

**THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

Petition of Comcast Phone of New Hampshire, LLC)
d/b/a Comcast Digital Phone for Arbitration of)
Rates, Terms and Conditions of Interconnection with)
Kearsarge Telephone Company d/b/a TDS Telecom,)
Merrimack County Telephone Company d/b/a TDS) DOCKET NO. 08-162
Telecom and Wilton Telephone Company, Inc. d/b/a)
TDS Telecom Pursuant to the Communications Act)
of 1934, as Amended)

**SUR-REPLY BRIEF
OF COMCAST PHONE OF NEW HAMPSHIRE, LLC**

Comcast Phone of New Hampshire, LLC d/b/a Comcast Digital Phone (“Comcast”), through undersigned counsel, submits this Sur-Reply to the Reply Brief filed by the TDS companies on May 15, 2009.

ARGUMENT

I. The Stipulated Facts Establish that Comcast is a Telecommunications Carrier

TDS disputes whether the Stipulated Facts (“SF”) establish that Comcast is a telecommunications carrier. TDS makes this argument despite stipulating that the Commission has already authorized Comcast to provide telecommunications services in New Hampshire (SF-1) and that Comcast has interconnection agreements with other ILECs in New Hampshire and around the country (SF-4, 15, 16). TDS has even stipulated that Comcast has schedules filed with the Commission and posted on its web site for various service offerings, including exchange access services provided to interexchange carriers (“IXCs”); a local networking and traditional calling service offering to schools and libraries (“SLNS”), a “PSTN interconnection” offering to providers of interconnected voice over Internet protocol (“I-VoIP”) services; and a local calling service directed to small business customers. SF-5, 6.

Nonetheless, TDS claims that Comcast has only assumed the “guise of a telecommunications carrier,” that these service offerings are “merely window dressing,” and that Comcast does not really intend to serve any customers.¹ This TDS claim, however, is directly contradicted by the stipulated fact that Comcast has “approximately 25 intrastate and interstate interexchange access customers in New Hampshire that are sent carrier access bills each month for terminating traffic.” SF-7. TDS asserts that this does “not by any means constitute exchange access service,” but it does not explain why that is the case.² TDS’ position will therefore come as a surprise to the IXC’s that pay Comcast for terminating access, as well as to the carriers with whom Comcast has reciprocal compensation arrangements for the transport and termination of local telecommunications traffic. *See* SF-16.

Comcast has already addressed and rebutted TDS’ contention that Comcast’s offerings do not qualify as telecommunications services because of what TDS claims is the overly narrow and restrictive nature of Comcast’s offerings.³ There is simply no legal basis for these claims, as demonstrated by, in addition to the legal authority that Comcast has cited, the fact that many of the terms about which TDS complains are found in TDS’ own service offerings.⁴

Conspicuously absent from TDS’ briefs is any mention of the Commission’s order granting Comcast authority to operate in TDS’ service territories. That order found that Comcast offers telecommunications services and definitively disposes of TDS’ claim to the contrary. For

¹ *See, e.g.*, TDS Reply Br. at 2-3.

² *Id.* at 3.

³ *See* Comcast Initial Br. at 7-9; Comcast Reply Br. at 7-12.

⁴ *See* Comcast Reply Br. at 11, 12.

obvious reasons, therefore, that order figures prominently in Comcast's briefing.⁵ TDS does not mention it because there is nothing it can say, and that silence speaks volumes.

Finally, TDS accuses Comcast of "play[ing] with words" and "dancing" around definitions.⁶ That is not the case. Comcast *is* a local exchange carrier by virtue of its exchange access and telephone exchange service offerings, and thus *provides* a local calling capability to its customers.⁷

II. More than 20 Decisions in at least 10 States, the FCC, and 2 Federal Courts of Appeals, Definitively Establish Comcast's Interconnection Rights.

TDS argues that "a service provider is a common carrier on the basis of what it does, not what it says."⁸ Comcast agrees. Comcast is common carrier because it has obtained authority from the Commission to offer services to that portion of the public that it is suited to serve. A carrier can take one of two routes. It can serve just itself or a small number of selected customers (private carriage), or it can offer its services more broadly to that section of the public it is best suited to serve (common carriage). When a carrier takes the latter approach, it *chooses* to be a common carrier. But as the FCC has explained, "being deemed a 'common carrier' (i.e., being deemed to be providing 'telecommunications services') confers substantial responsibilities as well as privileges."⁹ Thus, achieving common carrier status *is* a process of "self-

⁵ See Comcast Initial Br., *passim*; Comcast Reply Br. at 5-6.

⁶ TDS Reply Br. at 3-4.

