

ORIGINAL



JVA
JLG



STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF COMCAST PHONE OF)
CENTRAL INDIANA LLC FOR)
ARBITRATION OF AN)
INTERCONNECTION AGREEMENT WITH)
TRI-COUNTY TELEPHONE CO., INC. D/B/A)
TDS TELECOM AND TIPTON TELEPHONE)
COMPANY D/B/A TDS TELECOM)
PURSUANT TO SECTION 252 OF THE)
FEDERAL COMMUNICATIONS ACT OF)
1934, AS AMENDED, AND APPLICABLE)
STATE LAWS)

CAUSE NO. 43621 INT 01

FINAL ORDER

APPROVED: SEP 03 2009

BY THE COMMISSION:

Larry S. Landis, Commissioner
Lorraine Hitz-Bradley, Administrative Law Judge

1. **Procedural History.** On December 18, 2008, Comcast Phone of Central Indiana, LLC, d/b/a Comcast Digital Phone ("Comcast Phone") filed a Petition for Arbitration in this Cause ("Petition") pursuant to 47 U.S.C. § 252(b)(1) of the federal Communications Act of 1934, as amended ("Act"), to establish an interconnection agreement with Tri-County Telephone Co., Inc. d/b/a TDS Telecom and Tipton Telephone Company d/b/a TDS Telecom (collectively, "TDS"). Sections 252(b) and (c) of the Act direct state commissions to arbitrate unresolved issues related to the obligations imposed on telecommunications carriers and local exchange carriers by Section 251 of the Act.

TDS timely responded. The parties agreed to forego a prehearing conference and submitted an *Agreed Upon Proposed Procedural Schedule*, which set the schedule and procedures for the taking of written and documentary discovery and the submission of pre-filed direct and rebuttal testimony. The Commission adopted the *Agreed Upon Proposed Procedural Schedule* by order dated March 11, 2009.

On March 6, 2009, TDS filed the direct testimony of Douglas Duncan Meredith, Director-Economics and Policy for John Staurulakis, Inc., who testified on behalf of TDS ("Meredith Direct"). Also on March 6, 2009, Comcast Phone filed the direct testimony of Beth Choroser, Executive Director of Regulatory Compliance for Comcast Cable Communications, LLC ("Choroser Direct"). On April 23, 2009, TDS filed the rebuttal testimony of Mr. Meredith ("Meredith Reply"), and Comcast Phone filed the reply testimony of Ms. Choroser ("Choroser Reply").

On April 30, 2009, the parties filed a *Joint Motion to Stipulate Public Hearing*, in which the parties stipulated to the authenticity and waived cross examination as to the direct and reply testimonies of Mr. Meredith and Ms. Choroser. On May 7, 2009, the Presiding Officers convened a hearing at which time counsel for Comcast Phone entered into the record Ms. Choroser's Direct Testimony (Comcast Phone Ex. 1), Ms. Choroser's Reply Testimony (Comcast Phone Ex. 2), Ms. Choroser's verification (Comcast Phone Ex. 3), and Comcast Phone's response to the Commission's docket entry (Comcast Phone Ex. 4). Counsel for TDS entered into the record Mr. Meredith's Direct Testimony (TDS Ex. 1), Mr. Meredith's Reply Testimony (TDS Ex. 2), Mr. Meredith's verification (TDS Ex. 3), and TDS' response to the Commission's docket entry (TDS Ex. 4). The parties subsequently filed their respective responses to the Commission's May 7, 2009 docket entry seeking additional information as Comcast Phone Ex. 5 and TDS Ex. 5.¹

On June 4, 2009 the Parties filed their Proposed Orders. On July 2, 2009, Comcast Phone submitted a *Notice of Recently Discovered Controlling Indiana Authority and Supplemental Authority*. On July 7, 2009, the Presiding Officers approved a new procedural schedule providing for the submission of Revised Proposed Orders, with Exceptions due on July 24, 2009. On August 12, 2009, Comcast Phone filed a *Supplemental Filing*, to which TDS responded with an *Objection* on August 14, 2009. On August 17, 2009, TDS filed its *Statement Concerning New Hampshire Order*. On August 18, 2009, the parties filed a *Joint Motion to Extend Time for a Commission Order*, which was granted via docket entry on August 18, 2009. On August 20, 2009, Comcast Phone filed its *Notice of Supplemental Authority*.

2. **Notice and Jurisdiction.** Comcast Phone and TDS are both "public utilities" within the meaning of Ind. Code § 8-1-2. TDS is an "incumbent local exchange carrier" under § 251(h) of the Act and Comcast Phone is a "requesting telecommunications carrier" within the meaning of § 252(a) of the Act. Pursuant to I.C. § 8-1-2.6-1.5(b)(2), this Commission has authority to arbitrate this dispute. The Commission has jurisdiction over TDS and Comcast Phone, as well as the subject matter of this Cause in the manner and to the extent provided by the laws of the State of Indiana and the Act.

3. **Identification of Unresolved Issues.** Pursuant to Section 252(b)(4)(A) of the Act, the Commission "shall limit its consideration" to the issue set forth in Comcast Phone's Petition and TDS' Response. The parties have identified the sole disputed issue as "whether Comcast Phone qualifies as a telecommunications carrier entitled to interconnection with TDS under Sections 251 and 252 of the Act." This dispute is reflected in the following disputed interconnection language:

¹ TDS filed a *Motion to Compel Discovery* on April 23, 2009. The Presiding Officers issued a docket entry on April 30, 2009 ordering Comcast Phone to respond to the outstanding discovery at issue. On May 4, 2009, TDS filed a *Withdrawal of Motion to Compel Discovery*. The responses by Comcast Phone were not offered as evidence in this Cause and were not filed with the Commission. TDS made references to Comcast's responses to discovery in its Proposed Order, but because the material at issue is not in the record of this proceeding, the Commission cannot consider it in reaching a decision in this Cause.

