STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 08-162

Comcast Phone of New Hampshire

Petition for Arbitration of Rates, Terms and Conditions of Interconnection with Kearsarge Telephone Company, Merrimack County Telephone and Wilton Telephone Company

Brief of Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc.

NOW COME Kearsarge Telephone Company ("KTC"), Merrimack County Telephone Company ("MCT") and Wilton Telephone Company, Inc. ("WTC") (collectively, "the TDS Companies"), and hereby submit the following Brief in connection with the Petition for Arbitration the ("Petition") filed by Comcast Phone of New Hampshire, LLC ("Comcast Phone"):

I. INTRODUCTION

In a letter dated April 21, 2008, Comcast Phone requested interconnection negotiations with the TDS Companies pursuant to Sections 251(a) and (b) of the Act.[1] The TDS Companies and Comcast Phone agreed to November 17, 2008, and December 12, 2008, being the 135th and 160th day (respectively) for purposes of the negotiation time frames set forth within the Act.[2]

On December 12, 2008, Comcast Phone filed a Petition for Arbitration of what it characterizes as the one unresolved issue between the parties: whether Comcast Phone is a "telecommunications carrier" under the Act and therefore eligible to interconnect and interact

[1] *See* Petition, Exhibit A.

[2] *See id.*, Exhibit B.

with the TDS Companies in accordance with Sections 251(a) and (b) of the Act. Section 3.1 of the draft Interconnection Agreement contains the disputed language at issue.[3] Comcast Phone is of the position that it is a telecommunications carrier, the TDS Companies are of the position that it is not. The TDS Companies timely filed their Answer ("Answer") on January 9, 2009. The Parties jointly filed Stipulated Facts ("*Stipulation*") on April 16, 2009.

In its Petition, Comcast Phone purports to be perplexed by the TDS Companies' position that Comcast Phone is not a telecommunications carrier in this situation,[4] and implies that the TDS Companies raised the issue late in the negotiations as a delaying tactic.[5] This insinuation does not stand up to scrutiny, however. The TDS Companies inquired quite early in the negotiations as to the exact nature of Comcast Phone's operations. In correspondence dated June 18, 2008, the TDS Companies made a number of requests for clarification of how Comcast Phone sought to use the interconnection agreement with the TDS Companies.[6] Rather than engage with the TDS Companies, however, Comcast Phone deflected these questions and simply declared its right to interconnect.[7] Had Comcast Phone been forthright in its response, the essential issue would have been identified early on, and might have been resolved through negotiation, rather than arbitration.

Telecommunications carriers are obligated to negotiate in good faith, and so the TDS Companies do not consider it their duty or obligation to conduct an external investigation of a

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[3] *See id.* at 7, and Exhibit C thereto, p. 14.

[4] *Id.* at 7.

[5] *Id.* at 6.

[6] Answer, Exhibit B (Letter from Ms. Linda Lowrance to Mr. Robert Munoz, June 18, 2008).

[7] *Id.*, Exhibit C (Letter from Mr. Munoz to Ms. Linda Lowrance, June 24, 2008). Mr. Munoz's letter was not responsive to the issues and simply asserted in relevant part that Comcast Phone "...is...entitled to the rights of a telecommunications carrier."

requesting carrier's representations as to its bona fides. Consequently, if there is any impasse, it results from Comcast Phone's lack of information concerning its services and the mechanisms by which those services are to be provided.

Rather than address the central issue head-on, Comcast Phone's Petition continues with a tangential approach. After first disparaging the TDS Companies' motives,[8] the Petition proceeds to compare Comcast Phone's service offerings (both actual and purported) with those of genuine telecommunications carriers, using these comparisons to justify its conclusion that Comcast Phone must also be a telecommunications carrier. Based on this conclusion, Comcast Phone has represented itself as a telecommunications carrier in many jurisdictions, including New Hampshire, and acquired the incidences of a telecommunications carrier, including certifications and interconnection agreements. However, nowhere in the Petition does Comcast Phone meet its burden of proof by providing a rigorous examination of the services and operations that substantiate that it is truly a telecommunications carrier. Such an examination is conducted in this brief, and the results firmly establish that the TDS Companies' concerns were well founded. For the services at issue, Comcast Phone is not a telecommunications carrier, and the TDS Companies have no obligation to interconnect with Comcast Phone under the Act.

