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 | )  )  )  )  )  )  )  )  )  )  )  )  ) | CC Docket No. 98-221  IDAHO PUBLIC UTILITIES COMMISSION REPLY COMMENTS |

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SUMMARY

On November 23, 1998, the Idaho Public Utilities Commission (IPUC) filed a Petition for Declaratory Ruling pursuant to Section 251(h)(2) of the Telecommunications Act of 1996 (Telecommunications Act).  Specifically, the IPUC requested the Commission treat CTC Telecom, Inc., a local exchange carrier planning to offer basic local exchange service in Idaho to Hidden Springs Community Development, as an incumbent local exchange carrier for the purposes of Section 251(c) of the Telecommunications Act.  The IPUC further requested that the Commission provide for the treatment of all similarly situated local exchange carriers as incumbents for the purposes of Section 251(c) by rulemaking. Eight parties filed comments.

The Telecommunications Resellers Association, MCI Worldcom, Inc., AT&T Corp., Ameritech Operating Companies, and U S WEST Communications, Inc. support the Petition requesting CTC Telecom be treated as an incumbent under Section 251(h)(2).  AT&T suggests it may be premature to promulgate a rule of general applicability.  CTC Telecom, Inc., Time Warner Telecom and Electric Lightwave, Inc.oppose the Petition.  They suggest, among other things, that the IPUC has not established that CTC should be treated as an incumbent because CTC is small, there is alleged competition, and that any other local exchange carrier could have and still can over build or duplicate CTC’s facilities.

In response to those comments opposing the Petition, the IPUC argues that the number of loops or access lines a local exchange carrier has is irrelevant to whether it should be treated as an incumbent.  In addition, the IPUC contends that there is no competition in CTC’s study area.  Finally, the IPUC argues that competition as envisioned by Congress when it enacted the Telecommunications Act is not created by requiring all competitors to over build an existing telecommunications network.

The IPUC’s position is quite straight-forward:  Where a local exchange carrier provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of February 8, 1996, and that local exchange carrier controls the bottleneck local exchange network, it should be treated as an incumbent local exchange carrier for the purposes of Section 251(c) in order to realistically promote competition.  Granting this Petition would encourage competition in CTC’s study area, Hidden Springs Community Development, by imposing the pro-competitive standards enacted by Congress in Section 251(c).

With respect to the IPUC’s request for a general rule to apply to similarly situated local exchange carriers, the IPUC acknowledges that it is difficult to draft a rule that is neither overly broad nor overly narrow.  Therefore, the Commission could do as it did in the Guam case and decline to adopt a rule of general applicability.(footnote: 1)  Final Guam Order at ¶9.  In the alternative, the IPUC urges the Commission to modify 47 C.F.R. § 51.223 to allow state commissions to address similarly situated LECs within their jurisdictions.

I.  INTRODUCTION

Boiled down to its simplest terms, timing is everything.  Had CTC Telecom, Inc. been providing telephone service on February 8, 1996, and all other facts been the same -- CTC’s service territory, the number of loops, etc. -- this Petition would have been unnecessary.  CTC would have been an incumbent local exchange carrier under Section 251(h)(1).  It would have been subject to the obligations imposed by Section 251(c) and customers in the Hidden Springs Community Development would have had the practical and economic opportunity for choice in local exchange carriers.  Without Commission action, those customers will be deprived of the benefits of competition.

The Telecommunications Act of 1996(footnote: 2) (Telecommunications Act) fundamentally changed telecommunications in this country.(footnote: 3)  Prior to the Telecommunications Act’s passage, local telephone services were provided by local exchange carriers (LECs), many of which had been issued exclusive geographic franchises by state licensing authorities.  Each LEC operated its own local telephone network and controlled the strategic bottleneck to those essential facilities.  The Telecommunications Act was not simply an attempt to deregulate the existing telecommunications system.  Instead, Congress sought to promote competition in the nation's telecommunications system by opening up traditionally monopolistic local exchange networks to new competitors and by removing those barriers that have protected telephone monopolies from competition.

To facilitate the introduction of new competing local exchange carriers (CLECs), the Telecommunications Act included two important sections -- Sections 251(c) and 251(h)(2) --designed to eventually eliminate the ability of an incumbent local exchange carrier to use its control of the bottleneck local facilities to impede free market competition.  Interconnection Order, ¶4.  Section 251(c) requires incumbent local exchange carriers (ILECs) to provide CLECs with access to the ILEC’s services and networks.  More specifically, Sections 251(c)(2)-(4) impose three specific requirements on ILECs designed to foster competition: (1) interconnection -- ILECs must allow CLECs to interconnect with the ILEC’s local exchange networks at fair, nondiscriminatory rates; (2) lease of unbundled network elements -- ILECs must allow CLECs to lease parts of the ILEC’s network at fair, nondiscriminatory rates; and (3) resale -- ILECs must allow CLECs to purchase telephone services at wholesale rates for resale to the CLEC’s customers.  Relevant to this Petition, Congress also delegated to the Commission the authority to impose those same requirements on any LEC that enjoys the same monopolistic advantages as those LECs providing service before February 8, 1996.  47 U.S.C. §251(h)(2).  This Petition asks the Commission to exercise that authority and designate CTC Telecom as an ILEC for the purposes of imposing Section 251(c) requirements.