3. EFFECTIVE DATE

- 3.1 This Agreement becomes effective ("Effective Date") ~~only if (1) the Commission has determined in an arbitration or other appropriate proceeding that COMCAST is a telecommunications carrier in the state of () entitled to interconnection with TDS TELECOM pursuant to Section 251 of the Act and that the services COMCAST will be providing by way of the interconnection are telecommunications services (12) when executed by each Party and after approval by the Commission under Section 252(e) of the Act or (23) ...~~

TDS proposes including language shown in the strike-through included in the text above. Comcast Phone asserts that the language is unnecessary because it argues that the law and facts establish that Comcast is a telecommunications carrier entitled to interconnection under the Act.

4. **Statutory Standards.** The Act requires the Commission to "resolve each issue set forth in the petition and response, if any, by imposing appropriate conditions as required to implement subsection [§252(c)] upon the Parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section."²

We summarize the parties' positions on the disputed issue.

5. **Position of the Parties.**

a. **Comcast Phone Direct Case.** Through testimony submitted by Ms. Choroser, Comcast Phone asserts that it is a telecommunications carrier within the state of Indiana. Ms. Choroser testified that Comcast Phone (1) offers "various wholesale telecommunications services to the public, including both telephone exchange and exchange access service offerings," which it provides through (i) its Local Interconnection Service ("LIS"), offered to interconnected voice over Internet protocol ("VoIP") service providers, (ii) exchange access services offered to interexchange carriers ("IXCs"), and (iii) a Schools and Libraries service offered to qualifying schools and libraries, that includes both data networking and local exchange calling capabilities; (2) is authorized by the Commission to provide telecommunications services in Indiana, as reflected by the fact that it is a party to interconnection agreements with "nine other incumbent carriers in Indiana," including one between Comcast Phone and Communications Corporation of Indiana (a TDS affiliate).

Ms. Choroser stated that LIS provides "public switched telephone network (PSTN) interconnection" to interconnected VoIP service providers, which she describes as including the following:

two-way interconnection with the [PSTN] for exchange of voice traffic, and administration of numbering resources, local number portability, operator

² 47 U.S.C. § 252(b)(4)(C).

services, 911 emergency calling services, and directory listing and directory assistance services.

Ms. Choroser noted that LIS is a public offering “available to qualified providers of interconnected [VoIP] services.” She stated that similarly situated Comcast Phone affiliates around the country also offer LIS, and several Comcast Phone affiliates have received inquiries about the service. Ms. Choroser stated that no prospective customer has complained about the terms and conditions of the LIS offering or alleged that Comcast Phone has refused to consider a request for service.

Ms. Choroser stated that Comcast Phone “has approximately 35 exchange access service customers in Indiana who purchase either intrastate or interstate terminating access services,” all pursuant to its existing state and federal tariffs. Moreover, she noted that Comcast Phone “pays terminating access charges to numerous other carriers, including TDS, in Indiana and elsewhere,” and “makes and receives reciprocal compensation payments to other local exchange carriers pursuant to its Section 251 Interconnection Agreements in the state.”

Ms. Choroser testified that the FCC has recognized that interconnected VoIP service providers require the assistance of LECs in order to serve their customers, and that the FCC has referred to this relationship as a “partnership.” Further, the FCC ruled in *Time Warner* that CLECs who provide wholesale service to interconnected VoIP service providers (as Comcast Phone does by way of its LIS offering) have “full interconnection rights and obligations to provide PSTN connectivity to such providers.”³

Ms. Choroser also cited the FCC’s decision in *Bright House*, in which “the FCC found, and the D.C. Circuit Court of Appeals upheld, that Comcast’s provision of its interconnection services to its interconnected VoIP affiliate qualify[es] it as a telecommunications carrier under Section 222(b) of the Act.”⁴ The D.C. Circuit affirmed *Bright House* and found that “any other voice services provider similarly situated to Comcast’s interconnected VoIP provider affiliates could obtain LIS service from these Comcast CLECs, and Verizon had failed to provide any evidence to suggest that Comcast would turn away such customers.” Ms. Choroser also referenced decisions from “[m]ore than one-half dozen states” involving Sprint’s attempt to obtain interconnection so that it could provide PSTN interconnection services similar to Comcast Phone’s LIS offering. Ms. Choroser stated that in all of these cases, Sprint’s right to obtain Section 251 interconnection was affirmed.

Ms. Choroser argued that while *Bright House*, the D.C. Circuit’s decision affirming *Bright House*, and the Sprint interconnection cases are not binding in this proceeding, she felt that they were correctly decided and that the Commission should reach the same result.

³ *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 F.C.C.R. 3513 (2007) (“Time Warner”).

⁴ *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 F.C.C.R. 10704 (2008) (“Bright House”), *aff’d*, *Verizon California, Inc. v. F.C.C.*, 555 F.3d 270 (D.C. Cir. 2009).

b. TDS Direct Case. TDS offered the direct testimony of Douglas Duncan Meredith. Mr. Meredith stated Comcast Phone wanted to interconnect with TDS to enable another Comcast Corporation cable-based subsidiary to provide VoIP service over Comcast's existing cable facilities.