II. COMCAST PHONE HAS NOT DEMONSTRATED THAT IT QUALIFIES AS A TELECOMMUNICATIONS CARRIER UNDER THE ACT

As Comcast Phone admitted in its Petition, "only telecommunications carriers have rights under Sections 251 and 252 of the Act"[9] and this is, of course, true. Section 251(a)(1) provides that telecommunications carriers have a duty "to interconnect directly or indirectly with the

[8] Petition at 7.

[9] *Id.* at 8.

facilities and equipment of other *telecommunications carriers*."[10] Thus, the TDS Companies' duty to execute an interconnection agreement with Comcast Phone is conditioned on Comcast Phone's status as a telecommunications carrier as defined by the Act. However, a review of Comcast Phone's services and an analysis of legal precedent on this subject (including cases on which Comcast Phone relied on in its Petition) clearly establish that Comcast Phone is not a telecommunications carrier as that term, in its various iterations, has been understood for decades.

A. Characteristics of a Telecommunications Carrier

As a starting point, it should be understood that the terms "telecommunications carrier" and "common carrier" are interchangeable for the purposes of this discussion. The Federal Communications Commission ("FCC") has held that in passing the Telecommunications Act of 1996, Congress intended to clarify that "telecommunications services" are "common carrier services."[11] Furthermore, in Virgin Islands Telephone Co. v. F.C.C., the D.C. Circuit upheld a statement by the FCC that the term "telecommunications carrier" "means essentially the same as common carrier."[12] Thus, the considerable amount of authority on the subject of "common carriers" can be referenced to support the conclusion that Comcast Phone is not a telecommunications carrier.

Beginning with *NARUC I*,[13] one of the seminal cases on this subject, a number of decisions have stated that a key feature of common carriage is that the service provider

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[10] 47 U.S.C. 251(a)(1) (emphasis supplied).

[11] *Federal-State Joint Board on Universal Service*, Report & Order, 12 FCC Rcd 8776, para. 785 (1997); *Cable & Wireless, PLC, Cable Landing License*, 12 FCC Rcd 8516, para. 13 (1997).

[12] Virgin Island Tel. Corp. v. F.C.C., 198 F.3d 921, 925 (D.C. Cir. 1999).

[13] Nat'l. Ass'n. of Regulatory Util. Comm'rs. v. F.C.C., 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*").

undertakes to provide service "indifferently" to all potential customers, whereas a non-common carrier "make[s] individualized decisions, in particular cases, whether and on what terms to deal" with customers.[14] In short, the widespread, general solicitation of customers from the general population, i.e., the indiscriminate offering of service on generally applicable terms, constitutes common carriage.[15] In *NARUC I*, the court also described several factors that would tend to preclude status as a common carrier. These include: 1) establishment of medium-to-long-term contractual relations; 2) a relatively stable clientele, with terminations and new clients the exception rather than the rule, 3) methods of operation that may be highly individualized and comprise grounds for accepting or rejecting an applicant, and 4) an operator that would desire and expect to negotiate with and select future clients on a highly individualized basis.[16]

The FCC has generally concurred in this analysis. In one example, the FCC found that a carrier was a common carrier in that (1) the carrier recruited its customers by active telemarketing and print advertising; (2) the carrier targeted the public in general, not specific clients with specialized needs; (3) the carrier set generally applicable prices and terms of service, and any differences reflected discounts and fee waivers offered to customers, rather than tailored contracts; and (4) the carrier had short contracts, none with terms greater than five years.[17]

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[14] Nat'l. Ass'n. of Regulatory Util. Comm'rs. v. F.C.C., 533 F.2d 601, 609 (D.C. Cir. 1976) ("*NARUC II*"); *see also PLDT v. International Telecom*, File No. E-95-29, 12 FCC Rcd 15001, para. 13 (1997) ("*PLDT*"); *Independent Data Communications*, 10 FCC Rcd 13717, para. 50 (1995); *Beehive Telephone, Inc. v. Bell Operating Cos.*, 10 FCC Rcd 10562, para. 15(1995), *remanded on other grounds*, Beehive Tel. Co. v. F.C.C., No. 95-1479 (D.C. Cir. Dec. 27, 1996).

[15] *See PLDT* para. 13 (*citing* Southwestern Bell Tel. Co. v. F.C.C, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("*Southwestern Bell*")).

