(text box: 1)BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF THE ADOPTION OF TEMPORARY AND PROPOSED RULES GOVERNING ACCESS AND INTERCONNECTION IN UNSERVED AREAS, IDAPA 31.42.01.401 ETC. SEQ. | )  )  )  )  )  )  )  ) | CASE NO. 31-4201-9801  ADOPTION OF PENDING RULES  GENERAL ORDER NO.198 |

In this General Order, the Commission issues pending rules that adopt amendments to the Commission’s temporary rules for Interconnection and Access Standards in Unserved Areas (IDAPA 31.42.01).  On August 10, 1998,the Commission issued a Notice of Temporary and Proposed Rulemaking requesting written comments on the Commission’s temporary and proposed rulesno later thanOctober 29, 1998.  The Notice was published in the Administrative Bulletin (Vol. No. 98-10 at 401-404) on October 7, 1998.  The Senate and House Subcommittees for review of administrative rules held a meeting on September 30, 1998, and indicated on October 23, 1998, that they have no objections to the proposed rules.

Timely comments were filed by the Commission Staff, U S WEST Communications, Inc., and Idaho Telephone Association (ITA).  ITA also requested the Commission hold a public hearing.  A public hearing was held on November 16, 1998.  Rick Wiggins on behalf of CTC Telecom, Inc. and Cambridge Telephone Company, Conley Ward on behalf of ITA, Mary Hobson on behalf of U S WEST, and Deputy Attorney General Cheri C. Copsey on behalf of the Staff made oral statements.

Based on those written comments, the public hearing and its own review of the temporary and proposed rules, the Commission has changed several proposed rules, deleted some proposed rules and clarified the language of some proposed rules.  With those changes, the Commission adopts the proposed rules, as amended, as its pending rules.  Idaho Code § 67-5224.  Appendix A to this Order is a Notice of Pending Rules suitable for transmission to the Administrative Rules Coordinator.  Appendix B to this Order contains the pending rules as approved by this Order.  Moreover, the Commission amends the temporary rules adopted by the Commission on August 10, 1998, in Order No. 27673, to include the same revisions which are being made to the proposed rules, effective immediately.

BACKGROUND

On August 10, 1998, in GNR-T-98-4, the Commission ordered this rulemaking docket be opened.  Order No. 27673.  Case No. GNR-T-98-4 involved an Application for a Certificate of Public Convenience and Necessity to provide the first facilities-based basic local exchange service to a presently undeveloped area.  CTC Telecom, Inc. proposed to provide basic local exchange service to a large planned community located within U S WEST’s certificated study area in Ada County.  No facilities-based carrier provided basic local exchange service to customers in the Hidden Springs Development because the planned community is under construction.  By virtue of the fact that neither the incumbent LEC (U S WEST) nor any other local exchange carrier (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.  Moreover, because CTC did not offer telephone service prior to February 8, 1996, it is a non-incumbentLEC and is exempt from the Commission’s rate regulation.  Idaho Code §§ 62-603(6) and 62-622(2).  The Commission found that granting the Certificate of Public Convenience and Necessity without conditions would be contrary to the public interest because it would have the practical effect of creating a non-price regulated monopoly.

While the federal Telecommunications Act of 1996 imposes certain federal requirements on incumbent LECs to promote competition, the federal Telecommunications Act does not impose similar requirements on non-incumbent LECs.  After considering the merits in that case, the Commission found that conditioning CTC’s Certificate would only protect basic local exchange customers located in the Hidden Springs Development and would not address future applications or those local exchange carriers that have already received certificates for larger service areas.  Rather, the Commission found that adopting uniform rules setting the standards for interconnection and access in areas served solely by a non-incumbent facilities-based telephone corporation is the better approach and ordered this Rulemaking docket be opened and temporary rules adopted, effective immediately.

The Commission found that the temporary and proposed rules (identical in substance) were necessary to promote the public welfare by making it easier for new telephone company carriers to offer telephone customers basic local exchange service provider choices in areas served solely by a non-incumbent facilities-based telephone corporation.  The Commission further found that the proposed rules promoted and encouraged competition throughout local exchange calling areas as envisioned by the Legislature in 1997 when it amended the Idaho Telecommunications Act and wrote:

It is the intent of this legislature that effective competition throughout a local exchange calling area will involve a significant number of customers having both service provider and service option choices and that actual competition means more than the mere presence of a competitor.  Instead, for there to be actual and effective competition there needs to be substantive and meaningful competition throughout the incumbent telephone corporation's local exchange calling area.