Mr. Meredith asserted that the FCC's decision in *Time Warner* stated that Section 251 interconnection was "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." Mr. Meredith asserted that the scope of its action "is limited to wholesale carriers that are acting as telecommunications carrier[s] for purposes of their interconnection request." Mr. Meredith stated even if Comcast Phone were considered to be a common carrier in the regional telecommunication carriers ("RTCs") service territories, the traffic proposed to be delivered by Comcast Phone to the RTCs through the Section 251 interconnection agreement is interconnected VoIP service traffic, which he stated has not been designated as telecommunications traffic by the FCC. Mr. Meredith testified that the failure to exchange telecommunications traffic through a Section 251 interconnection arrangement is not in compliance with FCC regulation 47 C.F.R. § 51.100 and does not meet a threshold requirement for Section 251 interconnection. Mr. Meredith opined that Comcast Phone's requested arrangement would overstep the limits the FCC placed on wholesale service providers in *Time Warner*. Mr. Meredith stated that access traffic does not qualify Comcast Phone for interconnection with TDS under § 51.100 because no access traffic would be exchanged through a Section 251 arrangement with Comcast Phone. Mr. Meredith noted that the TDS companies do not send or receive access traffic over Section 251 interconnection facilities.

Mr. Meredith described 47 C.F.R. § 51.100 as follows:

FCC regulation 47 C.F.R. § 51.100 establishes a telecommunications carrier's general duty pursuant to section 251 of the Act. Section 51.100(b) prescribes the type of interconnection access granted by one telecommunications carrier to another telecommunications carrier that has obtained interconnection pursuant to section 251. Specifically it states:

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

Mr. Meredith explained how 47 C.F.R. § 51.100 applied to Comcast Phone. He stated this FCC regulation addresses the exchange of traffic between two carriers via an interconnection arrangement. Mr. Meredith said the carrier obtaining the interconnection must be transmitting telecommunications traffic pursuant to § 251(a)(1), 251(c)(2), or 251(c)(3) of the Act as an initial criterion for establishing the connection under § 51.100. He asserted that only after this initial criterion is established for telecommunications service traffic may a telecommunications carrier use the excess capacity of the same interconnection facility to exchange information services

traffic. Mr. Meredith asserted Comcast Phone may not obtain interconnection pursuant to Section 51.100 solely for non-telecommunications purposes. Mr. Meredith stated that in this case that addresses local interconnection, Comcast Phone must exchange telecommunications service traffic subject to Section 251 over the requested trunks and facilities before it can use the excess capacity in the same interconnection arrangement to exchange information services traffic. Mr. Meredith stated Comcast Phone is seeking to exchange VoIP traffic, which Comcast Phone does not claim as telecommunications traffic, over the interconnection facility.

Mr. Meredith also addressed the role of state commissions in interconnection matters. He asserted that in the *Time Warner* case, the FCC stated it would not review any state commission's evidentiary assessment as to whether "an entity had demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law." Mr. Meredith indicated the FCC's statements regarding state proceedings in *Time Warner* are important because they reinforce the role of the states to determine if a provider has Section 251 interconnection rights. He said this determination depends on whether Comcast Phone is seeking interconnection for the purpose of transmitting telecommunications traffic to or from the TDS companies. He also stated that the *Time Warner* decision indicates the FCC does not believe that self-certification is a sufficient determination of whether or not a provider is a common carrier for purposes of Section 251.

Mr. Meredith stated that Comcast Phone provided no evidence that it sought interconnection in its own right to transmit telecommunications traffic to or from the TDS Companies. Mr. Meredith said that based on the Petition and the information he had reviewed, his recommendation to the Commission was for the Commission to determine Comcast Phone was not eligible for Section 251 interconnection because it was not a common carrier in the TDS territories.

Mr. Meredith testified he has reviewed Comcast Phone's LIS tariff in Indiana, and has identified several facts supporting the conclusion the LIS was not being offered on a common carrier basis in the state. He stated that Comcast Phone is not a common carrier for purposes of its LIS Service because there were several aspects of the service that were characteristic of private service, not a common carrier offering. He said Comcast Phone made individualized decisions in some cases and cited *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), and *Southwestern Bell Telephone Company v. Federal Communications Commission*, 19 F.3d 1475 (D.C. Cir. 1994), as showing that carriers making individualized decisions were not common carriers.

He stated the LIS tariff was without specific provisions that would actually govern the terms and conditions of the service offering, and that the LIS tariff was a tool designed to camouflage the Comcast Phone relationship with its Comcast IP affiliates. He stated that LIS did not support common carriage status and did not support Section 251 interconnection. He testified that the LIS tariff was only available to a *bona fide* customer but the tariff did not define a "*bona fide*" request. He said charges for the LIS service were developed on a case-by-case basis subject to modification on one day notice. He contended that Comcast Corporation's retail subsidiaries were the only providers that would not be disadvantaged by increased rates or any termination penalty since it would be paid by one Comcast entity to another.

Mr. Meredith stated that Comcast Phone had no local telecommunications traffic to exchange with the Respondents in this proceeding. He said LIS service consists solely of VoIP traffic and that Schools and Libraries service is referred to as a point-to-point LAN service which does not generate any telecommunications traffic that is exchanged over the Section 251 interconnection arrangement. Mr. Meredith stated that Comcast Phone's wholesale offering was intended to be private carriage for Comcast IP's retail offerings. Mr. Meredith stated that if Comcast Phone is providing service on a common carrier basis in another area of Indiana it does not suggest or imply that it is a common carrier in the Respondent TDS Companies' service territories. Furthermore, he stated, there was no evidence showing Comcast Phone was seeking interconnection in its "own right" for the purpose of transmitting telecommunications traffic to or from the Respondents.