Those parties who support this Petition have a fundamentally different understanding than those who oppose the Petition of what Congress envisioned by encouraging competition when it enacted the Telecommunications Act.

The IPUC, the Telecommunications Resellers Association, MCI Worldcom, Inc., AT&T Corp., Ameritech Operating Companies and U S WEST Communications, Inc. all understand Congress did not intend to simply encourage side-by-side competition by LECs for segregated or isolated markets.  This would only perpetuate the existence of monopolies.  Moreover, division of markets or allocating territories between competitors who operate at the same level of market structure is considered anti-competitive.  See e.g., United States v. Topco Associates, 405 U.S. 586, 607-08 (1972).  In fact, if done by agreement, whether or not express, it violates Section 1 of the Sherman Act.  Id.

Instead, Congress intended to give customers the opportunity for choice in local exchange carriers.  As customers gain choices, competition will replace the need for regulation because the threat of customer defections acts to restrain the LEC from abusing its monopoly power.  Section 251(c) embodies many of the antitrust principles generated in antitrust telephone litigation and is intended to preclude the type of anti-competitive behavior earlier Sherman Act cases addressed.

CTC Telecom, Inc., Time Warner Telecom (Time Warner), and Electric Lightwave, Inc. (ELI), on the other hand, ignore the role of the customer in their comments.  They analyze this Petition solely from the standpoint of a LEC.  They assume the “competition” occurs when a developer requests bids from different LECs.  While this may give the developer choice, it does nothing to promote competition for end-user customers.  Clearly, a developer’s interests do not necessarily coincide with a customer’s interests.  CTC, Time Warner and ELI do not explain how the customer living in the Hidden Springs Community Development (CTC’s service area) will have the opportunity for practical and economical choices in LECs.  None explains what will restrain CTC, other than good will, from increasing customer rates or failing to provide good customer service.

II.  SECTION 251(C) EMBODIES TRADITIONAL ANTITRUST PRINCIPLES

To better understand why CTC should be treated as an ILEC under Section 251(h)(2), the genesis for the obligations enumerated in Section 251(c) and the legal underpinnings are important.  Section 251(c) incorporates and responds to a long history of antitrust telephone litigation.  Antitrust laws are rooted in the proposition that the public interest is best protected by competition, free from artificial restraints such as price-fixing and monopoly.  United States of America v. American Telephone & Telegraph Company, 461 F.Supp. 1314, 1321 (D.D.C. 1978).  On the other hand, the theory for regulation presupposes that with respect to certain areas of economic activity, the judgment of expert agencies may produce results superior to those of the marketplace and in those cases, competition will not necessarily serve the public interest.  Id.  Balancing these two divergent objectives, the pre-Telecommunications Act antitrust cases held that telephone local networks were essential facilities such that telephone companies controlling them were subject to the “essential facilities” or “strategic bottleneck” antitrust principles.(footnote: 4)  This legal principle was the basis for divestiture and the various Consent Decrees.

The “essential facilities” doctrine was first applied to a monopoly by the United States Supreme Court in 1912.  United States v. Terminal R.R. Assn. of St. Louis, 224 U.S. 383 (1912).  The Supreme Court held that any company that controls an “essential facility” or a “strategic bottleneck” in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them.  See also Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Hecht v. Pro-Football, Inc.,570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied 436 U.S. 956 (1978); Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (1st Cir. 1952); Woods Exploration and Producing Co., Inc. v. Aluminum Corp. of America, 438 F.2d 1286, 1300-09 (5th Cir. 1971).  Such access must be afforded “upon such just and reasonable terms and regulations as will, in respect of use, character and cost of services, place every such company upon as nearly as equal plane as may be.” Terminal R.R,. 224 U.S. at 411.  In United States v. AT&T, 524 F.Supp. 1336, 1353 (D.D.C. 1981), Judge Greene found that local network facilities controlled by the local exchange carrier are “essential facilities” within the meaning of these decisions and that, to the extent that the antitrust laws provide the legal standards governing the local exchange carrier’s conduct it was obligated to provide non-discriminatory access.

