "is entitled" to interconnection with TDS, regardless of the technology used to serve the ultimate end-user.⁴⁴ In addition, the Legislature has generally found "that the competitive provision of

⁴¹ 47 U.S.C. § 153(16).

⁴² Tr. 28 (Choroser Dir. at 7:16-18; Tr. 78:12-14).

⁴³ Tr. 37 (Choroser Rebuttal at 3:4-6); Tr. 82:2-6. *See also Consolidated Comm*, 497 F. Supp.2d at 845 ("[T]ariff provides additional evidence that Sprint holds itself out to serve all potential users indifferently"); *Comcast-TDS Washington Arbitrator's Report*, *supra* note 15 at 30 ¶ 92 ("A carrier may meet the [common carrier] standard by publicly filing tariffs or maintaining offers of service on a website, i.e., holding itself out to provide service").

⁴⁴ *See supra* note 18 (citing § 364.013, Florida Statutes).

telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.”⁴⁵ The Commission is therefore charged with “ensur[ing] the availability of the widest possible range of consumer choice in the provision of all telecommunications services,” “promot[ing] competition by encouraging innovation and investment in telecommunications markets,” and “preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.”⁴⁶

Permitting Comcast to interconnect will further the achievement of these policy objectives by, among other things, allowing Comcast to serve its interconnected VoIP service provider customers. Interconnected VoIP represent the only significant facilities-based, wireline competition in the residential marketplace today, and the consumer benefits of this competition are undeniable. The economic consulting firm MiCRA estimates that competitive facilities-based VoIP is expected to save Florida consumers over \$7.3 billion from 2008 to 2012.⁴⁷ Comcast’s presence in TDS’ service territory as, in part, a wholesale provider enabling interconnected VoIP services is essential for consumers to receive these benefits.

⁴⁵ § 364.01(3), Florida Statutes.

⁴⁶ *Id.* §§ 364.01(4)(b), (d), (g).

⁴⁷ See *Consumer Benefits from Cable-Telco Competition* (Microeconomic Consulting and Research Associates, Inc. November 2007) at 29, available at http://micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf. A substantial portion of these savings result from the lower prices and aggressive promotions offered by the incumbent carriers in response to competitive pressure from VoIP services. Nationally, VoIP-based competition is expected to directly and indirectly benefit consumers and small businesses by more than \$111 billion during this period. *Id.*

The FCC has specifically recognized the important role that interconnected VoIP plays in spurring demand for broadband networks and promoting competition.⁴⁸ Florida policy is similar.⁴⁹ The FCC has also recognized that interconnected VoIP services cannot be provided without the services of wholesale “PSTN interconnection services” that telecommunications carriers like Comcast provide. Interconnected VoIP service providers require interconnection “partners” like Comcast because they cannot obtain interconnection, access to numbering resources, and other rights crucial to offering services, on their own.⁵⁰

This is especially true in Florida and other states that have affirmatively deregulated VoIP services and underscores the hollowness of TDS’ “offer” to interconnect with Comcast’s VoIP affiliate (“Comcast IP”) rather than with Comcast directly.⁵¹ While the Florida Legislature has deregulated retail VoIP offerings, it has not deregulated the wholesale telecommunications service inputs that Comcast seeks here.

Finally, to the extent that the Commission has any doubt about Comcast’s telecommunications carrier status and its related interconnection rights, it should give the benefit of that doubt to Comcast, the new entrant seeking to bring the benefits of competition and lower cost, innovative communications services to consumers in TDS’ service territory. The “holding

⁴⁸ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶ 13 (2007) (“*Time Warner*”) (finding that CLEC common carrier rights are “a critical component for the growth of facilities-based local competition”).

⁴⁹ The Legislature has found that “the provision of voice-over-Internet protocol (VoIP) free of unnecessary regulation, regardless of the provider, is in the public interest.” F.S. § 364.01(3).

⁵⁰ See, e.g., *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 (2007).

⁵¹ VoIP is specifically exempted from the Commission’s jurisdiction. See § 364.011(3), Florida Statutes.

out indifferently” standard for defining a common carrier is, by design, not hard to satisfy. Many of the rights (and corresponding duties) of the Communications Act that make local competition possible are available only to telecommunications carriers. A narrow reading would impair competition in violation of the public policy that animates the Act.⁵²

III. TDS’ Arguments to the Contrary Are Unpersuasive

The affirmative case for Comcast’s interconnection rights is presented above and demonstrates Comcast’s right to interconnect. The discussion that follows rebuts the arguments that we anticipate TDS will make in its post-hearing brief.