Mr. Meredith said that Comcast Phones' Schools and Libraries service did not qualify it as a common carrier because it is described as a "high-speed data service that uses point-to-point T-1 circuits for the interconnection of Local Area Networks (LANs) across the customer's physical locations." He testified these factual considerations suggest the Schools and Libraries service does not support its qualification as a common carrier for any service requiring Section 251 interconnection. Lastly, Mr. Meredith stated that Comcast Phones' exchange access service allows end user customers to make and receive calls from their selected interchange carrier ("IXC"). Mr. Meredith said that if Comcast Phone has no retail end user customers because of never offering retail local exchange service in Indiana, it cannot be a terminating switched access service provider. Mr. Meredith stated that ancillary services offered with Interconnected-VoIP service are not telecommunications service because the underlying service they support is, as claimed by Comcast Phone, not telecommunications service.

Mr. Meredith stated the FCC has concluded that there are some services or functions that are "incidental or adjunct to common carrier transmission service," including local number portability, central office space for collocation, and certain billing and collection services. Mr. Meredith asserted that according to the FCC these services "should be treated for regulatory purposes in the same manner as the transmission services underlying them...." He argued the FCC has indicated that these adjunct-to-basic services are vital to the provision of the telecommunications services. Mr. Meredith said that using this same policy directive, it follows that when the underlying retail service is not a telecommunications service and not a common carrier service, these adjunct-to-basic services supporting the provision of non-telecommunications services should be treated similarly as non-telecommunications services. Mr. Meredith said Comcast IP will be offering a retail Interconnected-VoIP service which is not a telecommunications service. Therefore, he concluded that since the underlying retail service is not a telecommunications service, Comcast Phone's provision of ancillary services incidental to this transmission of non-telecommunications traffic does not constitute telecommunications service. Mr. Meredith contended that the insertion of a wholesale provider in the middle does not change the status of the underlying service. Mr. Meredith stated that to have it otherwise would provide an opportunity for non-telecommunications providers to obtain the benefits afforded telecommunications carriers not currently allowed under federal regulations or policy.

Mr. Meredith stated the Commission should not consider interconnection agreements in other states. He also said that the existence of Comcast Phone interconnection agreements in other states does not automatically support Comcast Phone's claim of being recognized in those states for purposes of Section 251 interconnection with Respondents. Mr. Meredith recommended the Commission determine that Comcast Phone is not a common carrier in the Respondent TDS Indiana Companies service territories.

c. **Comcast Phone Reply.** In response to TDS' assertion that Comcast Phone is not seeking interconnection "in its own right," Ms. Choroser stated that Comcast Phone is not offering a VoIP product itself, but is seeking interconnection in its own right to offer wholesale telecommunications services. Ms. Choroser characterized Mr. Meredith's testimony as an "attempt to blur the distinction between the telecommunications services that Comcast [Phone] provides and the interconnected VoIP services that its affiliates offer" which "ignores the distinction between an end-user product and Comcast's wholesale telecommunications services."

Ms. Choroser contended that the classification of a service offered by Comcast Phone's customer, whether affiliated or not, is "irrelevant to Comcast [Phone]'s status as a telecommunications carrier and related Section 251 interconnection rights." What matters, Ms. Choroser argued, is that Comcast Phone offers "retail telecommunications services directly to end-users and wholesale telecommunications services to other providers." Ms. Choroser contended that *Time Warner* clarified that, in a wholesale interconnection services arrangement, the regulatory classification of the service provided to the ultimate end user – whether interconnected VoIP or another service – has no bearing on the wholesale service provider's Section 251 interconnection rights.

Ms. Choroser addressed Mr. Meredith's concerns about Comcast Phone's LIS offering. First, she testified that *bona fide* is a common contract term that requires no separate definition. Ms. Choroser opined that potential customers can determine whether they qualify for LIS based on the description of the service. Likewise, Ms. Choroser asserted that the reference to "applicable" state or federal law is not confusing and would not deter a potential customer. She also noted that the "draconian financial provisions" identified by Mr. Meredith are actually common contract terms; that the LIS tariff states on its face that the termination provision is not a penalty and will only be assessed when necessary for Comcast Phone to recover its costs; and that the FCC has held that early termination clauses are reasonable telecommunications contract terms.

In addition, Ms. Choroser stated that common carriers are not required to offer standardized contracts in all cases. Citing the Iowa Utilities Board order finding that Sprint had the right to interconnect to provide its PSTN interconnection service, Ms. Choroser noted that regulators have approved the common carrier status of contracts with individualized prices, because each contract may contain circumstances and bundles of services unique to each customer. Furthermore, she asserted that tariff offerings utilizing Individual Case Basis ("ICB") pricing are not only well accepted, but are the norm for offerings like LIS.