There were four elements developed to establish liability under this doctrine:

(1)  control of the essential facility by a monopolist;

(2)  a competitor's inability practically or reasonably to duplicate the essential facility;

(3)  the denial of the use of the facility to a competitor;  and

(4) the feasibility of providing the facility.

MCI Communications Corporation v. AT&T Company, 708 F.2d 1081, 1133 (7th Cir. 1982).  In applying these elements, the D.C. Circuit found that any market condition that makes entry more costly or time-consuming reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm.  Southern Pacific Communications Co. v. AT&T, 740 F.2d 980,1001 (D.C. Cir. 1984), cert. denied 470 U.S. 1005 (1985).  Likewise, Judge Greene found in the divestiture cases that further barriers to entry that made a telephone company a monopoly included the control of network bottlenecks, large capital investment requirements, and the lengthy construction time necessary to enter the market.  United States v. AT&T, 524 F.Supp. 1336, 1347-48 (D.D.C. 1981).

It was against this backdrop that Section 251 was developed.  CTC clearly enjoys the attributes and advantages of a monopoly under traditional antitrust principles.  It cannot argue that it does not control the bottleneck local exchange network in Hidden Springs.  It does.  Likewise, CTC must admit that any competitor who is required to duplicate or over build CTC’s facilities would have large capital investment requirements.  Indeed, CTC itself argues the size of its investment is one reason to not impose Section 251(c) obligations.  And clearly lengthy construction would be necessary for any competitor to enter the market by over building CTC’s facilities.

By any standards, CTC is a monopoly in Hidden Springs.  Applying the four elements that establish liability under the “essential facilities” doctrine, it is clear that under traditional antitrust rules, CTC would be obligated to provide the kind of non-discriminatory access which those cases contemplate.  It is against that backdrop that the Commission should evaluate whether CTC meets the criteria established by Section 251(h)(2) to be treated as an ILEC.

III.  CTC TELECOM MEETS THE CRITERIA ESTABLISHED

BY SECTION 251(h)(2)

Those parties who oppose the IPUC’s Petition argue that CTC does not meet the criteria for treatment as an ILEC pursuant to Section 251(h)(2).  They argue that it does not occupy a dominant position in its market suggesting alternatively that the market is larger than CTC’s designated service area, that CTC is too small a LEC and that other LECs could have over built CTC’s facilities but did not.  Such arguments ignore one salient fact -- CTC is the only facilities based provider in the Hidden Springs service area -- a service area CTC designated in its Application to the IPUC -- and CTC will serve all or virtually all of the subscribers in that area.  Exhibit 1.  CTC controls the bottleneck local exchange network in Hidden Springs.

CTC concedes that any competitor will need to over build CTC’s facilities or resell service under Section 251(b)(1) in order to offer service to customers in CTC’s service area.  CTC Comments at 16 and 18.  In other words, CTC refuses to allow use of its facilities.  It suggests, instead, that its general duties imposed by Sections 251(a) and (b) are adequate.  As this Commission ruled in the Guam case,(footnote: 5) however, a LEC’s general duties for interconnection and resale under Sections 251(a) and 251(b) are not equivalent to the duties imposed on ILECs under Section 251(c).  Guam Report and Order at ¶19.  Sections 251(a) and 251(b) assume a competitive environment where a LEC’s prices and terms for resale are mediated by the existence of competition.  Whereas Section 251(c) imposes obligations that operate without recourse to the market.  Therefore, the Commission’s decision that these sections are not equivalent is correct.

The facts demonstrate that CTC occupies a dominant position in the Hidden Springs market comparable to an ILEC’s and that it controls the bottleneck to the essential network facilities in that service area.  Moreover, there are no alternative technologies, such as wireless telephone service, capable of competing with CTC.  Cusick Affidavit at 3.  These facts support the Commission concluding that CTC should be classified as an incumbent LEC pursuant to the authority of Section 251(h)(2).

A.CTC occupies a dominant position in the Hidden Springs market that is comparable to a traditional ILEC’s dominance.

CTC, Time Warner and ELI argue that CTC does not occupy a dominant position in the market.  Their argument relies on two erroneous assumptions -- that the market the Commission analyzes for Section 251(c) purposes is greater than or different from CTC’s certificated service territory and that CTC’s dominance is measured relative to U S WEST’s or some other Bell operating company’s dominance in its own market.

When measuring CTC’s dominance, the Commission must determine CTC’s dominance in its own market, its service area.  The Commission cannot measure a LEC’s dominance in a market in which it does not operate.  It is obvious that if it has no market presence, it has no dominance to measure.

Furthermore, a LEC’s dominance is not relative to another LEC’s independent dominance.  The Commission should not rule that because one LEC is dominant in a smaller market than another, it is somehow less dominant.  Dominance should be measured where the LEC offers service.