[16] *NARUC I*, 525 F.2d at 643.

[17] *See PLDT* at paras. 14-15

B. Comcast Phone Does Not Have the Characteristics of a Telecommunications Carrier.

By all of the generally accepted criteria, Comcast Phone is not a common carrier for the services on which it bases its request for interconnection: LIS, Single Line Business Service ("SLBS"), Schools and Libraries Network Service ("SLNS"), and exchange access service.[18] SLBS is not at issue because it is simply a resale offering of the business service offered by the ILEC, which Comcast Phone did not request in the interconnection agreement. Since the draft Interconnection Agreement has no provisions related to resale service, it is clear that Comcast Phone does not seek an interconnection agreement for the purpose of offering SLBS. For the same reason, exchange access service is not under consideration, since the draft interconnection agreement contains no provisions concerning exchange access.

Furthermore, Comcast Phone admits that it has no customers in New Hampshire for either its SLBS or SLNS.[19] If Comcast Phone were a new entrant in New Hampshire, this would not necessarily be disqualifying since, as Comcast Phone has pointed out, it would be a "Catch-22" to disqualify an applicant for not providing a service that it has yet no authority to provide. However, Comcast Phone has had the authority and the means to offer these services for some time in the FairPoint footprint, a much richer potential market. That it has not obtained any customers is a clear indication that these services are not true offerings, but merely ink on paper; a sham to establish Comcast Phone's bona fides as a telecommunications carrier.

This leaves only LIS to consider. Based on the factors described in the cases above,

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[18] Petition at 10-11, 18 (listing services that Comcast offers in New Hampshire). Comcast previously offered a retail, circuit switched telephone service offering in the FairPoint service territory in New Hampshire, which was marketed to the public under the brand-name Comcast Digital Phone ("CDP"). Comcast discontinued CDP on or about May 15, 2008 but retained its authority to provide other telecommunications services within the FairPoint territory. Stipulation 13.

[19] Stipulation 11 and 12.

Comcast Phone is not a telecommunications carrier for LIS. To begin with, this service offering is not widely and indiscriminately marketed. Comcast Phone has one customer in New Hampshire for its LIS service.[20] Moreover, as discussed further below, the potential market for LIS is one customer – Comcast Phone IP. Thus, it can hardly be said that Comcast Phone actively solicits customers on a widespread, general and indiscriminate basis.

Furthermore, the Comcast Phone LIS offering adheres closely to the other *NARUC I* factors that are indicative of a non-common carrier. First, it is only offered on a long term basis. Purchasers of LIS must commit to an initial term of three years.[21] If the customer terminates early, it must pay a termination liability equal to 100% of all recurring charges through the remaining term of the agreement. If Comcast Phone discontinues service for cause, the customer must pay immediately all amounts that would have been paid over the three year term of the agreement.[22] So, in addition to enforcing a lengthy term, these provisions also ensure that the LIS offering conforms to the second *NARUC I* factor: a relatively stable clientele, with terminations the exception rather than the rule.

Another aspect of this stability is that new clients are also the exception rather than the rule. Comcast Phone has not identified any entities which made bona fide inquiries to purchase the service, nor the substance of any discussions regarding the service.[23] This stands to reason, given how the restrictiveness of the purchase qualifications conform to the third *NARUC I* factor: highly individualized operations that comprise grounds for accepting or rejecting an applicant. As a practical matter, LIS is only available to Comcast Phone affiliates who provide

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[20] Stipulation 10.

[21] *See* LIS Guide, § 5.A.

[22] *Id.*, § 5.B.

[23] *See* Prefiled Direct Testimony of Ms. Choroser, at 9:4-10.

"unregulated" voice service to customers in the State of New Hampshire. LIS is offered only to providers of interconnected VoIP services. Providers of nomadic VoIP service can not purchase services under the LIS Guide.[24] Furthermore, providers of traditional landline telephone service, such as the TDS Companies, can not purchase services under the LIS Guide. The only providers who can purchase services under the LIS Guide are those whose facilities consist of an IP-based broadband network. The network must employ a Cable Modem Termination System ("CMTS") and must use network-based call signaling devices.[25] Additionally, the network-based call signaling devices must be specified by Cable Television Laboratories, Inc, and only traffic in time division multiplex ("TDM") protocol will be accepted and delivered.[26]

