Before the

FEDERAL COMMUNICATIONS COMMISSION

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| IN THE MATTER OF  IDAHO PUBLIC UTILITIES COMMISSION  PETITION FOR DECLARATORY RULING  concerning Section 251(h)(2) of the Communications Act  Treatment of CTC Telecom, Inc. And Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act | )  )  )  )  )  )  )  )  )  )  )  )  ) | CCB Pol.  CC Docket No. |

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SUMMARY

Pursuant to 47 U.S.C. §251(h)(2), the Idaho Public Utilities Commission (IPUC) petitions the Commission to, by rule, treat CTC Telecom, Inc. as an incumbent local exchange carrier for purposes of Section 251(c) of the Telecommunications Act of 1996.  CTC intends to provide local exchange service to a new large residential and commercial development -- a planned community -- located just beyond the city limits of Idaho’s largest metropolitan area of Boise but within U S WEST Communication, Inc.’s study area.  U S WEST is the incumbent local exchange carrier, as defined in Section 251(h)(1).  By virtue of the fact that neither the incumbent LEC nor any other LEC currently has facilities capable of serving the planned community and CTC has an exclusive contract with the developer, CTC will effectively be the sole provider of local exchange service to this “community” of approximately 900 residences and an undetermined number of small businesses.

Absent a Commission decision treating CTC as an “incumbent LEC” for purposes of Section 251, CTC is under no federal mandate to comply with the obligations of Section 251(c), because CTC is a “new” LEC created after February 8, 1996. 47 U.S.C. §251(h)(1)(A).  Under Idaho law, CTC is also exempt from price regulation by the IPUC.  Idaho Code §§ 62-603(6) and 62-622(2).

Granting this Petition would encourage competition by imposing the pro-competitive standards enacted by Congress in Section 251(c) on a local exchange carrier that intends to provide telephone local exchange service to all or virtually all of the subscribers in its service area, where, as here, no NECA member actually served the area at issue as of the date of the enactment of the 1996 Act.

I.  INTRODUCTION

Pursuant to 47 C.F.R. §51.233(b) (1997) and in compliance with 47 C.F.R. Ch. 1 Subpart C (1997), the IPUC, by and through its attorney of record, Cheri C. Copsey, Deputy Attorney General, State of Idaho, petitions the Commission to, by rule, provide for the treatment of CTC Telecom, Inc., a local exchange carrier offering basic local exchange service, as an incumbent local exchange carrier for purposes of Section 251(c) of the Communications Act of 1934, as amended (Act or Communications Act).(footnote: 1)  The IPUC further petitions the Commission to provide, by rule, for the treatment of all similarly situated local exchange carriers (LECs) as incumbent LECs for purposes of Section 251(c) of the Communications Act.  The statutory criteria set forth in Section 251(h)(2) and more completely discussed in the Commission’s decision in CC Docket No. 97-134 dated May 19, 1997, are satisfied for treating CTC and similarly situated LECs as incumbent LECs.

II.  BACKGROUND

A.  CTC Telecom, Inc.

On April 21, 1998, CTC Telecom, Inc. applied to the IPUC for a Certificate of Public Convenience and Necessity to provide basic local exchange service to a new residential and commercial planned community being constructed near Boise, Idaho.  The area being developed is  located within U S WEST Communications, Inc.’s existing study area in southern Idaho.  U S WEST is the incumbent LEC, as defined in Section 251(h)(1).  However, because this development is under construction, the incumbent LEC (U S WEST) has only limited facilities currently providing isolated service in the general area.  To meet the developer’s needs, any LEC would be required to construct substantial new facilities, requiring a large investment of materials and capital.  CTC was incorporated on February 17, 1998, and is a wholly-owned subsidiary of Cambridge Telephone Company, a rural incumbent LEC providing service in other areas in Idaho.(footnote: 2)

CTC has an exclusive contract with the developer of Hidden Springs Development to provide the telecommunications, cable television, high speed data transfer capabilities and other services to the development and its residences. Hidden Springs Development is a new planned community of approximately 900 residences and light commercial businesses to be located just north of Boise near Idaho State Highway 55.  Hidden Springs is within the Boise School District.  Because this development is under construction, no other local exchange carrier has provided service to the development, although U S WEST does provide local exchange service to a few existing customers in the Dry Creek area.  Only CTC will have facilities-based service in the Hidden Springs Development.