1.  CTC’s market is Hidden Springs.  While CTC, ELI and Time Warner argue that the relevant “market” for determining whether CTC occupies a comparable market position to an ILEC is either the entire nation or at least the Boise EAS(footnote: 6) region, all are wrong. CTC carefully defined its “market” as the Hidden Springs Community Development in its Application for a Certificate of Public Convenience and Necessity to the IPUC.  Exhibit 1, p. 3 (see Exhibit C attached to the Application).  CTC requested it be designated an eligible telecommunications carrier for the purposes of receiving state and federal universal service funds and further requested that its service territory for the purpose of universal service obligations be limited to its Hidden Springs certificated area.  Id. at pp. 5-6.

Therefore, CTC’s market is not the entire Boise EAS region, as it implies in its Comments.  CTC Comments at 16.  It specifically requested that its certificated service area be confined to Hidden Springs.  Id.  This market is separate and identifiable.  CTC will not be offering service beyond its service territory and where a company cannot provide service outside its territory, its market is clearly defined as that territory.  Just as the Commission did in Guam, the Commission should evaluate the dominance of CTC’s market power within its certificated service territory. Guam Report and Order, ¶¶25-26.(footnote: 7)

In making its argument, CTC also relies on several cases to suggest that the relevant market for CTC should be larger than its Hidden Springs certificated service territory.  Its reliance is misplaced for several reasons.  First, the cases cited by CTC involve violations of the Sherman Act and the Clayton Act.  They do not involve the Telecommunications Act.  Second, the cases do not stand for what CTC asserts.  Finally, even in antitrust law, the relevant geographic market is “the area of effective competition” or the area “in which the seller [CTC] operates, and to which the purchaser [Hidden Springs customer] can practicably turn for supplies [telephone service].”  Tampa Electric Co. v. Nashville Coal Co. 365 U.S. 321, 327, 328 (1961) quoted in Hecht v. Pro-Football, Inc., 570 F.2d 982, 988 (D.C. Cir. 1977) cert. denied 436 U.S. 956 (1978) (emphasis added).  Clearly, CTC operates and sells its services solely in Hidden Springs and, as will be demonstrated below, the Hidden Springs customer can only practicably turn to CTC for telephone service.

Moreover, while CTC cites United States v. Grinnell Corporation, 384 U.S. 563 (1966), to imply that CTC’s relevant market is national, the United States Supreme Court has made clear that the relevant market for analyzing antitrust allegations should reflect the reality of the way in which a company built and conducts its business.  Id. at 575-76. In Grinnell, because the alarm companies marketed, priced and integrated their service nationally, the court held the relevant market was national.  Id.  CTC only operates in its service territory.  Contrary to CTC’s suggestion, it is well settled that the relevant market need not be nationwide.  Hecht, 570 F.2d at 988, citing Standard Oil Co. v. United States, 377 U.S. 293, 299 n. 5 (1949).

“[W]here the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area.”  Indeed, courts have regularly identified relevant markets as single cities or towns, and even portions thereof.

Id., 570 F.2d at 988 quoting United States v. Columbia Steel Co. 334 U.S. 495, 519 (1948).

CTC also cites RSR Corporation v. Federal Trade Commission, 602 F.2d 1317, 1323 (9th Cir. 1979) cert. denied 445 U.S. 927 (1979) and Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 219 (D.C. Cir. 1986)cert. denied 479 U.S. 1033 (1987) for the proposition that the IPUC must show that there is price independence between the Boise EAS region and Hidden Springs to justify limiting CTC’s relevant market in Hidden Springs.  CTC Comments at 19.  Again, CTC is wrong.  Neither case stands for that proposition.  In both cases, the interrelationship of pricing was one factor in determining the geographic market area.  Moreover, there is no evidence that CTC’s prices will be interrelated with those in the Boise EAS region.  That is one of the IPUC’s concerns.  Under Idaho law, CTC is exempt from price regulation by the IPUC.  Idaho Code §§ 62-603(6) and 62-622(2).  Without the real threat of competition, CTC will be free to charge whatever it wishes.(footnote: 8)

2.  CTC will be one of Idaho’s larger rural LECs.  Some commenters suggest that CTC is so small as to preclude the imposition of Section 251(c) obligations or to make them unnecessary.  They are wrong on both counts.  Size is not relevant to whether a LEC is an incumbent subject to Section 251(c) obligations.  Furthermore, at completion, CTC will not be a small LEC by Idaho or national standards. See FCC Monitoring Report, CC Docket No. 98-202, dated December 1998, Table 3.22.