Consequently, the fourth *NARUC I* factor is present: Comcast Phone has created a situation in which it negotiates with and selects future clients on a highly individualized basis. The only customer who can use LIS to reach an end user's premise is a cable television provider who overbuilds the facilities of Comcast Phone's affiliated provider of IP based voice service. This situation rarely, if ever, will exist. The recurring and non-recurring charges for LIS are determined by Comcast Phone on an individual case basis in response to a bona fide request.[27] Although the LIS Guide implies that there will be a "negotiation" between Comcast Phone and the requesting party,[28] there is nothing in the LIS Guide that compels Comcast Phone to agree to any particular terms; and, there are no provisions for arbitration or dispute resolution by a regulatory body or third party if the parties can not agree on terms. The LIS Guide also provides

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[24] *See* LIS Guide, § 1.F.

[25] *See id.*, § 3.A.

[26] *See id.*, § 3.B.

[27] *See id.*, § 1.B.

[28] *See id.*, § 1.C.

Comcast Phone with complete protection from most liability arising out of performance under the agreement[29] and requires the customer to indemnify and hold harmless Comcast Phone in a multitude of situations.[30]

These are terms to which an *unaffiliated* customer would likely never agree. These terms are only palatable to a Comcast Phone affiliate, since unreasonable prices and terms do not result in economic harm to the overall Comcast Phone enterprise. By every measure, then, Comcast Phone is not providing a telecommunications service in New Hampshire.[31] Even if Comcast Phone was offering services on a true common carrier services in other parts of New Hampshire (which it is not), it would have no bearing on this arbitration, since a carrier can be a common carrier with respect to some of its activities and not with respect to others.[32]

C. *Time Warner* and *Bright House* are Inapplicable to this Issue.

In its Petition, Comcast Phone refers in passing to *NARUC I* and associated cases but it

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[29] *See* LIS Guide, § 9.

[30] *See Id.*, §§ 7.A, 9.H and 9.I.

[31] Although New Hampshire law does not govern the question of whether Comcast Phone is a common carrier under the Act, the New Hampshire Supreme Court has addressed the issue of "service to the public" in determining status as a common carrier or public utility under New Hampshire law. It has held that:

> An enterprise is necessarily private if the service provider has a relationship with the service recipient, apart from the service provision itself, that is sufficiently discrete as to distinguish the recipient from other members of the relevant public; this is the "discrimination" that separates public utilities from private.

Appeal of Zimmerman, 141 N.H. 605, 608 (1997). Clearly, Comcast has such a relationship with the only probable customer for its LIS service, Comcast IP. Furthermore, the *Zimmerman* decision also points out the distinction between a public utility that undertakes to provide service "at reasonable rates to all who apply therefor" and service that is "purely voluntary and at prices fixed in each case by special contract." *Zimmerman*, 141 N.H. at 608. The individually tailored Comcast services fall into the latter category.

[32] *Southwestern Bell*, 19 F.3d at 1481 (holding that "it is at least logical to conclude that one can be a common carrier with regard to some activities but not others. . . ") *quoting NARUC II*, 533 F.2d at 608.

places its faith primarily on the FCC's decisions in the *Time Warner* and *Bright House* proceedings[33] in support of its claim that it qualifies as a telecommunications carrier.[34] This reliance in misplaced, however, because neither case supports Comcast Phone's arguments.

1. *Time Warner*

Citing *Time Warner*, Comcast Phone asserted "that [CLECs] like Comcast Phone that provide wholesale service to interconnected VoIP service providers are 'entitled to interconnect and exchange traffic with [ILECs]'..."[35] This is incorrect, not only in the phrasing, but because it assumes what is meant to be proved. The FCC did not say or imply that "CLECs like Comcast Phone" can offer wholesale services; it said that "*telecommunications carriers*" are entitled to interconnect and exchange traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.[36] First, the provider must be a telecommunications carrier; only then can it offer wholesale services.

The facts and the issue in this proceeding are not the same as those in the Time Warner proceeding. In *Time Warner*, the issue was not whether MCI and Sprint were telecommunications carriers. The issue was whether wholesale telecommunications carriers were eligible for interconnection, i.e. whether, even though it was already established that they were telecommunications carriers, the VoIP interconnection services of the petitioners were

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[33] *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) ("*Time Warner*"); *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008) ("*Bright House*").

[34] *See* Petition at 11-14.

[35] *Id.* at 12.