The IPUC issued CTC a Certificate of Public Convenience and Necessity on August 10, 1998.  Order No.  27673 (Appendix A).  In relevant part the IPUC found:

CTC is the first applicant to request a Certificate of Public Convenience and Necessity in order to provide non-price regulated Title 61 basic local exchange service as a facilities-based carrier to a new development under construction in which no other facilities-based carrier presently has facilities providing service to customers.  Under Idaho law, CTC is not an incumbent telephone corporation and is, therefore, not price regulated.  Idaho Code §§ 62-603(6) and 62-622(2).  Moreover, unless the Commission conditions its Certificate of Public Convenience and Necessity or adopts rules establishing standards for interconnection and access, CTC would not be required to provide unbundled access, to negotiate wholesale prices or to generally facilitate competition for its services.  The Commission finds that this set of circumstances would not promote customer choice in service providers as mandated by the legislature.

Id. at 3.  The IPUC found that it had authority to impose additional conditions on CTC designed to protect customers.  However, rather than imposing conditions only on CTC, the IPUC found that

conditioning CTC’s Certificate would only protect Hidden Springs Development’s basic local exchange customers and would not address future applications or those local exchange carriers that have already received certificates for larger service areas.  Rather, the Commission finds that adopting rules setting the standards for interconnection and access in unserved areas is the better approach and orders a Rulemaking docket be opened and temporary rules adopted, effective immediately.  Therefore, the Commission finds it is not necessary to condition this individual Certificate because it and all similarly situated facilities-based competitors providing basic local exchange service in unserved areas will have the same standards for providing interconnection and access in those areas.

Id. at 4-5.

The IPUC, therefore, promulgated new rules designed to promote competition and protect the public where the first and only facilities-based LEC in a geographic area would technically be a non-incumbent LEC only by virtue of the date it began providing service.  (Appendix B).  The IPUC was sensitive to the prohibitions contained in Section 253 and, therefore, carefully crafted its rules to only apply in instances where there was no local competition.  For example, the IPUC specifically provided that any facilities-based competitor may petition the IPUC to be exempted from the rules if there is functionally equivalent, competitively priced basic local services reasonably available to both residential and small business customers within the undeveloped area from a telephone corporation unaffiliated with the petitioner,or where the IPUC finds that exemption is in the public interest.  IDAPA 31.42.01.410.(footnote: 3)  Appendix B.  Therefore, by definition, these rules would not “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” in violation of Section 253(a).  On the contrary, the IPUC rules promote competition by inhibiting the first facilities-based LEC from effectively creating an economic disincentive for competitive entry.  The rules are “competitively neutral,” consistent with Section 254 and adopted to ultimately safeguard the rights of consumers.

B.  Relevant Provisions of the Telecommunications Act.

Section 251(h) establishes two alternative grounds for classifying a LEC, such as CTC, as an incumbent LEC.  First, a LEC may satisfy the statutory definition of an incumbent LEC set forth in section 251(h)(1):

(1) Definition.--For purposes of this section, the term “incumbent local exchange carrier” means, with respect to an area, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B)

(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

Second, under Section 251(h)(2), the Commission “may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of [section 251]” if:

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

Section 251(c) requires incumbent LECs -- and only incumbent LECs -- to meet certain specified obligations with respect to interconnection, access to unbundled network elements, resale of their retail services, notification of interoperability changes to their facilities or networks, and collocation.