A. LIS Is A Telecommunications Service Offering

As noted, LIS provides “PSTN interconnection” to retail interconnected VoIP service providers that have their own last-mile facilities. TDS argues that this focused customer-base undermines the common carrier status of the LIS offering, claiming that LIS “will likely be used only to serve Comcast IP’s retail service and not be used by any competing retail VoIP service provider.”⁵³

There is no legal or factual basis for this argument. While it is true that LIS is only available to a particular class of users, the law is clear that Comcast is not required to offer its services to the entire public, nor must it secure a certain number of customers to be a common

⁵² We expect that TDS will argue that Comcast’s discontinuance of its retail “CDP” service offering in 2008 somehow bears on its current status as a common carrier in Florida, but there is no basis for such a claim. As Ms. Choroser repeatedly explained, the FCC filing related to the discontinuance of only certain telecommunications services in Florida. Comcast did not surrender its certificates and continues to provide other telecommunications services – including the three telecommunications services that Comcast discussed above. *See Comcast-TDS Michigan Order supra* note 4, at 4 (recognizing arbitrator’s finding that “TDS had read too much into Comcast Phone’s notice of discontinuance” and that “Comcast Phone’s current license to provide basic local exchange service is dispositive of its right to negotiate or arbitrate an interconnection agreement”).

⁵³ *Id.* at 21:24-22:2.

carrier. To the contrary, all that is required is that Comcast serve “indiscriminately . . . the clientele [it is] . . . suited to serve.”⁵⁴ As the courts have explained, “[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,”⁵⁵ even if that fraction is primarily the carrier’s affiliate.⁵⁶

Nor is there any merit to TDS’ claim that the customer eligibility requirements of the LIS offering are insufficiently clear. Sections 7.1.1 - 4 of LIS identify with great specificity the qualifications a prospective customer must have in order to be eligible for LIS and only such customers are capable of making “bona fide” requests for the service. *Bona fide* is a common contract term that requires no separate definition. Likewise, the reference to “applicable law” in the LIS Price List is not confusing. The draft interconnection agreement contains a nearly identical term on numerous occasions.⁵⁷

Nor is there any truth to Mr. Meredith’s claim that the early termination and related provisions in LIS “effectively serve as a poison pill for any unaffiliated third party VoIP provider.”⁵⁸ Indeed TDS mischaracterizes the early termination provision, which states only that

⁵⁴ *Consolidated Comms.*, 497 F.Supp.2d at 845 (quotation omitted).

⁵⁵ *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). See also *Iowa Telecomms. Servs.*, 563 F.3d at 750 n.6 (“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.”) (citing *Verizon Cal.*, 555 F.3d at 276).

⁵⁶ See *Bright House*, 23 FCC Rcd. ¶ 40, n.95 (“Given the nature of [the Comcast and Bright House CLEC] services, it could well be that there are only a few potential customers other than their affiliates.”).

⁵⁷ See, e.g., Comcast Exh. 4 (“Proposed Interconnection Agreement”), General Terms and Conditions, §§ 8.3.7, 8.4.2, 8.6.1, 8.6.2, 10.1, 12.1, 14.2, 15.1.3.1; see also *id.* § 2.2.6 (defining “Applicable Law” in general terms).

⁵⁸ Tr. 112 (Meredith Dir. at 20:10-12).

Comcast *may* assess such termination liability if necessary for Comcast to fully recover costs associated with providing LIS.⁵⁹ Such charges are not required in all circumstances. But even if they were, the FCC has found that early termination clauses such as that found in LIS constitute an “accepted commercial practice, both inside and outside of the telecommunications industry.”⁶⁰ Thus, it should not be surprising that many carriers in Florida, including both AT&T and even TDS, have early termination charge provisions similar to that found in LIS in their Commission-filed service offerings.⁶¹

TDS’ complaints about the Individual Case Basis (“ICB”) nature of the LIS offering are equally unfounded.⁶² It is well accepted that “common carriers do not have to offer standardized contracts.”⁶³ 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*.”⁶⁴ Services offered on an ICB basis, with material terms left open for negotiations, are not only well accepted, they are the *norm* for offerings such as LIS.⁶⁵ Indeed, a

⁵⁹ Tr. 48 (Choroser Rebuttal at 14:16-21); *see also* LIS Price List, § 7.1.5.B (“In the event of early termination of service by the Customer before the expiration of the Term, the Company *may* assess a termination 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).

⁶⁰ *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).