Size does not determine whether a LEC is an incumbent.  An “incumbent local exchange carrier” is simply a local exchange carrier that provided telephone exchange service in an area on the date of enactment of the Telecommunications Act of 1996 (February 8, 1996) and was a member of an exchange carrier association.  47 U.S.C. §251(h)(1).  Size is only relevant to whether a LEC is rural.  Furthermore, it is not unusual to have rural LECs with fewer than 100 loops or access lines.  See FCC Monitoring Report, CC Docket No. 98-202, dated December 1998, Table 3.22.  While an ILEC may be defined as rural based on its size, significantly Congress did not automatically exempt rural ILECs from Section 251(c) obligations.  It simply provided a mechanism to obtain an exemption or suspension from Section 251(c) obligations and left the decision to grant exemptions to state commissions.  47 U.S.C. §251(f).  Had Congress wanted to make size determinative, it could have done so.

In addition, CTC is not small by Idaho standards or by most state standards.  By contract, it may be required to provide up to six (6) access lines per lot in Hidden Springs.  The community is anticipated to include more than nine-hundred (900) homes and an undisclosed number of small businesses and a school.  Mr. Cusick, Chief of the IPUC Staff Telecommunications Section, testified in his Affidavit that it is reasonable to assume that CTC could have more than 3,000 loops or access lines when the project is completed.  Cusick Affidavit at 1.  Of the thirteen (13) IPUC regulatedrural LECs reported on the most recent FCC Monitoring Report, nine (9) have fewer than 2,000 loops and four (4) have fewer than 1,000 loops. FCC Monitoring Report, CC Docket No. 98-202, dated December 1998, Table 3.22, excerpt attached as Exhibit 3.  Cambridge, CTC’s parent, only reported 2,001 loops.  Id.  Therefore, in Idaho, CTC will be one of the larger rural LECs.

3.  CTC enjoys market power and seeks to exercise dominance in the Hidden Springs marketby controlling the bottleneck local exchange service.  CTC seeks to dominate the Hidden Springs market and enjoys a position comparable to a statutorily defined ILEC, because it is the sole provider of telephone service in its service territory -- Hidden Springs Community Development.  To avoid this obvious fact and change the focus of the Commission’s inquiry, CTC, ELI and Time Warner argue that any LEC could have built facilities as CTC did.  That may be true, as a matter of law, but that is irrelevant to these proceedings.

The important inquiry is not whether other LECs could have entered into an agreement with the developer or simply over built CTC’s facilities.  The relevant question is whether CTC controls the only network facilities in the Hidden Springs service territory today.  It does.  Thus, regardless of the way CTC became the sole provider, it now controls the bottleneck local exchange network to the Hidden Springs Community Development and absent compliance with the obligations of Section 251(c), it has the ability to impede the development of telephone exchange service competition in that community.  The issue is not its contract; the issue is CTC’s present monopoly position.

Furthermore, CTC and ELI are wrong in assuming that any LEC would have simply over built CTC’s facilities at the time of trenching without a development agreement.  Cusick testified in his Affidavit that Development Agreements are necessary for more than determining costs; coordination, specifications and other construction requirements are also covered.  Cusick Affidavit at 2-3.  Ms. Carlock, Supervisor of the IPUC Staff Accounting Section, testified that no rate regulated LEC (whether it is U S WEST or any other rate regulated company) should simply build facilities in a large new development without complying with its line extension tariff.  Carlock Affidavit at 1; U S WEST Tariff attached to Carlock Affidavit.  Carlock stated:

Rate regulated companies are at risk for facilities they build on speculation.  Every investment in plant by a rate regulated company must be justified as “used and useful” before it can be included in rate base for the purposes of earning a rate of return.  Where a rate regulated company has a tariff addressing speculative investments, such as building facilities in a new development, it must comply with that tariff or run the risk that the investment will be disallowed.

Carlock Affidavit at 1.  Therefore, to the extent it is relevant at all, U S WEST could not simply have shown up and over built CTC’s facilities as CTC and ELI suggest.  Besides, it makes no economic sense for any LEC, whether rate-regulated or not, to over build or duplicate CTC’s facilities especially where there is a three year exclusive marketing agreement and, therefore, it is unlikely those duplicate facilities will have sufficient customers to be economically viable.

Finally, CTC ignores the economic realities created by its contract with the developer.  This developer paid CTC a non-refundable payment of $60,000 and a refundable facilities charge of $35,250.  CTC admits that U S WEST’s tariff would have required a similar construction charge.  CTC Comments at 2.  In addition, by virtue of the fact that the refund of the facilities charge is directly tied to the number of CTC customers, the developer has a financial interest in not entering into any other development agreements.  Indeed, the developer did not enter into such agreements and rejected U S WEST’s proposal.  Id.; Exhibit 2.