C.  Relevant Commission Rules.

The relevant Commission rule, 47 C.F.R. § 51.223(b), provides:

(b)  A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs, pursuant to section 251(h)(2) of the Act.

III.  ARGUMENT IN SUPPORT OF PETITION

As the Commission stated recently in Guam, Congress’ intent was

‘to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .’

In the Matters of Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act and Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, CC Pol. 96-18, CC Docket No. 97-134 (released May 19, 1997), ¶2.  The Commission found that

To accomplish this purpose, Congress chose, inter alia, to impose on entities that are classified as incumbent LECs the duties of interconnection, access to unbundled network elements, resale of retail services, collocation, public notification of interoperability changes, and good faith negotiation specified in section 251(c).

Id. at ¶32.  The Commission further found that these requirements were crucial to encouraging competition -- the clear goal of the federal Telecommunications Act of 1996.

The incumbent LEC’s existing infrastructure in an area enables it to serve new customers within the area at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking, and loops to serve its customers.  CTC shares this advantage as the first facilities-based service provider in the Hidden Springs Development.  Moreover, prior to enactment of the Federal Telecommunications Act of 1996, the incumbent LEC had no incentive to assist new entrants because the incumbent LEC is typically dominant in its service area.  In Guam,the Commission found that “[p]rior to the enactment of section 251(c), an incumbent LEC also had the ability to discourage entry and robust competition by refusing to interconnect its network with the new entrant’s network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant’s customers to its customers.” Id.

Without Commission action, CTC likewise can insist on supracompetitive prices for interconnection, resale or impose other unreasonable conditions for terminating calls from the entrant’s customers to its customers.  It was these advantages that the Telecommunications Act attempted to minimize.  The IPUC agrees with the Commission that an incumbent LEC’s inherent economic advantages can render competitive entry very difficult, if not impossible.  This is precisely the problem this Petition is attempting to resolve.

In this case, CTC was not providing telephone exchange service on the date of enactment of the Telecommunications Act of 1996.  Therefore, CTC does not meet the first prong of the federal definition of an “incumbent LEC” as established by Section 251(h)(1)(A).  Thus, absent a Commission decision treating CTC as an “incumbent LEC” for purposes of Section 251, CTC is under no federal mandate to comply with the obligations of Section 251(c).  Moreover, although the IPUC promulgated rules intended to impose standards for interconnection and access on LECs similarly situated to CTC in order to promote competition, CTC argues that only the Commission can impose additional requirements on CTC.  47 C.F.R. Ch. 1 §51.223(a).(footnote: 4)  Therefore, CTC, likeGuam Telephone Authority, should be declared an incumbent LEC for the purposes of imposing Section 251(c) obligations, because, like the Guam Telephone Authority, it enjoys that same advantages that any incumbent LEC enjoys.

A.CTC Telecom meets the criteria established by Section 251(h)(2)(A).

Under Section 251(h)(2)(A), in order for the Commission to treat CTC as an incumbent LEC, CTC must “occup[y] a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [section 251(h)(1)].”  Unless this Commission imposes a duty on CTC to provide other LECs trying to offer service to customers in the Hidden Springs Development with interconnection, access to unbundled network elements, resale of retail services, and collocation and requires CTC to engage in good faith negotiation subject to Commission appeal, CTC can impede rather than advance the development of local exchange service competition.

Factually, within this yet to be constructed development, CTC occupies a market position that is comparable to an incumbent LEC.  As the Commission found in Guam:

[i]ncumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c).

Id. at ¶26.  CTC offers the first facilities based service to about nine hundred (900) residential customers and light commercial parcels presently under development in this planned community and clearly occupies a position comparable to the statutorily-defined incumbent LEC (i.e., a quasi-monopoly position).