⁶¹ Tr. 48 (Choroser Rebuttal at 14:1-15 (citing to *Bell South General Subscriber Tariff*, admitted as Exhibit 2 (Composite Rebuttal Exhibit BAC-1, Exhibit F)).

⁶² Tr. 113-114 (Meredith Dir. at 21:8-22:10).

⁶³ *Sprint-Iowa Order*, *supra* note 9, at 14-15.

⁶⁴ *MCI Telecomms. Corp*, 917 F.2d at 34 (emphasis added).

⁶⁵ *See* Choroser Rebuttal at 15:4-17; Tr. 84:16-22 and 85:4-13.

standard price for LIS would not be possible. The LIS price list allows customers to choose from a menu of features, including emergency calling (“911”) capabilities, telecommunications relay services (711), Toll, and Directory Listings.⁶⁶ The price of the service will therefore depend on, among other things, whether the customer purchases all of these features from Comcast, self-provisions, or obtains them from a third-party, as well as other costs that will vary on a case-by-case, customer-by-customer basis.

Every state commission and reviewing court that we are familiar with that has considered a claim that ICB pricing prevents a PSTN interconnection service offering (like LIS) from qualifying as common carriage has rejected it. For example, as the Iowa Utility Board explained in an order that the *Eighth Circuit recently affirmed*:

[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.⁶⁷

The *Indiana commission* has ruled likewise. In its determination ruling that Sprint’s Local Interconnection Service offering in that state was a telecommunications service despite an ICB contracting requirement, the commission explained that,

[W]e find that the common carrier (telecommunication carrier) requirement to indiscriminately offer service status turns on the presence of simple indiscriminate offering of service, rather than on the offering of services of identical terms and conditions. Different retail carriers have different characteristics that can reasonably result in differing prices, terms, and conditions under which a carrier, like Sprint, offers its wholesale services. Therefore, it is conceivable that the

⁶⁶ See LIS Price List § 6.1.3.D.

⁶⁷ *Sprint-Iowa Order*, *supra* note 9.

terms and conditions offered by Sprint to its varied wholesale services customers could very well differ.⁶⁸

In sum, there is simply no basis for any of Mr. Meredith's criticisms of LIS. That is not surprising, as he has never been the principal negotiator for a commercial contract of any kind, let alone one between a telecommunications carrier and an interconnected VoIP service provider.⁶⁹ Indeed, he admitted that he has never even seen such a contract, except for the one between Comcast and its interconnected VoIP service provider affiliate (which contains terms that closely track the LIS price list). Mr. Meredith's claims are thus self-serving assertions without any basis in personal experience or fact.⁷⁰

B. The "Type" Of Traffic Originated By Comcast's Customers Has No Bearing on Comcast's Interconnection Rights Under Section 251

According to TDS, even if Comcast were considered a "common carrier," it would not qualify for interconnection because Comcast's LIS customers are interconnected VoIP service providers.⁷¹ This argument, however, is directly contrary to the FCC's holding in *Time Warner*, which provides that "[w]holesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers (LECs) when providing services to other service providers, including voice over Internet Protocol (VoIP) service providers pursuant to sections 251(a) and (b) . . ."⁷² To the extent that any questions about the order's scope and intent remained, the FCC clarified its holding as follows:

⁶⁸ *Sprint-Indiana Order*, *supra* note 12, slip op. at 10.

⁶⁹ Tr. 171:1-6.

⁷⁰ Comcast has not moved to strike Mr. Meredith's testimony, but it is clear that his lack of experience and knowledge on these contract issues mean that his testimony is not particularly "helpful" to the Commission's investigation in this case and should be given little if any weight. See *Marsh v. Vallyou*, 977 So.2d 543, 557 (Fla. 2007).

⁷¹ Tr. 121 (Meredith Dir. at 29:10-11).

⁷² *Time Warner*, ¶ 1 (emphasis added).

The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251. As such, we clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service *is irrelevant* to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b).⁷³

This holding is based in large part on the statutory definition of "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*."⁷⁴ As the FCC and the Supreme Court have recognized, "all information-service providers . . . use 'telecommunications' to provide their service[s] . . ."⁷⁵ For example, dial-up Internet access – indisputably an information service – includes a separate telecommunications service component, as the FCC has repeatedly recognized, including most recently just last November when it reaffirmed that carriers are entitled to reciprocal compensation for terminating dial-up Internet Service Provider-bound calls.⁷⁶ While the Internet access service provided to the end-user is an information service, the intermediate point-to-point transmission of those calls are telecommunications services.⁷⁷ The transmission service that Comcast Phone provides to its interconnected VoIP service provider affiliates and offers to other VoIP providers is a telecommunications service for the same reason. Comcast's regulatory classification is not

⁷³ *Id.* ¶ 15 (emphasis added).