Ms. Choroser stated that the PSTN interconnection offered to interconnected VoIP service providers is a telecommunications service, and that there is no basis to Mr. Meredith's

claim that Comcast Phone will not be transmitting any telecommunications traffic. Ms. Choroser stated that Mr. Meredith had "inappropriately directed the Commission's attention to the end-user interconnected VoIP service provided by Comcast Phone's interconnected VoIP service provider affiliates ("Comcast IP")." Thus, Ms. Choroser argued that Mr. Meredith's Section 51.100 analysis would only be relevant if Comcast Phone planned to offer information services. Ms. Choroser stated that because Comcast Phone is offering wholesale telecommunications services (to interconnected VoIP service providers) via its interconnection agreement with TDS, Section 51.100 has no bearing on this case.

With respect to the contention that Comcast Phone may not "self-certify" as a common carrier, Ms. Choroser asserted that the "key factor in establishing 'telecommunications carrier' status is the entity's announced willingness to hold itself out as a common carrier." Ms. Choroser stated that the FCC used the phrase "self-certify" to describe a carrier's willing offer of telecommunications services to the public and the rights and obligations attendant thereto, including regulatory oversight. She argued that because Comcast Phone is certificated by the Commission, provides telecommunications services in Indiana pursuant to publicly available tariffs, and has declared its willingness to serve as a common carrier, "Comcast qualifies as a telecommunications carrier as a matter of law."

In response to Mr. Meredith's testimony dismissing the significance of Comcast Phone's other interconnection agreements in the state, and with other TDS entities, which Mr. Meredith claims were entered into at a time when TDS did not fully understand Comcast Phone's business model, Ms. Choroser noted out that Comcast Phone never offered a retail circuit switched telephone service in Indiana. Ms. Choroser stated that Comcast Phone's service offerings today are no different than those offered when Communications Corporation of Indiana, and the other nine ILECs in Indiana, executed their respective interconnection agreements with Comcast Phone.

d. TDS Reply. Mr. Meredith argued that even if Comcast Phone is considered a telecommunications carrier, it is not "automatically" eligible for Section 251 interconnection with TDS. Comcast Phone, Mr. Meredith contended, must deliver telecommunications traffic, as required in FCC regulation 47 C.F.R. § 51.100. Mr. Meredith contended that Ms. Choroser's testimony omits an "affirmative declaration" that Comcast Phone will deliver telecommunications traffic, and asserts that Comcast Phone "proposes to deliver its VoIP traffic."

With regard to Ms. Choroser's discussion of Comcast Phone's Schools and Libraries service, Mr. Meredith replied that this service is not eligible for interconnection because "Comcast Phone never describes this service as a telecommunications service," "Comcast Phone has never claimed there are any potential customers in [TDS'] service territories," and Comcast Phone has not provided any evidence of what its facility and system conditions are. Mr. Meredith repeated his assertion that Comcast Phone's wholesale and retail service offerings do not qualify Comcast Phone for interconnection.

Mr. Meredith also contended that Ms. Choroser had misinterpreted the FCC's *Time Warner* ruling. Mr. Meredith stated that Comcast Phone was not abiding by this decision because

it seeks to provide exclusively information services. He reiterated that the FCC placed limits on the applicability of interconnection for retail VoIP providers in *Time Warner* and *Bright House*.

Mr. Meredith rejected Ms. Choroser's reliance on the Michigan Public Service Commission's decision granting interconnection rights to Comcast Phone's Michigan affiliate because that decision was unique and therefore not relevant to this matter. Mr. Meredith stated that the Michigan commission did not permit the parties to conduct discovery, and that no testimony was offered in that proceeding. Mr. Meredith contended that the decision "focused inappropriately on Comcast Phone's carrier status when the issue is whether Comcast Phone is eligible for Section 251 interconnection under the regulations and policies of the FCC." Mr. Meredith also rebutted the relevance of the interconnection agreements between Comcast Phone and other TDS affiliates in Vermont and Indiana. He stated that those agreements were entered into voluntarily before it became clear to TDS how Comcast Phone and its affiliates were operating subsequent to their withdrawal of exchange service from the marketplace. He stated that at the time the agreement was executed, Comcast Phone had not executed a national policy to withdraw its exchange services.

6. Commission Discussion and Findings The Commission finds that Comcast Phone qualifies as a telecommunications carrier under 47 U.S.C. § 153(44) and is entitled to interconnection with TDS pursuant to Section 251 because (1) it has received authority from the Commission to provide telecommunications services in Indiana, and (2) it does, in fact, offer such services to the public. Further, Comcast Phone requires interconnection with TDS to exchange telecommunications traffic with TDS.

In reaching this conclusion, we follow Commission precedent in the *Sprint Order*⁵, a Section 252 arbitration between Sprint and several rural ILECs, in which we found that Sprint was a telecommunications carrier entitled to Section 251 interconnection so that it could provide "PSTN interconnection" services to MCC Telephony, a cable-affiliated provider of voice services. The Commission's *Sprint Order* is similar to those of other state commissions and in accord with the FCC's finding in *Bright House*, affirmed by the D.C. Circuit, that Comcast Phone qualifies as a telecommunications carrier by virtue of its LIS offering to interconnected VoIP service providers. Our decision is also in accord with the FCC's ruling in *Time Warner*, which provides that telecommunications carriers are entitled to Section 251(a)-(b) interconnection in order to provide wholesale services, including to interconnected VoIP service providers.