While CTC uses the presence of TCI Cable in its trenches to bolster its assertion that other LECs, and in particular U S WEST, could have over built its facilities during the development phase, CTC ignores two important facts.  TCI had to threaten litigation to obtain an injunction in order to get the developer to comply with the Cable Communications Policy Act requirements, 47 U.S.C. §621(a), as amended, 47 U.S.C. §541(a)(2).  Exhibit 4.  And TCI is neither providing rate regulated telecommunications services or local exchange service nor is bound by a tariff.

It is also true that as a matter of law, Hidden Springs customers may request telephone service from U S WEST or some other LEC certificated for the service area.  However, customers are unlikely to actually use another carrier for one very simple reason -- cost.  It is not economically reasonable to expect customers in CTC’s service territory to use a competitor, because, by CTC’s own admission, any competitor must over build CTC’s facilities and that cost for over building is borne by the customer.  CTC Comments at 16, 18.  Those construction costs will be high(footnote: 9) and there will be delays associated with obtaining service from any LEC that must over build CTC’s facilities.  Both of these things make it unlikely a customer has real economic or practical choice.  It is hollow to suggest customers have practical competitive choices in the absence of this Commission imposing Section 251(c) obligations.  CTC clearly will enjoy market dominance similar to that dominance that any ILEC that had been providing service to Hidden Springs as of February 8, 1996, would have had.  CTC satisfies the criteria contained in Section 251(h)(2)(A).

B.CTC is a substitute for an ILEC within the meaning of Section 251(h)(2)(B).

It is true that CTC is not “replacing” an ILEC in Hidden Springs.  No LEC has ever provided network facilities to the Hidden Springs service territory.  There have been no customers.  However, in Guam, the Commission interpreted Section 251(h)(2)(B) regarding this very issue of “replacement.”  The Commission concluded that “any LEC that provides telephone exchange service to all or virtually all of the subscribers in its service area, where . . . no NECA member served the area at issue as of the date of the enactment of the 1996 Act” satisfies the second requirement (Section 251(h)(2)(B)) for treatment as an ILEC under Section 251(h)(2). Guam Report and Order, ¶¶ 25, 31.  The Commission invited comment to its interpretation and in response to comments, adopted this interpretation on July 15, 1998, and released the Final Order, July 20, 1998.  Agency interpretation is entitled to deference.  Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

Furthermore, the Commission’s interpretation makes sense.  To hold otherwise would mean that all non-incumbent LECs that build new facilities (no matter the size) in areas that have no current facilities would always be exempt from the obligations of Section 251(c).  This would undermine Congress’ clear intent to promote competition.

In this case, CTC will provide telephone exchange service to all or virtually all of the subscribers in its service area (Hidden Springs Community Development).  U S WEST, the incumbent LEC in the larger study area, has no facilities within Hidden Springs Community Development and virtually no subscribers located there.  Moreover, CTC will enjoy that same monopolistic advantage as a traditional incumbent and has already indicated that other LECs may only “compete” if they over build CTC’s facilities or resell CTC’s services under Section 251(b).  CTC controls the bottleneck network facilities.  This alone gives it the economies of scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of Section 251(c).  This will not open CTC’s service area to competition.  Therefore, CTC by virtue of the fact it serves all or virtually all subscribers in its service area satisfies Section 251(h)(2)(B) and the Commission should exercise its authority under Section 251(h)(2) to treat CTC as an incumbent LEC for the purposes of Section 251(c).

C.Treating CTC Telecom as an incumbent LEC is consistent with the public interest, convenience, and necessity and the purposes of Section 251.

Under Section 251(h)(2)(C), in order for the Commission to treat CTC as an ILEC for purposes of Section 251, “such treatment [must be] consistent with the public interest, convenience, and necessity and the purposes of [section 251].”  The Commission found that “Congress has declared unequivocally that promoting competition in local exchange and exchange access markets serves the public interest, convenience, and necessity.”  Guam Report and Order at ¶¶ 32, 40.  Therefore, because Congress has already unequivocally declared that promoting competition in the local exchange serves the public interest, convenience, and necessity, the only issue is whether treating CTC as an ILEC would promote competition in the local exchange and exchange access markets in Hidden Springs.

CTC asserts these obligations are unnecessary to promote competition because competition in its service territory already exists or could potentially exist.  It asserts that “TCI is presently a facilities-based competitor.”  CTC Comments at 22.  That is simply not true.  If it were true this Petition would not have been filed.  TCI is a franchised cable company.  It has never either filed an Application for a Certificate of Public Convenience and Necessity with the IPUC or indicated in any way its intention to provide telephone service in Idaho.  In fact, the New York Times recently described TCI’s and AT&T’s telecommunications plans.  Exhibit 5. Even in the near future, there is no plan to offer telecommunications service to any location in Idaho and no plans to offer service specifically to Hidden Springs.  Therefore, CTC is wrong.  There is no facilities-based local exchange competitor.