[36] *Time Warner* para. 1.

telecommunications services eligible for interconnection.[37] It was never a disputed issue in the *Time Warner* proceeding whether Sprint and MCI were (or were not) CLECs entitled in their own right to Section 251 interconnection. The question presented was whether these entities could use their section 251 rights, not only in their own right, but also to provide a wholesale service to an entity that was not a telecommunications carrier. *Time Warner* did not establish that the petitioners were telecommunications carriers because they were offering this service – it established that they could offer this service because they were first telecommunications carriers.

In this case, Comcast Phone has not established that it is offering a telecommunications service. Even assuming for the sake of argument that LIS is a telecommunications service, Comcast Phone is providing no other telecommunications service in its own right, separate and distinct from the LIS that it provides to its affiliates. *Time Warner* was explicit that Section 251 interconnection is available only to those telecommunications carriers who "seek interconnection in their own right:"

> Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service *and that seek interconnection in their own right for the purpose of transmitting traffic to or from another service provider.* To address concerns from commenters about which parties are eligible to assert these rights, we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are acting as telecommunications carriers for purposes of their interconnection request . . .[38]

The FCC reemphasized its rule that a telecommunications carrier must use its section 251

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[37] *Id.* para. 2. In the Time Warner proceeding, the wholesale providers of telecommunications services to Time Warner were MCI Worldcom ("MCI") and Sprint Communications Company ("Sprint"). MCI and Sprint provided Time Warner transport for the origination and termination of traffic on the public switched network ("PSTN") through their interconnection agreements with ILECs. In *Time Warner*, it was a given that MCI and Sprint are telecommunications carriers.

[38] *Id.* para. 16 (emphasis added).

interconnection rights to actually provide a telecommunications service.[39] The FCC quoted 47 CFR § 51.100(b):

> For example, under the Commission's existing rules, "[a] telecommunications carrier that has interconnected or gained access under section . . . 251(a) . . . of the Act, may offer information services through the same arrangements, *so long as it is offering telecommunications services through the same arrangement as well.*"[40]

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

> In making this clarification, we emphasize that the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis. We do *not* address or express any opinion on any state Commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service.[41]

The TDS Companies have never disputed that Comcast Phone is offering a wholesale service. The issue is whether it is a telecommunications carrier. *Time Warner* did not address this issue, and is therefore irrelevant to this case.

2. *Bright House*

Comcast Phone also wishes the Commission to adopt the reasoning of the *Bright House* decision and states that the facts of the two cases are similar.[42] Again, this is incorrect. First, the FCC's rulings in *Bright House* do not apply to this proceeding for the simple reason that the FCC dictated that they do not. The FCC's decision is clear as to its limited applicability:

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[39] *Id.* para. 14 and fn. 39.

[40] *Time Warner* fn. 39 (emphasis original).

[41] *Id.* para. 14.

[42] *See* Petition at 12-13.

> We stress, however, that our holding is limited to the particular facts and the particular statutory provision at issue in this case. The U.S. Court of Appeals for the D.C. Circuit has made clear that an agency may interpret an ambiguous term "differently in two separate sections of a statute which have different purposes." Here, section 222(b) has a different purpose – privacy protection . . . and we believe that this purpose argues for a broad reading of the provision. As a result, our decision holding the Competitive Carriers to be 'telecommunications carriers' for purposes of section 222(b) *does not mean that they are necessarily 'telecommunications carriers' for purposes of all other provisions of the Act.* We leave those determinations for another day.[43]

Consequently, *Bright House* is not dispositive of this case *or any other case*, for that matter. "Therefore, whether a provider has made such an offering must be determined *on a case-by-case basis*."[44]

This seriously undermines Comcast Phone's argument, because Comcast Phone has latched on to *Bright House* to support its proclamation of a common carrier "self-certification" requirement. The FCC determined that Comcast Phone and Bright House were telecommunications carriers because they had "self-certified" that they were and had obtained certifications and interconnection agreements based on these self-certifications. The FCC held that that "[t]hese facts, in combination, establish a prima facie case that the Comcast Phone and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of Section 222(b)."[45]

This conclusion provided the FCC an expedient solution to a difficult policy issue regarding consumer privacy, but it is ill-considered, contrary to precedent and unsustainable. A review of the governing case law exposes this holding as yet another maneuver by the FCC to escape from the corner in which it has painted itself by insisting that VoIP is not a

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[43] *Bright House* para. 41 (emphasis added).

