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Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)	
TIME WARNER CABLE INFORMATION)	CASE NO. TIM-T-08-01
SERVICES (IDAHO), LLC FOR A)	
CERTIFICATE OF PUBLIC CONVENIENCE)	
AND NECESSITY TO PROVIDE LOCAL)	COMMENTS OF THE
EXCHANGE AND INTEREXCHANGE)	COMMISSION STAFF
TELECOMMUNICATIONS SERVICES)	
<u>WITHIN THE STATE OF IDAHO</u>)	

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Neil Price, Deputy Attorney General, and in response to the Notice of Application and Notice of Modified Procedure issued in Order No. 30958 on December 4, 2009, in Case No. TIM-T-08-01, submits the following comments.

THE APPLICATION

On November 14, 2009, Time Warner Cable Information Services (Idaho), LLC (TWCIS) filed an Application for a Certificate of Public Convenience and Necessity (CPCN) to provide competitive facilities-based local and interexchange telecommunications services within the State of Idaho. In the Application, TWCIS states that it is a competitive telecommunications company that intends to offer intrastate telecommunications services for commercial and wholesale customers statewide. Application at 2.

TWCIS is a registered foreign limited liability company in good standing with the Idaho Secretary of State's Office. TWCIS is wholly owned by TWC Digital Phone, LLC and incorporated in the State of Delaware with its principal address located in Stamford, Connecticut. The Company's registered agent for service in Idaho is CT Corporation System. *Id.*

The Company's source of capital funds will be provided by Time Warner Cable Inc. as memorialized in a letter signed by an officer of the company. *Id.*, Exhibit 4. A 2007 Annual Report for Time Warner Cable Inc. containing financial information was included in the Application. *Id.*, Exhibit 5. An illustrative price list was included. *Id.*, Exhibit 6. TWCIS asserts the Company has reviewed all of the Commission rules and agrees to comply. *Id.* at 7.

Following the initial review of the Application, Staff advised TWCIS that as a provider of commercial and wholesale services, a CPCN was neither applicable nor necessary to conduct business in Idaho. TWCIS was advised that the services described in the Application did not meet the definition of basic local exchange service as defined in *Idaho Code* § 62-603(1)(9)(11).¹ During a face-to-face meeting, the TWCIS representatives agreed that the Company was a wholesale and not a retail service provider. Staff informed the Company that the CPCN Application was a registration process for basic local exchange service providers similar to water and energy utilities. The absence of a CPCN does not preclude TWCIS from entering the Idaho market as a wholesale service provider, nor should it prevent the Company from entering into interconnections agreements. After numerous emails, and conversations, TWCIS elected not to follow Staff's suggestion to withdraw the Application, but instead, submitted a supplement to the Application.

¹ *Idaho Code* § 62-603(1) "Basic local exchange service" means the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communications within a local exchange calling area.

Idaho Code § 62-603 (9) "Residential customers" shall mean persons to whom telecommunication services are furnished at a dwelling and which are used for personal or domestic purposes and not for business, professional or institutional purposes. *Idaho Code* § 62-603 (11) "Small business customers" shall mean a business entity, whether an individual, partnership, corporation or any other business form, to whom telecommunications services are furnished for occupational, professional or institutional purposes, and which business entity does not subscribe to more than five (5) access lines which are billed to a single billing location.

The Supplement to the Application

On November 9, 2009, TWCIS filed a supplement to the Application to set forth additional reasons why TWCIS should be granted a CPCN. These are: (1) TWCIS has met the requirements for a CPCN; (2) TWCIS has proposed to offer a Basic Local Exchange Service; (3) Nothing in Title 62 remotely prohibits the grant of a CPCN to TWCIS; and (4) Section 253 of the Communications Act, backed by federal and state policies favoring competition, precludes a narrow reading of Title 61 and 62. Supplement at 3-10.

BACKGROUND

The Commission's traditional regulatory authority is found in Title 61 of the Idaho Code. The Idaho Telecommunications Act of 1988 added a new chapter Title 62 of the Code that created a modified form of regulation for telecommunications companies providing other than basic local exchange services in Idaho. Those telecommunications companies intending to offer only non-basic local exchange service (e.g. 6 or more business lines, MTS, dedicated service) need not apply for a certificate, but must comply with the filing requirements of Idaho Code § 62-604.