CTC next asserts that Sections 251(a) and 251(b) obligations create competition and are equivalent to Section 251(c) obligations.  In Guam, Guam Telephone made the same argument to the Commission and the Commission properly rejected that argument.  Guam Report and Order at ¶19.  Furthermore, those lesser obligations apply to all LECs, including CLECs, because the underlying assumption is that there is competition and competition mediates the prices and terms.  The reason Section 251(c) is so specific is that Congress recognized that where there is no effective competition, the ILEC would be able to misuse its monopolistic advantages to charge discriminatory prices and impose discriminatory terms.  Thus

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).  These duties require incumbent LECs to share with competitors some of their inherent economic advantages -- advantages that would otherwise render competitive entry very difficult, if not impossible.

Guam Report and Order at ¶32.

CTC also sugggests that the IPUC has authority to resolve its concerns be simply ordering U S WEST to over build CTC’s network pursuant to Idaho Code § 61-508.(footnote: 10)  Essentially, CTC is arguing that the IPUC, or any other state commission faced with a similar dilemma, should order a rate-regulated LEC to over build and duplicate existing network facilities. This is contrary to IPUC policy and it should be contrary to the Commission’s policy.  The IPUC has an affirmative duty to prevent duplication and the resulting economic waste.  In the past, the IPUC has even decertified a portion of a telephone utility’s service territory in order to allow an unserved area to be served by a competitor because it was cheaper for the competitor to build the facilities.  Cambridge Telephone Co., Inc v. Pine Telephone System, Inc., 109 Idaho 875, 712 P.2d 576 (1985). Furthermore, CTC’s suggestion makes no regulatory or economic sense and the Commission should reject that argument.  Clearly neither Congress nor the Commission would endorse over building and duplicating existing networks on a large scale basis as the sole means for providing effective competition and choice in local exchange markets.  That is the precise reason Congress imposed the Section 251(c) obligations on those LECs that control the bottleneck network facilties.

D.The Petition is not premature.

CTC, ELI and Time Warner suggest that this Petition is premature because no customer is complaining or presently served.  However, this places the burden of policing CTC and other similarly situated LECs on the customers who may not understand the complexities of telecommunications law and procedure.  It ignores the impact of regulatory delay in addressing abuses and regulatory inefficiency in policing those abuses.  Moreover, waiting until some customer complains does not promote competition.  No competitor will even request to serve the territory when faced with the necessity to over build and duplicate CTC’s facilities.  The capital intensive nature of over building and duplicating facilities, the construction delays and the costs associated with construction that all get passed on to the customer make it improbable that any competitor will ever compete in Hidden Springs.  This rule making is not premature.

IV.  CTC TELECOM IS A RURAL LEC ENTITLED TO

THE PROTECTIONS OF SECTION 251(f)

CTC, like Guam Telephone, has fewer than 100,000 access lines.  Therefore, like Guam Telephone, it is a rural LEC under Section 3(37) of the Telecommunications Act.  Nothing in this Petition changes the fact that as a rural LEC, CTC will be entitled to avail itself of the exemptions enumerated in Section 251(f).  Moreover, under Idaho law, upon petition it will enjoy an automatic exemption from the imposition of Section 251(c) obligations for a duration of three to five years.  Idaho Code § 62-615(2).(footnote: 11)

Therefore, its concern about immediate competition before it has a chance to recoup its investment are unfounded.

V.  APPLICABILITY OF RULES TO SIMILARLY SITUATED LECS

Several commenters expressed concern about the proposed general application of the rule to other similarly situated LECs.  AT&T suggested witholding decision on the proposed rule of general applicability but designate CTC as an ILEC for the purposes of imposing Section 251(c) obligations.  The IPUC acknowledges that it is difficult to draft a rule that is neither overly broad nor overly narrow.  Therefore, the Commission could do as it did in Guam and decline to adopt a rule of general applicability.  Final Guam Order at ¶9.  In the alternative, the IPUC urges the Commission to modify 47 C.F.R. § 51.223 to allow state commissions to address similarly situated LECs within their jurisdictions.  There are two obvious reasons for this.