⁷ See Comcast Initial Br. at 8-9. Moreover, whether Comcast provides a "switched local service" is irrelevant to its telecommunications carrier status or its right to interconnection under Sections 251(a)-(b). See TDS Reply Br. at 4. Neither the applicable definitions of local exchange carrier (47 U.S.C. § 153(26)) or "telecommunications service" (*id.* § 153(47)) imposes such a requirement.

⁸ TDS Reply Br. at 6.

⁹ *Bright House Networks, LLC v Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 10704 ¶ 39 (2008) ("*Bright House*").

certification,” as the FCC,¹⁰ the Michigan commission,¹¹ and now the Eighth Circuit,¹² have recognized.

As a regulated carrier, Comcast is subject to oversight by the Commission, and has cited to and briefed literally dozens of regulatory orders and judicial decisions that establish the common carrier *bona fides* of its service offerings and that definitively establish its Section 251 interconnection rights. TDS, by contrast, does not cite to a single case that supports its position. Instead, it attempts to argue that the cases that Comcast cites are somehow inapplicable. TDS’ discussion of these cases is misleading.

Comcast has cited cases from Texas, New York, Pennsylvania, Iowa, Nebraska, Illinois, Ohio, and Washington involving efforts by Sprint and/or MCI to obtain section 251 interconnection to provide a PSTN interconnection service to interconnected VoIP service providers – *i.e.*, a service functionally comparable to Comcast’s LIS offering.¹³ The ILEC in each of those cases argued that Sprint/MCI was not entitled to interconnection based on many of the same arguments that TDS raises here. The FCC disposed of those arguments in its *Time Warner Declaratory Ruling*, where it held that telecommunications carriers are entitled to ILEC

¹⁰ *Id.*

¹¹ *Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone*, Decision of the Arbitrator, Case No. U-15725, U-15730, slip op. at 14-16, 20-21 (Mich. PSC, Jan. 28, 2009) (“*Michigan Arbitrator Recommendation*”), *aff’d by In the Matter of the Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 arbitration of interconnection rates, terms and conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone*, Order, Case No. U-15725, U-15730 (Mich. PSC, March 5, 2009) (“*Comcast-TDS Michigan Decision*”).

¹² *Iowa Telecom. Services, Inc. v. Iowa Utils. Bd.*, Case No. 08-2140, 2009 WL 1119335, at 4 (8th Cir., Apr. 28, 2009).

¹³ Comcast Initial Br. at 4-5 (collectively the “Sprint/MCI cases”).

interconnection in order to offer PSTN interconnection, numbering resources, and other telecommunications services to interconnected VoIP service providers.¹⁴

TDS contends that the Sprint/MCI cases are inapplicable because Sprint and MCI are “undisputed telecommunications carriers, eligible for interconnection in their own right.”¹⁵ TDS has distorted and misrepresented these cases. While Sprint and MCI may have already been providing other telecommunications services, each of the Sprint/MCI cases hinged on whether the carrier’s PSTN interconnection service offering qualified as a common carrier offering *in its own right*. In Illinois, for example, it was not relevant that Sprint was already authorized to provide (and did provide) telecommunications services in other parts of the state.¹⁶ Indeed, the ILEC in that case specifically argued that Sprint’s other telecommunications services did *not* entitle it to interconnection “for all purposes.”¹⁷ And the Illinois commission agreed, explaining that “[t]o determine if [ILECs] have a duty to negotiate interconnection with Sprint, the Commission must first evaluate whether Sprint, *for purposes of its arrangement with MCC*, is a telecommunications carrier as defined by federal law.”¹⁸ Thus, the Illinois commission’s determination that Sprint was a common carrier was based solely on Sprint’s arrangement to provide PSTN interconnection services to MCC, and not on Sprint’s other service offerings.

¹⁴ See *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 (2007).

¹⁵ See TDS Reply Br. at 7; see also TDS Initial Br. at 9-15.

¹⁶ *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill CC, July 15, 2005).

¹⁷ *Id.*

¹⁸ *Id.* (emphasis added).

Similarly, the Iowa Utilities Board (“IUB”) acknowledged that “[t]he major issue at this time is whether Sprint’s proposed activities in the RLEC exchanges will support a finding that Sprint will be a ‘common carrier’ in those exchanges.”¹⁹ The IUB’s determination that Sprint was a common carrier, upheld by both the federal District Court and the United States Court of Appeals for the Eighth Circuit,²⁰ was therefore based on Sprint’s PSTN interconnection services *only*. The commissions and courts in New York,²¹ Pennsylvania,²² and Texas,²³ among others, likewise based their decisions on Sprint’s wholesale interconnection services, and not on any other services that Sprint may have been providing at that time.