A. Comcast Phone is a Telecommunications Carrier. Many of the rights and duties that make local competition possible are available only to telecommunications carriers. Both Indiana and federal law require telecommunications carriers to serve the public in ways that

⁵ *In the Matter of 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.*, Cause No. 43052-INT-01 (consolidated with 43053-INT-01 and 43055-INT-01) (Ind. Util. Regulatory Comm'n, Sept. 6, 2006) ("Sprint Order").

private carriers need not, including the duty to provide service upon request. Comcast Phone's certificated status is thus the dispositive fact in this case. Comcast Phone is authorized to provide local exchange, interexchange and other telecommunications services in Indiana pursuant to the authority granted by this Commission in Cause No. 42593 (June 9, 2004).⁶ Pursuant to that authority, Comcast Phone qualifies as a competitive local exchange carrier ("CLEC") and is therefore a telecommunications carrier under the Act.

There are two basic requirements for an entity to be considered a telecommunications carrier. First, the carrier must hold itself out to serve all potential users indiscriminately and second, it must allow each customer to transmit information of the customer's choosing.⁷ Comcast Phone qualifies under both elements of this test.

The evidence shows that Comcast Phone offers three services in Indiana: LIS, Schools and Libraries, and exchange access services. These telecommunications services are all offered pursuant to its publicly available Indiana and federal tariffs. Thus, Comcast Phone satisfies the public "holding out" requirement. We find illustrative the decision of the New Hampshire Commission that Comcast Phone qualifies as a telecommunications carrier entitled to interconnection by virtue of its exchange access and school and libraries service offerings alone.⁸ Both involve the transmission of information of the customers' choosing and the services are offered pursuant to tariff. The schools and libraries service includes several telecommunications service components, including point-to-point transport, which is similar to certain types of "special access" telecommunications services that have been regulated by the states and the FCC. The service also includes local and long-distance calling capabilities which qualify as telecommunications services under the Act and are among the types of service which the Commission has given Comcast Phone the authority to provide. We concur with the New Hampshire Commission's findings, and find that Comcast Phone is entitled to interconnection as a consequence.

The LIS offering also qualifies as a telecommunications service. LIS provides a connection between a customer's facilities and the public switched telephone network. See, Comcast Phone Ex. 2, p. 2. Comcast Phone also transmits its customers' telecommunications traffic in the same format in which it is received, the TDM telecommunications format. *Id.*, p. 5.

⁶ The CTAs of Comcast Telecommunications, Inc. were transferred to Comcast Phone in Cause No. 42593. The authority granted Comcast Telecommunications in Cause Nos. 41810 and 41822 was for the provision of resold bundled local exchange, facilities-based local exchange switched and special access, dedicated private line and interexchange toll services on a statewide basis. Therefore, upon the transfer of the CTAs, Comcast Phone received authority to provide the same services.

⁷ Under 47 U.S.C. § 153(44), a "telecommunications carrier" is "any provider of telecommunications services," which, in turn, are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The Act further explains that, "[a] telecommunications carrier shall be treated as a common carrier" *Id.* § 153(44).

⁸ See, e.g., *Comcast Phone of New Hampshire, LLC, Request for Authority to Provide Local Telecommunications Services, Order Granting Authority*, Docket No. DT-08-013, Order No. 24,938 (Feb. 6, 2009).

LIS is also offered pursuant to tariff, in which it is made available to any qualifying customer who requests the service.

The transmission requirement is also satisfied. The evidence shows that Comcast Phone is a party to approved Section 251 interconnection agreements between itself and eleven other incumbent carriers in Indiana, including one of TDS's other affiliates in the state, Communications Corporation of Indiana.⁹ Pursuant to those interconnection agreements, Comcast transmits and receives non-toll, locally rated traffic either on a "bill-and-keep" or on a reciprocal compensation payment basis. Comcast Phone also provides either intrastate or interstate terminating access service to approximately 35 customers in the state, and "pays terminating access charges to numerous other carriers, including TDS, in Indiana and elsewhere," for toll traffic originated by its customers. Comcast Phone requires interconnection with TDS so that its customers can communicate with TDS' customers, and vice versa. Moreover, interconnection with TDS is required so that third-party interexchange carriers can route their traffic to Comcast Phone's customers.¹⁰

Our finding is consistent with the FCC's determination in *Bright House* (affirmed by the D.C. Circuit):¹¹ i.e. that Comcast Phone is a telecommunications carrier. In so ruling, the FCC relied in large part on the fact that both Comcast and Bright House previously certified that they had operated, and would continue to operate, as common carriers serving all similarly situated customers equally.¹² 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 a statement lightly. Further, supporting our conclusion are the public steps that [Comcast and Bright House] have taken, consistent with their undertaking to serve the public indifferently. Specifically, each . . . has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates. Moreover, each . . . 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

⁹ Ms. Choroser testified that Comcast Phone had nine interconnection agreements with ten incumbent carriers in Indiana, including Communications Corporation of Indiana (noting that the Commission approved a single interconnection agreement between Comcast Phone and both CenturyTel of Central Indiana, Inc. and CenturyTel of Odon, Inc.). However, Comcast Phone recently amended its interconnection agreement with Frontier Communications of Thorntown, LLC (Docket No. 42602-INT-08ND, Dec. 13, 2008) to include the service territory of Frontier Communications of Indiana, LLC. Thus, Comcast Phone now has nine interconnection agreements with eleven incumbent carriers in Indiana.

¹⁰ Section 51.3.1 of the draft interconnection agreement that the parties have negotiated but not yet signed (attached as an exhibit to Comcast Phone's petition), provides that the parties will exchange access traffic over interconnection facilities established pursuant to the agreement.

¹¹ *Verizon Calif. Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

¹² See *Bright House*, 23 F.C.C.R. 10704 at ¶ 39.