First, these decisions are clearly best left to the individual state commissions.  What might be a problem in Idaho may not be a problem in New York.  In addition, the state commissions can more easily draft conditions or issue decisions that precisely meet the needs presented by the particular LEC’s situation.  For example, the IPUC proposed state rules(footnote: 12)do not impose all the obligations that are in Section 251(c).  Moreover, the Idaho proposed rules allow the IPUC to only apply a few of the obligations to the LEC or none of them if the IPUC finds it is in the public interest.  IDAPA 31.42.01.410.(footnote: 13)  In addition, if there is actual competition or functionally equivalent, the IPUC can exempt the LEC entirely.  Id.

Second, CTC Telecom will not be the only LEC that decides to build the first network facilities in a newly developed area.  As more LECs choose to follow CTC’s lead, the Commission will face more Petitions from state commissions.  Therefore, the IPUC suggests that the Commission’s rule should be modified to allow states to first address this issue.  The Commission still retains its authority under Section 253 to preempt any state commission that improperly creates a barrier to competition.

CONCLUSION

Based on this Petition, the record, the comments 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 January 1999.

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**FOOTNOTES**

1:

 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 (adopted on July 15, 1998 and released July 20, 1998).  (Final Guam Order).

2:

 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq.  Hereinafter, all citations to the Telecommunications Act of 1996 will be to the Telecommunications Act as codified in the United States Code unless otherwise indicated.

3:

 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, ¶1, FCC 96-325 (released August 8, 1996), 61 Fed. Reg. 45476 (August 29, 1996) (“Interconnection Order”).

4:

 See e.g., United States of America v. AT&T, 524 F.Supp. 1336 (D.D.C. 1981); United States of America v. AT&T, 461 F.Supp. 1314 (D.D.C. 1978).

5:

 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) 12 FCC Rcd 6925 (1997) (adopted July 15, 1998 and released July 20, 1998) (“Guam Report and Order”).

6:

 Toll-free calling between and among local exchanges is usually provided via a service arrangement known as extended area service (EAS).

7:

 “Regarding the first requirement, we tentatively conclude that GTA occupies a position in the market for telephone exchange service in its service area that is comparable to an incumbent LEC’s, because GTA appears to occupy a dominant position in that market. . . .  Incumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas . . . .”  Guam Report and Order, ¶¶ 25 and 26 (emphasis added).

8:

 This, however, is not the basis upon which a LEC should be designated an ILEC under Section 251(h)(2).  This Petition would still have been necessary even if CTC’s prices were regulatedby the IPUC.  The only difference is that CTC would have been a price regulated monopoly and the pro-competitive purposes for the Telecommunications Act would still have been frustrated.

9:

 For example, U S WEST’s tariff requires any customer pay all construction charges in excess of $1,600.  Cusick Affidavit at 2.  Mr. Cusick testified that there is no way to definitively determine in advance what those construction charges might be -- they are directly related to customer location.  However, the IPUC Staff has some experience with U S WEST’s costs for constructing facilities to serve new customers in the same general area as the Hidden Springs Community Development.  Id. at 2-3. Based on that experience, Mr. Cusick testified that most customers in the Hidden Springs Community Development would probably experience substantial construction charges in order to receive service from U S WEST over U S WEST’s own facilities.  Id. at 3. He based his opinion on IPUC Staff files.  According to those files, in 1997, one customer located just north of the proposed Hidden Springs Community Development requested telephone service from U S WEST and the construction costs for a one-half mile line extension were quoted at over $14,000.  Id. at 3. Moreover, IPUC Staff also found that because of the geography, even wireless phone service was problematic for this new community. Id. at 3.

10:

 Idaho Code § 61-508.  Improvements may be ordered -- Cost.   Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to or changes in the existing plant, scales, equipment, apparatus, facilities or other physical property of any public utility or of any two (2) or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing such additions, extensions, repairs, improvements, or changes be made or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the commission has ordered to be erected, requires joint action by two (2) or more public utilities the commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost, whereupon the said public utilities shall have such reasonable time as the commission may grant within which to agree upon the portion or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time, such public utilities shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structures or structure, the commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured.

11:

 Idaho Code § 62-615(2).  Upon petition of a rural telephone company with fewer than two percent  (2% ) of the nation's subscriber lines installed in the aggregate nationwide, the commission shall suspend the petitioner's obligations pursuant to section 251(c) of the telecommunications act of 1996.  The period of suspension shall be determined by the commission, consistent with the public interest, convenience, and necessity, provided that such suspension shall be for a period of not less than three (3) years nor more than five (5) years.  All other suspensions, modifications or exemptions pursuant to the telecommunications act of 1996 shall be committed to the commission's discretion.

12:

 CTC suggests these state rules make this proceeding unnecessary.  However, CTC is contesting these state rules within the state administrative process, and it ignores the fact that it threatened to sue the IPUC in the federal district court for an injunction enjoining the IPUC from enacting the proposed IPUC rules.  Exhibit 6.

13:

 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.