While TDS unsuccessfully attempts to argue that the Sprint/MCI cases are inapplicable, it does grudgingly acknowledge the favorable decisions in Michigan²⁴ and Vermont²⁵ decisions,

¹⁹ *Sprint Comm. Co LP v ACE Comm Group, et al*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405, at 1 (Iowa Utils Bd, Nov 28, 2005).

²⁰ *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.*, Case No. 08-2140, 2009 WL 1119335 (8th Cir., Apr. 28, 2009).

²¹ *Berkshire Tel Corp v Sprint*, Case No. 05-CV-6502, 2006 WL 3095665, at 6 (WDNY, Oct. 30, 2006) (focusing on Sprint’s “new business arrangement” in upholding the Public Service Commission’s finding that Sprint was a common carrier), *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).

²² *Sprint Comm. Co LP*, Order, App No. 310183F0002AMA, *et al*, 101 PaPUC 895, 2006 WL 3675279 (Pa PUC, Nov 30, 2006) (recognizing that Sprint’s proposed certificate to provide service in RLEC’s territory was based on Sprint’s wholesale interconnection business model).

²³ *Consolidated Comm Of Fort Bend Co v Public Utility Commission of Texas*, Memorandum Opinion and Order, 497 F Supp 2d 836, 846 (W.D. Tex 2007) (affirming Public Utility Commission’s finding that “Sprint will be operating as a common carrier with respect to its interconnection with [ILEC]”), *aff’g* *Petition of Sprint Comm Co LP*, Order, Docket No. 32582, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006).

²⁴ *Comcast-TDS Michigan Decision, aff’g Michigan Arbitrator Recommendation*.

which specifically involved Comcast's section 251 interconnection rights. TDS argues that those decisions are inapplicable as well, however, because they are "unenthusiastic" or "far from a rousing endorsement of Comcast's status as a telecommunications carrier."²⁶

Comcast will not address whether those decisions are rousing or enthusiastic, but the bottom line in both cases speaks for itself: Comcast now has an interconnection agreement with the TDS affiliate in Michigan and with the Vermont Telephone Company in Vermont. Likewise, Comcast need not dwell on former Chairman Martin's dissenting opinion in the *Bright House* case.²⁷ Four commissioners voted the other way and rejected Verizon's challenge to Comcast's telecommunications carrier status, and that order was affirmed by a unanimous panel of the DC Circuit.²⁸

One aspect of TDS' advocacy does merit a response. In its discussion of the arbitration between Comcast and TDS in Michigan, TDS refers to the arbitrator's "gross misreading of the FCC's position on IP voice traffic."²⁹ TDS is right that the arbitrator incorrectly characterized a letter from two FCC officials to a Comcast affiliate as a "private letter ruling."³⁰ But that error was subsequently corrected by the full commission in its order affirming TDS' obligation to interconnect, where the Michigan commission explained that, "footnote 6 is not necessary to the

²⁵ *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*").

²⁶ TDS Reply Br. at 7-8.

²⁷ *Id.* at 8.

²⁸ *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

²⁹ See TDS Reply Br. at 8.

³⁰ *Michigan Arbitrator Recommendation*, slip op. at 21 n.6.

decision reached in this case and forms no part of the basis for the Commission's decision."³¹ Thus, TDS' suggestion that the arbitrator's error therefore somehow undermines the rationale of the Michigan commission's decision is a gross mischaracterization of that order.

³¹ *Comcast-TDS Michigan Decision*, slip op. at 5. TDS asserts (Reply Br. at 9) that it is "particularly noteworthy" that Comcast objected to the characterization that its affiliate's interconnected VoIP service offering is not a telecommunications service. But there was nothing particularly noteworthy about that objection, as Comcast has long taken the position that interconnected VoIP is an information service not a telecommunications service. The classification of the retail service provided to end-users is irrelevant, in any event, as the FCC ruled in the *Time Warner Declaratory Ruling* (at ¶ 15) (explaining that the unresolved classification of interconnected VoIP as either an information service or telecommunications service has no "bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251").

CONCLUSION

For the foregoing reasons, the Commission should find that Comcast is a telecommunications carrier and order TDS to execute the agreement that the parties have negotiated and which is attached as Exhibit P-2 to Comcast's Petition.

Respectfully submitted,



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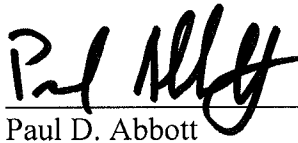
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ATTORNEYS FOR COMCAST PHONE OF
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May 22, 2008

CERTIFICATE OF SERVICE

I, Paul D. Abbott, hereby certify that I have, this 22nd day of May, 2009, served the foregoing document, by email, on all parties of record.



Paul D. Abbott