When the federal Telecommunications Act of 1996 (the Act) became law, one of the purposes of the Act was to foster competition in the local telecommunications market. To address the ensuing Applications to provide basic local exchange services in a consistent manner, the Commission issued procedural Order No. 26665 outlining the requirements for a company to provide services within the state of Idaho pursuant to Idaho Code §§ 61-526 through 61-528 and IDAPA 31.01.01.111 (Rule 111) and IDAPA 31.01.01.114 (Rule 114). Rule 111 applies to Applicants for the issuance of CPCNs as a new utility under Section 61-526, Idaho Code. Applications for new competitive local exchange carriers (CLEC) are addressed in Rule 114 (adopted on May 8, 2009) and applies to the issuance of CPCNs to CLECs seeking to provide local exchange services in Idaho.

In 2005, the Idaho Legislature passed House Bill No. 224. This bill "amends and adds to existing law to authorize a telephone corporation to elect to have all or part of the telecommunications services excluded from regulation pursuant to Title 61, Idaho Code, and to be subject to regulation pursuant to Chapter 6, Title 62, Idaho Code; to authorize the Public Utilities Commission to regulate telephone corporations for the purpose of implementing the Federal Communications Act of 1996 (the Act); and to provide the Public Utilities Commission with

authority to determine noneconomic regulatory requirements for telephone corporations providing basic local exchange service...”

STAFF ANALYSIS

Before embarking on any detailed discussion of TWCIS’s Application and the arguments concerning its right to be granted a CPCN, there is a threshold question to be addressed.

In its Application, TWCIS admits to being a wholesale provider. Application at 2 and supplement at 5. This means that the Company provides its services to retail companies and not to the public or end users. Looking at the definition of “telecommunication service” in *Idaho Code* §§ 61-121(2) or 62-603(13), the definition states that “telecommunications service means the transmission of two-way interactive switched signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means (which includes message telecommunication service and access service), which originate and terminate in this state, and are offered *to or for the public, or some portion thereof, for compensation* [emphasis added].” Because TWCIS does not offer service directly to the public, the service cannot then be considered telephone service within the definition of *Idaho Code*. Because the Company does not offer telephone service, it then cannot be considered a “telephone corporation” in accordance with that definition in *Idaho Code* §§ 61-121(1) or 61-603(14). Because it is not a telephone corporation in accordance with *Idaho Code*, any further discussion of the Application is moot.

That said, Staff will still address some of TWCIS’s points, *arguendo*, to provide further clarification. In the supplement to the Application, TWCIS argues that the company meets the requirements for a CPCN, and in fact, the Commission must grant a CPCN to the Company. Staff addresses each of the four arguments posed by TWCIS in its supplement.

I. TWCIS has met the requirements for a CPCN. TWCIS asserts that it has met and satisfies the requirements set in Commission Order No. 26665 to be granted a CPCN in Idaho. Supplement at 3-4.

Staff agrees all requisite information has been provided by TWCIS.

II. TWCIS has proposed to offer a basic local exchange service. The company states that “through informal discussion with the Commission Staff, it understands Staff is not inclined to recommend grant of a CPCN because TWCIS has not included basic local exchange services

among its proposed tariff service offerings.” TWCIS argues that in fact “TWCIS has proposed to offer a service that should be considered a form of basic local exchange service.” *Id.* at 4. Citing *Idaho Code* § 62-603(1) and IDAPA 31.42.01.005.01, the Company maintains it falls within the parameters of stated statutory definition in its description that “Local Interconnection Service will be offered on a wholesale basis to facilities-based providers of interconnected VoIP service and will provide, among other things, the transport and termination of voice calls within a local calling area. These services will be used to connect TWCIS customers to the PSTN, thus enabling two-way interactive switched voice communications within the relevant local exchange calling area using soft switch technology.” *Id.* at 5. The Company concludes, “[t]hus, TWCIS’s services will enable other service providers to offer residential and small business customers a competitive choice in telephone services, which in turn will lead to consumer benefits in the form of reduced rates and increased quality of service.” *Id.*

TWCIS’s definition of basic local exchange service is not the same as the statutory definition found in *Idaho Code* § 62-603(1). Specifically, basic local exchange service means “the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communications within a local exchange calling area.” That is not the same as providing service to a company that is going to provide service to residential and small business customers. The Commission does not have Title 61 and Title 62 jurisdiction in cases where a company’s services are offered on a wholesale basis through interconnection agreements. Staff believes TWCIS’s interpretation of “offering” basic local exchange service is an inaccurate application of the statute. TWCIS is attempting to equate wholesale interconnection services to directly providing basic local exchange service.