⁷⁴ 47 U.S.C. § 153(20).

⁷⁵ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005).

⁷⁶ *High Cost Universal Service Reform, et al.*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking ¶ 13 (FCC 08-262 rel. Nov. 5, 2008).

⁷⁷ Indeed, the interconnection agreement the parties have negotiated but not yet executed specifically provides for the treatment of IP-originated traffic as ordinary telecommunications traffic. See *Proposed Interconnection Agreement, Appendix Reciprocal Compensation* § 2.1.2.

affected by the classification of the service provided by a different company to retail end-user customers.

Thus, TDS's reliance on a footnote from *Time Warner*, which cites FCC Rule 51.100(b),⁷⁸ is misplaced. That rule provides that telecommunications carriers may use interconnection arrangements with ILECs to also provide information services so long as they also provide telecommunications services through the same arrangement. Comcast will not provide any information services through its interconnection with TDS. Rule 51.100(b) is, therefore, irrelevant.⁷⁹

C. Decisions From the FCC, Other State Commissions and Reviewing Courts, Provide Persuasive Authority in Support of Comcast's Petition

While the Commission will make its decision based solely on the record and arguments presented in *this* proceeding, the rulings from other regulatory authorities and reviewing courts around the country cited above are persuasive authority in favor of Comcast's position. In particular, Comcast asks the Commission to take note of the state commission decisions in Michigan and Vermont, the *Arbitrator's Report* in Washington, the recent order from New Hampshire, and the FCC's *Bright House* ruling, which was subsequently affirmed on appeal by the D.C. Circuit. These cases recognized similarly-situated Comcast affiliates' telecommunications carrier status and, in the Michigan, Washington and New Hampshire cases, specifically affirmed Comcast's related interconnection rights with TDS.

We begin with *Bright House*. That case arose from a Comcast affiliate's complaint that Verizon was violating the customer proprietary network information ("CPNI") privacy protections of Section 222 of the Act. Among Verizon's defenses was the procedural claim that

⁷⁸ Tr. 124 (Meredith Dir. at 32:17-22).

⁷⁹ Tr. 56:21-22; 159:11-17.

Comcast (and a co-complainant, Bright House Networks) were not entitled to the protection of the CPNI rules in the first place because they were not telecommunications carriers – which, of course, is very the same argument that TDS makes here.

The FCC rejected it. The FCC found particularly relevant that Comcast (and Bright House) “self-certify that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally.”⁸⁰ As the FCC explained,

We give significant weight to these attestations because being deemed a “common carrier” (i.e., being deemed to be providing “telecommunications services”) confers substantial responsibilities as well as privileges, and we do not believe these entities would make such statements lightly. Further supporting our conclusion are the public steps the Comcast and Bright House Competitive Carriers have taken, consistent with their undertaking to serve the public indifferently. Specifically, each of the Comcast and Bright House Competitive Carriers has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates. Moreover, each of the Comcast and Bright House Competitive Carriers has entered into a publicly-available interconnection agreement with Verizon, filed with and approved by the relevant state commission pursuant to sections 251 and 252 of the Act. These facts, in combination, establish a prima facie case that the Comcast and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of section 222(b).⁸¹

The D.C. Circuit affirmed. Among other things, the Court rejected Verizon’s argument that the lack of multiple customers for LIS negated Comcast’s common carrier status. There was “not any evidence,” the court explained that Comcast “would turn away” a prospective customer.⁸² Accordingly, there were no grounds to question Comcast’s status as a common carrier. The same is true here.

On the heels of *Bright House* and *Verizon Calif.*, Comcast affiliates in Vermont and Michigan obtained similarly favorable rulings in interconnection arbitrations in those states. In

⁸⁰ *Bright House*, *supra* note 1, ¶ 39 (internal citation omitted) (internal punctuation altered).

⁸¹ *Id.*

⁸² *Verizon Calif. Inc.*, 555 F.3d at 275.