Idaho Code § 62-602(2) (emphasis added). The Commission found these proposed rules would inhibit telephone corporations from creating non-price regulated virtual monopolies and depriving customers of choices in providers.  Providing customers choice is also consistent with Congress’ intent to foster competition in local service markets, as embodied in the federal Telecommunications Act of 1996.  Order Nos. 27236 and 27043.

WRITTEN COMMENTS

Both U S WEST and Staff generally supported adoption of the proposed rules.  Both also offered several changes to those rules.  Most notably, both suggested that the Commission delete proposed rules 411 and 401.05 -- suspension of the proposed rules for “rural” local exchange carriers (LECs).  They argued that while the proposed rule mirrors the existing exemption provided to incumbent rural local exchange carriers, those rules are not appropriate for competitive local exchange carriers (CLECs).  Idaho Code § 62-615(2) only applies to incumbent rural local exchange carriers and is intended to protect existing incumbent rural companies from certain interconnection requirements.  In those cases, the incumbent is rate regulated and the “protection” is necessary to protect existing rate payers.  By definition, these rules only apply to CLECs that are not rate regulated and, therefore, this protection is not necessary.

Both U S WEST and Staff also recommended minor changes to other parts of the proposed rules.  For example, both recommended that the definition of unserved area be clarified.  U S WEST suggested the term “unserved area” may create confusion because it is a term of art in the industry.

Staff also recommended the Commission modify the rule(footnote: 1) allowing affected facilities-based competitors to petition the Commission for an exemption from these rules.  Staff’s recommended change would allow the Commission to grant an exemption where the Commission found it was in the public interest.  Staff suggested that this would give the Commission flexibility to address concerns about the costs of certain rule provisions on smaller facilities-based competitors.  In addition, it would allow the Commission to exempt facilities-based competitors from rules that may unintentionally inhibit competition.

ITA argued that the Commission does not have the authority to adopt these rules, because it suggested that Congress preempted state utility commission authority in this area.  It rested its argument, not on the federal statute, but on regulations promulgated by the Federal Communications Commission (FCC).  47 C.F.R. §51.223.  ITA suggested  that the Commission could Petition the FCC pursuant to Section 251(h)(2) of the Federal Telecommunications Act of 1996 to treat CTC Telecom, Inc., and all similarly situated local exchange carriers, as incumbent local exchange carriers for the purposes of Section 251(c) of the Telecom Act.

PUBLIC HEARING

A public hearing was held November 16, 1998.  Oral statements were made by Rick Wiggins on behalf of CTC Telecom and Cambridge Telephone Company, Conley Ward on behalf of ITA, Mary Hobson on behalf of U S WEST, and Deputy Attorney General Cheri C. Copsey on behalf of the Staff.

Mr. Wiggins stated that CTC and Cambridge became involved in the Hidden Springs Development because they “were going into a nonregulated-type environment” and that they  “were going to be able to go into that environment and provide service to those customers in a new and less regulated environment.”  Tr. at 2.  He discussed the technical aspect of unbundling CTC’s  telecommunications elements and indicated unbundling would be difficult but not impossible.  Tr. at 3-4.

Mr. Ward discussed the economics involved in bidding on building a facilities-based telephone company designed to compete with the incumbent -- U S WEST.  Tr. at 5-7.  Rather than implementing these rules, Mr. Ward suggested that the Commission wait to see if customers become dissatisfied with CTC’s service.  He argued that if there were problems, the Commission could address those problems then.  Tr. at 8.  Mr. Ward also reiterated his legal argument first set out in ITA’s written comments that the rules are preempted by the Federal Communications Commission (FCC) in 47 C.F.R. §51.223.

Ms. Hobson indicated that U S WEST generally supports the proposed rules.  She stated that the technical difficulties in unbundling elements referenced by Mr. Wiggins were no different than those facing U S WEST and were not insurmountable.  Tr. at 16-17.  She also stated that the real concern underlying these rules was that “instead of enhancing competition through facilities-based entrants [the situation] presented in Hidden Springs will mean that these is no facilities-based  competition.”  Tr. at 18.  Moreover, she argued that the concern addressed by these rules “was not that customers would complain or perhaps prices would be a bit too high, but rather that the exact problem that the Federal [Telecom] Act and this Idaho legislature’s acts in the past have attempted to address, that is the total lack of competition in the local market, would be perpetuated rather than alleviated by the entrants [sic] like CTC in these undeveloped areas.”  Id.