III. Nothing in Title 62 remotely prohibits the grant of a CPCN to TWCIS. The Company recounts that in its discussion with Staff, it was stated that TWCIS must provide a basic local exchange service to obtain a CPCN because *Idaho Code* § 62-604(1)(a) provides that telephone corporations that did not have a CPCN as of January 1, 1988 and that do not provide basic local exchange services shall be subject to Title 62 and further shall be exempt from Title 61. *Id.* at 6. The Company argues that an “exemption from the requirements of Title 61 does not mean that an entrant is foreclosed from voluntarily seeking certification under that title as there is no provision of Idaho law that explicitly limits the grant of a CPCN to a carrier that provide basic local exchange service.” *Id.* TWCIS believes a “review of the legislative history of Title 62 shows that

its primary purpose was to allow certificated rate-regulated telephone corporations to elect whether to remain rate regulated for telecommunications service other than basic local exchange services and did not contemplate and was not designed to address the wholesale telecommunications services that TWCIS intends to provide.” *Id.* at 6-7. TWCIS states, “nothing in the legislative history of the 1988 legislation or the 2005 amendment[s] thereto remotely suggest that a competitive carrier providing a service other than basic local exchange service should be *precluded* [emphasis TWCIS] from obtaining a CPCN.” *Id.* at 7.

The Commission issues certificates to CLECs seeking to provide basic local exchange services in Idaho. The Commission uses the certification process to register and review applications from companies that provide basic local telecommunications services. All other service providers are exempt from this process.

IV. Section 253 of the Communications Act Precludes a Narrow Reading of Titles 61 and 62. TWCIS asserts that “while a straightforward application of the relevant provisions support granting a CPCN, the Company’s entitlement to a certificate is all the more clear in light of (a) Section 253 of the Communications Act of 1934, as amended (the Act), which prohibits barriers to entry, and (b) the strong federal and state policies favoring entry by facilities-based competitors such as TWCIS.” *Id.* The Company contends that “finding TWCIS ineligible for a CPCN based on a cramped reading of Titles 61 and 62 would run afoul of federal law and undercut important policy objectives.” *Id.*

Idaho statutes allow easier entry into the market than the Act. Therefore, the Commission cannot be considered guilty of “running afoul” of federal law and “undercutting important policy objectives” if a certificate is not granted, as suggested by TMI. *Id.* at 8. While TWCIS’s argument concerning Section 253 is imaginative, it simply makes no sense. Staff does not see how the state’s lack of regulatory requirements, that is, no need for a CPCN or price list, can be viewed as a barrier to entry. It should be noted that the Commission has issued over 100 certificates.

SUMMARY

Staff is somewhat perplexed by this Application in that most telecommunications companies seek reduced oversight, yet TWCIS, in its Application, is seeking the opposite--more regulatory oversight than the Staff believes is warranted.

As a threshold question, Staff believes TWCIS does not meet the definition of a telephone corporation as defined in Idaho statutes and, therefore, is not subject to regulation under Title 61 or Title 62.

STAFF RECOMMENDATION

Staff does not believe the Commission has authority over TWCIS under Title 61 or Title 62, and therefore, recommends that the Commission dismiss Time Warner Cable Information Systems (Idaho), LLC's Application for a Certificate of Public Convenience and Necessity.

Respectfully submitted this 28th day of December 2009.



Neil Price
Deputy Attorney General

Technical Staff: Grace Seaman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 28TH DAY OF DECEMBER 2009, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. TIM-T-08-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

GARY WENGROFSKY
MANAGER REGULATORY
TIME WARNER CABLE INC
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SECRETARY

CERTIFICATE OF SERVICE