

representatives of the Company entered into another series of discussions during which the parties agreed that TWCIS would be permitted to issue a written reply to Staff's comments. On January 29, 2010, TWCIS submitted a written response to Staff's comments.

On February 23, 2010, the Commission issued an Order denying TWCIS' Application for a CPCN. *See* Order No. 31012. On March 16, 2010, TWCIS filed a Petition for Reconsideration of the Commission's Order.

Thereafter, TWCIS and Staff submitted direct testimony and TWCIS submitted rebuttal testimony. On June 10, 2010, the Commission held an oral hearing regarding TWCIS' Petition for Reconsideration and ordered the parties to submit simultaneous post-hearing briefs on the legal issues presented by TWCIS' Application for a CPCN in Idaho.

STATEMENT OF JURISDICTION

"The [Commission] is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state." *Idaho Code* § 61-501. The Commission has the authority to issue a CPCN to either a "street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation . . ." *Idaho Code* § 61-526.

Specifically, the Idaho legislature has delegated to the Commission the authority to administer the Telecommunications Act of 1988, as amended ("the Idaho Act"), and applicable federal law. *Idaho Code* § 62-602(5). A provision in the Idaho Act exempts from Title 61 regulation certain "telephone corporation(s) which did not, on January 1,

1988, hold a certificate of public convenience and necessity issued by the commission and, which does not provide basic local exchange service . . .” *I.C. § 62-604(1)(a)*.

The Commission “issues Certificates of Public Convenience and Necessity to competitive local exchange carriers (CLECs) seeking to provide local exchange services in Idaho.” Commission Rules of Procedure 114, IDAPA 31.01.01.114. “The Commission uses the certification process to register and review applications to provide local telecommunications services.” *Id.*; *see also* Commission Order No. 26665.

SUMMARY OF ARGUMENT

TWCIS is not entitled to a CPCN because the Commission lacks the requisite statutory authority to issue a Certificate to the Company. TWCIS is not a telephone corporation, as the term is defined by Idaho and federal law, because its business plan does not contemplate the offering of its wholesale telecommunications services directly to the public. The Commission’s authority to enforce the provisions of the Idaho Act is limited to the authority delegated to the agency by the Idaho legislature. The Commission should avoid the appearance of regulatory authority where none exists. The Commission’s interpretations of the application of the statutes and rules at issue in this case are reasonable and are entitled to deference.

TWCIS’ Application for a CPCN can be distinguished from other CPCN Applications filed with the Commission. Nevertheless, TWCIS’ Application should be evaluated on its own merits. While the Commission has granted CPCN’s to other wholesale providers, these Certificates were dispensed to providers proposing to offer basic local exchange services and are now awarded subject to strict conditions to ensure the preservation of Idaho’s dwindling numbering resources. TWCIS should not be

allowed to effectively step into the shoes of other successful Applicants and adopt their Applications as their own.

TWCIS' inability to secure an interconnection agreement is not relevant to the Commission's review of whether TWCIS should be granted a CPCN. TWCIS has failed to take advantage of specific remedies provided for by the Commission's Rules of Procedure and Idaho law, including the filing of a formal complaint against the offending incumbent carrier or a petition for a declaratory ruling, in order to secure an interconnection agreement.

ARGUMENT

I. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO ISSUE A CPCN TO TWCIS.

1. *TWCIS Does Not Qualify for a CPCN Because the Company Does not Propose to Offer its Services Directly to the Public.*

As stated above, the Idaho Act contains specific enabling language allowing the Commission to administer the Idaho Act. *See I.C. § 62-602(5)*. However, the provisions of the Idaho Act, and other Idaho statutes governing the telecommunications industry, are only applicable to entities meeting the statutory definition of "telephone corporation[s]." *See I.C. § 61-121(1); I.C. § 62-604(1)(a)*.

In Idaho, a telephone corporation is defined as "every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, providing *telecommunication services* for compensation within this state . . ." *I.C. § 61-121(1); I.C. § 62-603(14)(emphasis added)*. "Telecommunication service" includes the following:

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.

I.C. § 61-121(2); I.C. § 62-603(13)(emphasis added). Similarly, the federal Act defines ‘telecommunications service’ as the “offering of telecommunications for a fee directly to the public or . . . effectively available directly to the public, regardless of the facilities used . . .” 47 U.S.C. § 153(46).