CTC will clearly exercise dominance in the Hidden Springs Development because it will be the sole facilities-based provider of local exchange and exchange access services in the Hidden Springs Development.  While certainly customers could request a different carrier, if CTC is not obligated to provide, among other things, interconnection at fair and reasonable rates, unbundled access or to negotiate in good faith, the customer would be faced with the “non-choice” of requiring another competitive LEC (CLEC) to overbuild in order to provide that service.  For example, any new CLEC must build its own facilities, dig up existing streets, and lay wire.  Obviously, no customer would be willing to pay for that over built facility.  Thus, there would be no real choice in providers for the customer.

Given the exclusive contract with the development, CTC will be the incumbent provider of local exchange service, not a viable competitor.  It therefore will control the bottleneck local exchange network in the Hidden Springs Development and possess substantial economies of density, connectivity, and scale that, absent compliance with the obligations of Section 251(c), can impede the development of telephone exchange service competition in the Hidden Springs Development.  It, therefore, occupies a position in the market for telephone exchange service in the Hidden Springs Development that is comparable to the position typically occupied by incumbent LECs.  Therefore, CTC satisfies the requirement of Section 251(h)(2)(A).

B.  CTC Telecom satisfies the criteria of Section 251(h)(2)(B).

Under Section 251(h)(2)(B), in order for the Commission to treat CTC as an incumbent LEC, CTC  must have “substantially replaced an incumbent local exchange carrier described in [section 251(h)(1)].”  The Commission found that this section depends on what the word “replace” means.  The Commission defined it as meaning “to take the place of: serve as a substitute for or successor of: SUCCEED, SUPPLANT. . . .”  Guam at ¶28 (emphasis added).

CTC serves as a substitute and supplants U S WEST, the incumbent LEC, in U S WEST’s existing study area.  U S WEST’s study area includes the Hidden Springs Development.  U S WEST, however, has been supplanted by CTC as the first facilities-based provider.  Consequently, CTC meets the second criteria of Section 251(h)(2)(B).

C.Treating CTC Telecom as an incumbent LEC is consistent with the public interest, convenience, and necessity and the purposes of the Federal Telecommunications Act of 1996.

Under Section 251(h)(2)(C), in order for the Commission to treat CTC as an incumbent LEC for purposes of Section 251, “such treatment [must be] consistent with the public interest, convenience, and necessity and the purposes of [section 251].”  As described above, Congress has declared unequivocally that promoting competition in local exchange and exchange access markets serves the public interest, convenience, and necessity.  Treating CTC as an incumbent LEC would promote competition in this community, because such treatment would require CTC to comply with the pro-competitive obligations of Section 251(c), absent an exemption, suspension, or modification under Section 251(f).  Moreover, because CTC will be the sole provider of local exchange and exchange access services in this community, CTC has market power, economies of density, connectivity, and scale, and control of the local network comparable to that possessed by entities that are incumbent LECs under Section 251(h)(1).  Consequently, treating CTC as an incumbent LEC may well be a prerequisite for the development of competition in this community.  Thus, treating CTC as an incumbent LEC for purposes of Section 251 would be consistent with the public interest, convenience, and necessity.  In fact, failure to treat CTC as an incumbent LEC for the purposes of Section 251(c) would stifle competition in this community and encourage other LECs to contract for exclusivity in newly constructed self contained communities.

D.  The Commission’s Guam decision dictates that CTC Telecom is an incumbent LEC.

In the Commission’s Guam decision, the Commission interpreted Section 251(h)(2) to include “any LEC that provides telephone exchange service to all or virtually all of the subscribers in its service area, where, as here, no NECA member served the area at issue as of the date of the enactment of the 1996 Act.”  Guam at ¶41.  In this case, CTC will provide telephone exchange service to all or virtually all of the subscribers in its service area (Hidden Springs Development), approximately 900 residential subscribers and an unidentified number of small business customers.  U S WEST, the incumbent LEC in the larger study area, has no customers.  Therefore, the Commission should treat CTC as an incumbent LEC for the purposes of Section 251(c).