[44] *Id.* para. 38 (emphasis added).

[45] *Id.* para. 39.

telecommunications service. There is, however, no doctrine of "self-certification" for common carriers and, in fact, the opposite is true.

Case law going back to the early days of common carrier regulation establishes unequivocally that an operator is a common carrier on the basis of what it *does*, not what it *says*. Over seventy years ago, the Supreme Court held that "[w]hether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does."[46] This holding was affirmed in *NARUC I* when the court stated that "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[47]

In the Petition, Comcast Phone refers to *Southwestern Bell* to support the proposition that "whether a carrier is a 'common carrier' or a 'private carrier' ultimately turns on what the carrier 'chooses' to be."[48] Comcast Phone does not actually provide the exact language of the decision, however. As it turns out, the only similarity between Comcast Phone's interpretation and the language of the decision is that both contain one occurrence of the word "chooses" somewhere in the text. Other than that, *Southwestern Bell* is absolutely unsupportive of Comcast Phone's argument. Here is the actual text of what the court said:

> Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.[49]

This statement of the law is entirely consistent with the *NARUC I* factor, discussed above, in

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[46] U.S. v. California, 297 U.S. 175, 181 (1936).

[47] *NARUC I* 525 F.2d at 644.

[48] Petition at 9 fn. 21.

[49] *Southwestern Bell*, 19 F.3d at 1481 (citing *NARUC I* and *NARUC II*).

which a non-common carrier (like Comcast Phone) negotiates with and selects future clients on a highly individualized basis. Moreover, in focusing on the "particular practice under surveillance,"[50] *Southwestern Bell* confirms that a common carrier is determined by what it does, not what it says. Thus, there is no "self-certification," and a carrier does not "choose" to be labeled a common carrier. Comcast Phone is not a telecommunications carrier just because it represents that it is, or because it has been able to obtain agreements and certifications based on this erroneous representation.[51]

Bright House and Comcast Phone prevailed in *Bright House* because the FCC was content to base its decision on the *indicia*, rather than the *fact* of being telecommunications carriers for the purpose of protecting the confidentiality of customer information. The facts of *Bright House*, the governing statute, and the policy issues are far different from this case. Comcast Phone has not met the burden of proof that it qualifies as a telecommunications carrier under the Act, and citations to either *Time Warner* or *Bright House* are irrelevant and unavailing.

III. THE TDS COMPANIES' GOOD FAITH ACCEPTANCE OF COMCAST PHONE'S REPRESENTATIONS DOES NOT CONSTITUTE A WAIVER.

Comcast Phone argues that the TDS Companies have "expressly waived" their rights to claim or assert that Comcast Phone does not qualify as a telecommunications carrier under the

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[50] *Id.*

[51] The Petition also contains a similar misinterpretation of another decision. Comcast Phone claims that the FCC has held that a service provider "can be a common carrier 'even if it intends to serve only a single customer.'" Petition at 15-16, citing *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Co.*, File No. EB-05-MD-014, Memorandum Opinion and Order, 22 FCC Rcd 3392 para. 20 (2007). Actually, the FCC never reached this issue. The quoted material occurs in paragraph 21 of the Order, not paragraph 20, and is part of a discussion in which the FCC determined that the defendant had provided no support for its "supposition" that the plaintiff only intended to served a single customer, and thus could not prevail on that argument. In essence, then, the FCC implied that if the defendant *had* produced such evidence, then it would have had a bearing on the decision.

Act.[52] In addition, Comcast Phone argues that, because affiliates of the TDS Companies entered into interconnection agreements with certain of Comcast Phone's affiliates, the TDS Companies have acknowledged Comcast Phone to be a telecommunications carrier under the Act.[53] However, this is contrary to the facts and Comcast Phone's own assertions in this proceeding.