[Comcast and Bright House] are indeed telecommunications carriers for purposes of Section 222 of the Act.¹³

TDS asserts that *Bright House* is inapplicable because it was decided under Section 222, not Section 251. TDS' argument ignores the normal rule of statutory construction and interpretation under which identical words used in different parts of the same statute are generally presumed to have the same meaning. The term "telecommunications carrier" is defined in 47 U.S.C. § 153(44), and that definition applies throughout the Act, which includes Section 251.

Moreover, the *Bright House* decision is in accord not only with our own *Sprint* decision, but also with the decisions of state regulatory commissions and courts across the nation.¹⁴ Each of these cases affirmed the telecommunications service status of the PSTN interconnection service offered by a CLEC like Comcast Phone and further affirmed a CLEC's interconnection rights under Section 251. Three cases, in Vermont, New Hampshire and Michigan, specifically involved Comcast Phone affiliates.¹⁵ While we recognize that these cases are not binding upon this Commission, we nonetheless find them persuasive authority and concur in their conclusions.

¹³ *Id.*

¹⁴ *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, 2005 WL 1863370 (Ill. CC, July 15, 2005); *Sprint Comm. Co LP v ACE Comm. Group, et al*, Order on Rehearing, Docket No. ARB-05-2, 2005 WL 3624405 (Iowa Util. Bd., Nov 28, 2005) ("*Sprint Iowa Order*") *aff'd Iowa Telecomms. Servs., Inc. v Iowa Utils. Bd.*, 563 F.3d 743 (8th Cir. 2009); *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*"), *aff'g 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*, Decision of the Arbitrator, Case No. U-15725, U-15730 (Mich. PSC, Jan. 28, 2009); *Sprint Comm. Co. LP v. Nebraska Pub. Serv. Co.*, Case No. 4:05CV3260, 2007 WL 2682181 (D. Neb., Sept. 7, 2007), *rev'g Re Sprint Comm. Co LP*, Opinion and Findings, Appl. No. C-3429, 2005 WL 3824447 (Neb PSC, Sept 13, 2005); *Comcast Phone of New Hampshire d/b/a Comcast Digital Phone Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS*, DT 08-162, Order No. 25,005 (N.H. P.U.C. Aug. 13, 2009); *Berkshire Tel Corp v. Sprint*, Case No. 05-CV-6502, 2006 WL 3095665 (WDNY, Oct. 30, 2006), *aff'g Sprint Comm. Co. LP*, 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); *Sprint Communications Company, L.P.*, Order Ruling on Objections and Requiring the Filing of a Composite Agreement, Docket No. P-294, Sub 30 (N. Carolina Utilities Comm'n Dec. 31, 2008), 2008 WL 5456090 (N.C.U.C.), *adopting in relevant part Sprint Communications Company, L.P.*, Recommended Arbitration Order, Docket No. P-294, Sub 30 (N. Carolina Utilities Comm'n August 29, 2008) 2008 WL 4123656 (N.C.U.C.); *Re The Champaign Tel Co*, Case No. 04-1494-TP-UNC, *et al* (Ohio PUC, Apr. 13, 2005); *Sprint Comm. Co LP*, Order, App No. 310183F0002AMA, *et al*, 101 PaPUC 895, 2006 WL 3675279 (Pa PUC, Nov. 30, 2006); *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) ("*Sprint Texas PUC Order*"); *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); *Re Sprint Comm. Co. LP*, Order No. 4, Docket UT-073031, 2008 WL 227939 (WUTC, Jan. 24, 2008) ("*Sprint Washington Order*").

¹⁵ While TDS attacked the Michigan proceeding on the grounds that no testimony was offered in the proceeding, the arbitrator's decision explicitly references "extensive attachments and supporting testimony".

B. Comcast Phone's Customers and the Services They Provide Are Not Relevant to Comcast Phone's Telecommunications Carrier Status. TDS argues that LIS does not qualify as a telecommunications service because Comcast Phone's customers are interconnected VoIP service providers. However, as the FCC found in *Time Warner*, the "regulatory classification of the [interconnected VoIP] service provided to the ultimate end user has no bearing" on the interconnection rights of wholesale providers.¹⁶ We therefore reject the argument that the nature of traffic as it is originated or terminated has any bearing on telecommunications carriers' rights and obligations with respect to the exchange of that traffic on the PSTN.

Comcast Phone provides a telecommunications service to its affiliate(s) providing VoIP service, with whom it is interconnected, but it does not provide VoIP itself. In other words, while Comcast Phone's customers' traffic may be originated in IP format, that does not mean that Comcast Phone is seeking to exchange "VoIP traffic" with TDS. To the contrary, Comcast Phone's traffic is telecommunications traffic under the Act. The regulatory classification of the service that its customers provide does not affect the regulatory classification of the service that Comcast Phone provides.¹⁷

TDS cites 47 C.F.R. § 51.100 in support of its position. That regulation states in relevant part:

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

Comcast Phone provides telecommunications services. Therefore, we need not address the question of whether Comcast Phone is providing information services.

C. Comcast Phone Satisfies the Public "Holding Out" Requirement. TDS argues that LIS does not satisfy the "public holding out" requirement of the common carrier test because of the "restrictive" nature of the services they offer. We disagree. As we found three years ago in the *Sprint Order*,

[i]n order to determine whether an entity qualifies as a common carrier, we must first consider whether the carrier holds itself out to serve potential users

Comcast-TDS Michigan Decision, Decision of the Arbitrator, p.1 (Jan. 28, 2009), *supra* n. 13. In addition, TDS' argument does nothing to alter the Michigan Commission's conclusion.