E.The Commission should promulgate rules of general applicability to similarly situated LECs.

The IPUC urges the Commission to adopt rules that treat similarly situated LECs as incumbent LECs for the purposes of Section 251(c).  With the continuing new construction of fully contained communities within or adjacent to larger metropolitan areas, other LECs could also enter into exclusive contracts to provide the first facilities-based local service.  If those LECs only began providing service after the enactment of the Federal Telecommunications Act of 1996, like CTC, technically they would not be included in the definition of an incumbent LEC under Section 251(h)(1).  Yet functionally these LECs are no different from incumbent LECs and clearly enjoy the same advantages and ability to preclude real competition.  This is not what Congress intended.  Therefore, the Commission should adopt rules designed to address this problem.

F.Congress did not intend to preempt state utility commissions from imposing additional conditions on LECs providing the first facilities-based local exchange service in an area.

By filing this Petition, the IPUC is not conceding that the Commission has broad authority to preempt state utility commissions from imposing additional interconnection and access requirements on LECs that are not classified as incumbent LECs, as defined by Section 251(h)(1) of the Communications Act, in the absence of a Commission finding that such additional requirements violate Section 253.  SeeLouisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 374-375, 106 S. Ct. 1890, 1901-1902 (1986).  In fact, the IPUC asserts that Congress did not intend to preempt state utility commissions from imposing competitively neutral  interconnection and access standards on LECs that provide the only facilities-based local service in order to promote competition.  See 47 U.S.C. §§ 251(d)(3), 252(e)(3), 253(b).  Moreover, by promulgating 47 C.F.R. §51.223, the Commission did not intend to preempt state utility commissions from imposing legitimate rules designed to promote competition and to protect the public interest in situations like the one facing the Commission in this Petition where the LEC in question stands in the same position as an incumbent LEC.

IV.  CONCLUSION

Based on this Petition and the material included in the attached appendices, the IPUC requests:

1.  That the Federal Communications Commission find that the statutory criteria for the Commission to treat CTC Telecom, Inc. as an incumbent local exchange carrier for section 251 purposes asset forth in Section 251(h)(2) are satisfied, and

2.  That the Commission further find that such treatment is necessary to avoid frustrating the Congressional intent to create the framework of competition in telecommunications, and

3.  That the Commission treat CTC Telecom, Inc. as an incumbent local exchange carrier pursuant to Section 251(h)(2), and

4.  That the Commission adopt a rule that treats all facilities-based local exchange carriers as incumbent local exchange carriers pursuant to Section 251(h)(2), that, after February 8, 1996, began to provide telephone exchange service exclusively over their own telecommunications service facilities, or predominantly over their own facilities in combination with the resale of telecommunications services of another carrier, to customers in a geographic area in which no other telephone corporation has facilities capable of providing basic local exchange service to customers.

Respectively submitted this                       day of November, 1998.

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**FOOTNOTES**

1:

47 U.S.C. § 251(h)(2).  Section 251(h)(2) was added to the Telecommunications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (1996 Act), which added many other provisions to the Communications Act, as well.  See, e.g., 47 U.S.C. §§ 251-261.  All citations herein to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

2:

 CTC also requested it be designated as a “rural competitive local exchange carrier” under state law.  State law mirrors the language in the Telecommunications Act of 1996.  Compare Idaho Code § 62-603(10) and 47 U.S.C. § 153(47).

3:

 IDAPA 31.42.01.410.  PETITION FOR EXEMPTION FROM RULES 402-409.  (Rule 410) Any facilities-based competitor may petition the commission to exempt it from the application of Rules 402 through 409. The commission may grant the petition if the petitioner demonstrates there are functionally equivalent, competitively priced basic local services reasonably available to both residential and small business customers within the unserved area from a telephone corporation unaffiliated with the petitioner, or the petitioner demonstrates exemption is in the public interest.

4:

 47 C.F.R. Ch. 1 §51.223(a).  A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.