From the beginning of negotiations, it has been understood that neither party waived any rights on account of having negotiated unrelated interconnection agreements. Comcast Phone's first exhibit to the Petition clearly preserves each of parties' rights with respect to all legal issues. In submitting the request for negotiations, Ms. Beth Choroser wrote on April 21, 2008 that:

> Since at this time I believe we have reached substantive agreement on the terms for the Vermont agreement currently being negotiated, we propose to use that agreement as the starting point for negotiating the New Hampshire Agreement; *provided, however, neither Party shall be considered to waive any rights it may have in negotiating or arbitrating terms of the Agreement in the state* [sic] *of New Hampshire.*[54]

Furthermore, all of the interconnection agreements in states other than New Hampshire, were executed prior to, or contemporaneously with, Comcast Phone discontinuing its "Comcast Digital Phone" local exchange operations nationwide. For example, the Vermont agreement was finalized in the Spring of 2008 before the TDS Companies was aware that Comcast Phone had filed multiple notices of service discontinuance nationwide. Similarly, other interconnection agreements between the TDS Companies' affiliates and Comcast Phone affiliates for the states of

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[52] Petition at 8.

[53] *Id.*

[54] *See* Petition, Exhibit A (emphasis added). This is consistent with Comcast's practices in other the TDS Companies negotiations. *See, e.g.* Request by Ms. Choroser to negotiate interconnection with Comcast Phone of Michigan, LLC, April 17, 2008 at 2 (Answer, Exhibit D) ("[N]either Party shall be considered to waive any rights it may have in negotiating or arbitrating terms of the Agreement in the State of Michigan.")

Indiana and Tennessee[55] were completed in 2006, well before Comcast Phone had discontinued services. The same holds true for any other interconnection agreements that Comcast Phone has with other ILECs in New Hampshire. For example, Comcast Phone cannot rely on its interconnection agreement with FairPoint,[56] because the Commission's order cited in support of this argument dates back to 1998 and the interconnection agreement dates back to 2003 – both of which clearly precede Comcast Phone's discontinuance of its Comcast Digital Phone service in New Hampshire. Thus, the existence of these interconnection agreements is of no relevance to the instant proceedings.

Furthermore, Comcast Phone has been on notice for some time that its status as a telecommunications carrier was an issue, inasmuch as it was actually Comcast Phone, not the TDS Companies, that raised the issue in the first place. Rather then respond to the TDS Companies' legitimate inquiries, Comcast Phone used the occasion of its June 24, 2008 letter to proclaim that it qualified as a telecommunications carrier under the Act. Far from being caught perplexed and unawares, it appears that Comcast Phone has been anticipating this dispute virtually since the day it requested negotiations.

It is also unjust for Comcast Phone to twist the TDS Companies' willingness to negotiate into a waiver of its rights under the Act. Realistically, the TDS Companies had no choice but to accept Comcast Phone's representations on faith, given that FCC rules require ILECs to negotiate the terms of an interconnection agreement before a prospective carrier has even obtained state certification.[57] However, the fact that federal law requires a negotiation does not support Comcast Phone's assertion that it provides telecommunications services or constitute a

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[55] *See* Petition at 8; Prefiled Direct Testimony of Ms. Choroser at 10:4-5.

[56] *See* Prefiled Direct Testimony of Ms. Choroser at 7:4-8.

[57] *See* 47 C.F.R. § 51.301(c)(4).

waiver of an ILEC's right to challenge such an assertion.

Despite its claim, Comcast Phone cannot point to any document or event where the TDS Companies "expressly" waived any of their rights as they pertain to interconnection agreements. Furthermore, there is no other course of conduct or legal theory by which an implied waiver can be determined. The TDS Companies are well within their rights under the Act to insist that only those who have assumed the obligations of legitimate telecommunications carriers can obtain rights under Section 251. Nothing bars the TDS Companies from questioning Comcast Phone's status as a telecommunications carrier or whether Comcast Phone provides telecommunications services as defined under the Act.

IV. CONCLUSION.

Competitive entry into the local exchange market must be done in accordance with the law. Comcast Phone has not met its burden of demonstrating that it is a telecommunications carrier. Accordingly, the Petition should be dismissed on the ground that Comcast Phone does not qualify as an entity entitled to seek interconnection under Section 251 of the Act or arbitration under Section 252 of the Act.

Respectfully submitted,

KEARSARGE TELEPHONE COMPANY
MERRIMACK COUNTY TELEPHONE COMPANY
WILTON TELEPHONE COMPANY

By Their Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: April 20, 2009

By: _____

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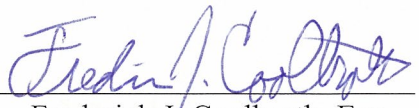
CERTIFICATE OF SERVICE

I hereby certify that a PDF copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: April 20, 2009

By: 

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