Michigan, a TDS affiliate argued that Comcast Phone of Michigan, LLC was not a telecommunications carrier. The Michigan commission ruled otherwise, and found that the local calling capabilities of the Schools and Libraries and the LIS offerings qualified as local exchange carrier services. It also dismissed TDS' argument that Comcast's lack of multiple customers for some of its services disqualified it from common carrier status. "Whether [Comcast] currently provides regulated basic local exchange service is not dispositive of its right to negotiate an interconnection agreement with another telecommunications provider."⁸³ In other words, the Michigan commission found that if a carrier was required to *already have* traffic before it could be entitled to an interconnection agreement, then no interconnection agreements would ever be granted to new entrants. The Michigan Commission thus ruled that all that carriers really need is operating authority from the Commission in order to obtain a Section 251 interconnection agreements.⁸⁴

The Vermont Public Utility Board also rejected a Vermont ILEC's challenge to a Comcast Phone affiliate's common carrier status. The Board explained that,

In view of the *Bright House* decision, Comcast's offering of the LIS service to all eligible customers (not merely its affiliates), and the obligations of Comcast under Vermont law not to engage in unjust discrimination with respect to its offering of wholesale local interconnection services, it is difficult not to conclude that Comcast is a telecommunications carrier for purposes of Section 251 of the Act.⁸⁵

Like the Michigan Commission, the Vermont Board focused on the Comcast affiliate's status as a licensed carrier in the state and the rights and responsibilities associated with that status. That is what the FCC meant when it observed that common carriers "self certify."

⁸³ *Comcast-TDS Michigan Order*, *supra* note 4, at 3.

⁸⁴ *Id.* at 5 ("Comcast's current license to provide basic local exchange service is dispositive of its right to negotiate or arbitrate an interconnection agreement.").

⁸⁵ *Comcast-VTel Vermont Board Order*, *supra* note 5, at 18 (internal citation omitted).

Carriers may choose to be private carriers, but once they choose to offer their services to the public for a fee – *i.e.*, to become telecommunications carriers – they take on “substantial responsibilities” that cannot be taken “lightly.” Similarly, the Washington ALJ’s *Arbitrator’s Report* concluded that Comcast was a telecommunications carrier entitled to interconnection “as a matter of law,” and in so doing rejected every one of TDS’ arguments to the contrary.⁸⁶

The New Hampshire decision is the most recent blow to TDS’ position. Faced with the same circumstances as here, the New Hampshire Public Utilities Commission concluded that, “[s]o long as Comcast Phone continues to be a telecommunications carrier, offering telecommunications on a common carrier basis, it has a right to interconnection with TDS.”⁸⁷

In addition to these Comcast interconnection cases, ten other state regulatory commissions have affirmed CLEC interconnection rights where the analysis focused primarily, and in some cases exclusively, on the CLEC’s right to serve interconnected VoIP service providers.⁸⁸ Such rulings are in keeping with the FCC’s determination that CLECs like Comcast that provide wholesale telecommunications services to interconnected VoIP service providers are “entitled to interconnect and exchange traffic with [ILECs] when providing services . . . pursuant to sections 251(a) and (b) of the [Act].”⁸⁹

⁸⁶ See *Comcast-TDS Washington Arbitrator’s Report*, *supra* note 15 at 1, ¶ 1.

⁸⁷ *Comcast-TDS New Hampshire Order*, *supra* note 16, slip op. at 20. The New Hampshire commission, in fact, did not even deem it necessary to consider Comcast Phone’s LIS service, as it found that Comcast Phone’s Schools and Libraries and exchange access services were being offered indiscriminately and, based on those services alone, Comcast Phone was entitled to interconnection. *Id.* slip op. at 17.

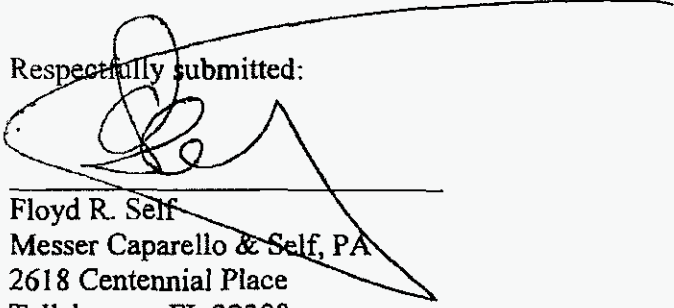
⁸⁸ See *supra* notes 6-15 and accompanying text.

⁸⁹ *Time Warner*, ¶ 1.

CONCLUSION

For the foregoing reasons, the Commission should grant Comcast's Petition and order TDS to execute the interconnection agreement the parties have negotiated, reflecting Comcast's status as a telecommunications carrier entitled to interconnection.

Respectfully submitted:



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ATTORNEYS FOR COMCAST OF
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Dated: August 20, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 20th day of August, 2009.

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