¹⁶ *Time Warner Declaratory Ruling*, ¶ 15; *see also id.* ¶¶ 9, 16. Information services are provided via telecommunications, but they are mutually exclusive statutory categories, as the FCC has recognized. *See also Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, 11 F.C.C.R. 21905, ¶ 103 (1997).

¹⁷ For example, dial-up ISP customers access the Internet over ordinary telephone lines. Internet access is an information service. But that does not transform the telecommunications service used to access that service into an information service.

indiscriminately. Second, we must consider whether the carrier alters the content of the users' transmissions. Because there is no dispute over whether Sprint is altering the content of the communications it carries, our decision turns on the question of whether Sprint's services are offered indiscriminately.

In this case, it is undisputed that Sprint is not directly serving MCC customers or end users. Instead, MCC will provide "last mile" services from the Sprint switch. Accordingly, such last mile providers are the class of users at issue in this case.¹⁸

There is a strong similarity between the services offered in the *Sprint* case and Comcast Phone's LIS offering. LIS is offered to a particular class of users, *i.e.*, retail interconnected VoIP service providers capable of offering their own last-mile facilities that want Comcast Phone's interconnection service. A prospective customer will be able to determine whether it is eligible to purchase LIS by examining the description of the service in the tariff. While there may be limited customer pool for these services, this does not prevent a finding that Comcast Phone is a telecommunications carrier. Comcast Phone is not required to expand the scope of its offering, nor must it secure a threshold number of customers before it can gain status as a common carrier. Such a requirement would effectively limit competition by creating an additional burden on carriers wishing to enter the market. All that is required is that it serve "indiscriminately ... the clientele [it is] ... suited to serve."¹⁹ As the D.C. Circuit held, "[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."²⁰ We therefore reject TDS' contention on this point.²¹

TDS also argues that the early termination and related provisions in LIS could be construed to limit Comcast Phone's willingness and ability to indiscriminately offer services to other potential customers. We do not accept this premise. Early termination clauses such as that found in LIS are frequent industry practice, and the FCC has found that early termination clauses are "typically found in fixed term contracts" and constitute an "accepted commercial practice, both inside and outside of the telecommunications industry."²² The presence of an early termination clause does not nullify Comcast Phone's willingness and ability to indiscriminately offer services to other potential customers.

¹⁸ *Id.*, at 9 (internal citations omitted).

¹⁹ *Consolidated Comms. of Fort Bend*, 497 F.Supp.2d at 845 (quotation omitted).

²⁰ *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

²¹ We find support in the findings of other state utility commissions that have examined this issue. The Iowa Utilities Board found that Sprint was a common carrier because it offered PSTN interconnection to "that class [of potential customers] consisting of entities capable of offering their own last-mile facilities."²¹ The Eighth Circuit upheld the *Sprint Iowa Order* and noted that it was "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."*Iowa Telecomms. Servs.*, 563 F.3d at 750 n.6 (citing *Verizon Cal.*, 555 F.3d at 276).

²² *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 F.C.C.R. 16978, ¶¶ 692, 698 (2003).

We make a similar finding regarding TDS' complaints about the ICB nature of the LIS offering. "[C]ommon carriers do not have to offer standardized contracts,"²³ and 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."²⁴ Given that every potential customer's network may be different, every contract might have to be different, as well. Accordingly, it is not surprising that different contracts have "different pricing,"²⁵ as the Iowa Utility Board explained in its order which 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.²⁶

D. Conclusion. We find that Comcast Phone is a telecommunications carrier entitled to interconnection under the Act. In the words of the New Hampshire Commission,

So 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, pursuant to 47 U.S.C. § 251(a), and may, therefore, permit its affiliate to provide Voice over Internet Protocol services to customers in TDS' territory. In fact, the introduction of such potentially competitive services in TDS territory is consistent with the overarching policy of reducing barriers to competition in ILEC territories.²⁷

And for good measure, our Order also comports with the goal of encouraging competition as defined in HEA 1279. The parties shall therefore jointly execute and file their interconnection agreement (including all attachments, appendices, and exhibits) with the Commission for approval consistent with this finding.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION THAT:

1. The disputed issue between the parties is resolved in accordance with the findings and conclusions set forth herein. Comcast Phone is a telecommunications carrier entitled to interconnection under the Act.

²³ *Sprint Iowa Order* at 14-15.

²⁴ *MCI Telecomms. Corp.*, 917 F.2d at 34.

²⁵ *Id.*

²⁶ *Sprint Iowa Order* at 14-15.

²⁷ *Comcast Phone of New Hampshire d/b/a Comcast Digital Phone Petition for Arbitration of Rates, Terms and Conditions of Interconnection with TDS*, DT 08-162, Order No. 25,005, at p. 20 (N.H. P.U.C. Aug. 13, 2009).

2. The parties shall jointly execute and file a single Interconnection Agreement (including all attachments, appendices, and exhibits) for the Commission's approval reflecting our resolution of the disputed issue in this Order. Such Interconnection Agreement shall be submitted to the Commission as set forth herein by the parties within thirty (30) calendar days following the issuance of this Order.

3. This Order shall be effective on and after the date of its approval.

HARDY, ATTERHOLT, GOLC, LANDIS, AND ZIEGNER CONCUR:

APPROVED: SEP 03 2009

**I hereby certify that the above is a true
and correct copy of the Order as approved.**



**Brenda A. Howe
Secretary to the Commission**