Ms. Copsey stated that these rules were not promulgated to address only one facilities-based provider, CTC, but the CTC Application did provide the impetus for the rules.  Tr. at 25.  She asserted that these rules were designed to promote the opportunity for competition.  Id.  She characterized Mr. Ward’s suggestion that the Commission not promulgate rules but wait until there are customer complaints, as a little like Microsoft arguing that since there are no customers complaining about Microsoft or its costs, there is no antitrust question.  She suggested that the real  issue was whether the failure to promulgate these rules would create the potential for abuse -- not just by CTC but by other similarly situated companies.  Tr. at 26-27.  Ms. Copsey also observed that many of the concerns expressed by Mr. Wiggins could be addressed by the Commission through exempting particular companies under the proposed Rule 412 as modified by the Staff recommendation.  Tr. at 27-28.  She explained that Staff’s recommended changes to proposed Rule 412 were designed to give the Commission the flexibility to exempt particular providers from all or some of the proposed rules.

FINDINGS

The Commission finds it has authority to promulgate these rules pursuant to Idaho Code §§ 62-602, 62-606, 62-611, 62-614, 62-615, 62-616 and 62-622.  The Commission accepts most of the changes recommended by Staff and U S WEST.  In particular, the Commission agrees with Staff and U S WEST that proposed Rules 411 and 401.05 be deleted.  Likewise, the Commission recognizes U S WEST’s concerns about the use of the term “unserved area” and that these rules apply equally where a LEC is the first to provide facilities-based local exchange service in an area not located within any existing LEC study area.  Therefore, the Commission modifies the definition of “unserved area” adopting in part U S WEST’s recommended term “new telecommunications development area.”

The Commission has carefully considered the statements made at the public hearing held November 16, 1998.  The Commission is sensitive to the concerns expressed by Mr. Wiggins.  Based partly on those concerns, the Commission adopts the Staff’s recommended changes to proposed Rule 412.  This rule, as amended, will provide the Commission with the flexibility to exempt a petitioning facilities-based competitor from some or all of the proposed rules where such exemption is in the public interest.  For example, if the Commission finds some small facilities-based competitors may be unreasonably burdened by the arbitration provisions in the proposed rules or that some of these proposed rules may inhibit rather than promote competition and innovation, it can grant an exemption to that provider.  Modification of this proposed rule gives the Commission the ability to consider each case on its particular merits.

The Commission further finds that the pending rules found in Appendix B are reasonable and will promote competition and provide consumers with additional protections and are in the public interest.  Consequently, the Commission adopts these pending rules and submits them for legislative review.  The Commission also finds that it is in the public interest to amend the temporary rules, adopted by the Commission on August 10, 1998, in Order No. 27673, to include the same revisions which are being made to the proposed rules and make them effective immediately.

Finally, the Commission appreciates ITA’s legal argument.  However, the Commission finds that it has the requisite authority to adopt these rules and that Congress has not preempted the Commission’s authority over intrastate services.  The FCC cannot usurp unto itself authority that has not been clearly and directly given to it by the Congress.  SeeLouisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 374-375, 106 S. Ct. 1890, 1901-1902 (1986).  The United States Supreme Court specifically held in that case that preemption of state authority is not presumed and must be clearly enunciated by Congress.  The Commission has found no such clear Congressional statement preempting state authority to place competitively neutral and non-discriminatory conditions on non-incumbent local exchange carriers providing basic local exchange services.

However, the Commission finds that the relevant issue is ultimately the public interest.  Implicit in ITA’s legal argument is that 47 C.F.R. §51.223(b) controls this issue and that the Commission should petition the FCC pursuant to that regulation.  Therefore, in order to clearly protect the public from the inadvertent creation of virtual monopolies in undeveloped areas, the Commission finds that it is in the public interest to also petition the FCC pursuant to Section 251(h)(2) of the federal Telecom Act to treat CTC Telecom and all similarly situated local exchange carriers, as incumbent local exchange carriers for the purposes of Section 251(c) of the Telecom Act.

GENERAL ORDER

IT IS HEREBY ORDERED that the Commission adopts the pending rules, shown in Appendix B, and orders those be transmitted to the Administrative Rules Coordinator for publication in the December Administrative Bulletin.

IT IS FURTHER ORDERED that the Commission amends the temporary rules adopted by the Commission on August 10, 1998, in Order No. 27673, to include the same revisions which are being made to the proposed rules, effective immediately.

THIS IS A FINAL GENERAL ORDER.  Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No.31-4201-9801 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. 31-4201-9801.  Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration in response to issues raised in the petition for reconsideration.  See section 61-626, Idaho Code.

DONE by ORDER of the Idaho Public Utilities Commission at Boise, Idaho this                     day of November 1998.

                                                                                                                                      DENNIS S. HANSEN, PRESIDENT

                                                                                           RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

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**FOOTNOTES**

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 Proposed Rule 412, IDAPA 31.42.01.412.  By amending the proposed rules, this proposed rule becomes pending Rule 410.

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

November 20, 1998