In sworn testimony before the Commission, TWCIS representative Julie Laine testified that TWCIS’ business model in Idaho would include the sale of the Company’s “services to its retail VoIP entity, which will provide services – VoIP services – to end-user customers.” *Commission Hearing Transcript*, June 10, 2010, TIM-T-08-01, at p. 22, lines 14-16. Ms. Laine explained that “the retail entity owns the last-mile facilities to the customer . . . and is the retail unit that sells the service to the end user.” *Id.*, lines 17-20. TWCIS “will be essentially a carrier’s carrier.” *Id.* at p. 23, lines 1-2.

These admissions are consistent with the Company’s November 9, 2009 Supplemental Application for a CPCN wherein TWCIS revealed its intent to operate in Idaho as a wholesale provider of intrastate telecommunications services to its VoIP provider customers. *See Supplemental Application* at p. 5.

Therefore, because TWCIS does not offer, nor does it have any current plans to offer, its telecommunications services directly to the public the Company does not meet the definition of a telephone corporation. Notwithstanding TWCIS’ apparent desire and consent to be subject to regulation, the Company falls outside the Commission’s jurisdiction and authority to regulate. “An administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature.” *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996). The Commission should not

endeavor to read TWCIS into the relevant statutes and rules governing the issuance of a CPCN and thereby create the appearance of regulatory authority where none exists.

a. The Commission's Interpretations of the Relevant Statutes at Issue in this Case are Reasonable.

In its prior Order, the Commission interpreted that the plain language of *I.C. § 62-604* “removed any discretion” from the Commission and that TWCIS was “specifically exempted from the regulatory structure found in Title 61 of the Idaho Code.” Order No. 31012 at p. 5. Court will defer to an agency’s interpretation of a statute or rule so long as: “(1) the agency is responsible for administration of the rule in issue; (2) the agency’s construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present.” *Preston v. Idaho State Tax Comm’n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998). One of the rules of deference includes whether “a practical interpretation of the rule exists.” *Id.* at p. 505.

TWCIS argues that the legislative history of Title 62 demonstrates that the Idaho legislature’s purpose in enacting *I.C. § 62-604* was to allow rate-regulated certificated telephone corporations to elect whether to remain rate-regulated. *TWCIS Petition* at p. 9. According to TWCIS, even if the Company is “exempt” from the provisions of Title 62 nothing in the definition of that word, “or *Idaho Code § 62-604*, requires an exempt party to forego, or precludes the Commission from facilitating benefits or advantages otherwise available for similarly situated entities.” *Id.*

TWCIS interpretations are nonsensical. They ignore the circumscribed nature of the Commission’s authority and suggest that an entity specifically exempted by the plain language of a statute can later elect to be subject to that very same statute if it is in its

interest to do so. In short, TWCIS is asking the Commission to exercise regulatory authority over the Company so that it may share in the benefits or advantages offered to other non-exempt entities.

2. *TWCIS' Application for a CPCN Should be Strictly Limited to its Content.*

In its Petition for Reconsideration, TWCIS alleges that the Commission's decision to deny the Company a CPCN was unduly discriminatory because the Commission has previously granted CPCN's to "carriers that proposed to provide services comparable to those proposed by TWCIS." *TWCIS Petition* at p. 3-5. In making its argument of disparate treatment, TWCIS specifically referenced the Applications of ALEC Telecom, Inc. ("ALEC"), Case No. ALE-T-09-01, and Eltopia Communications, LLC ("Eltopia"), Case No. ECL-T-07-01. *Id.* at p. 3-4.

Staff witness Grace Seaman noted in her direct testimony that "some companies, that obtained certificates in the past, may have been wholesale services providers." *Hearing Transcript* at p. 64, lines 3-5. However, Ms. Seaman explained that, upon learning that some of these companies did not plan to offer local exchange services, the Commission Staff began to recommend, and the Commission approved, CPCN's to these companies "on a conditional basis." *Id.*, lines 8-13. Certificates are now granted on a conditional basis and companies like ALEC and Eltopia must agree to the following conditions prior to receiving a CPCN:

compliance with the Number Pool Administrator and Order No. 30425 mandating number resource utilization forecast (NRUF) reporting; (2) contribution to the Idaho Universal Service Fund, Idaho Telecommunications Relay System (TRS) Idaho Telephone Assistance Program (ITSAP) and any future reporting requirements deemed appropriate for competitive telecommunications providers; (3) filing a final and complete price list with the Commission containing all

of its rates, terms and conditions; and (4) an agreement from the Company to relinquish its certificate and any telephone numbers if, within one year of the issuance of a CPCN, the Company is not offering local exchange telecommunications services in Idaho.¹

Id. at p.64-65, lines 14-25, lines 1-2; *See also* Case No. ALE-T-09-01 (Order No. 30944 at 3); Case No. BVN-T-09-01 (Order No. 31030), Case No. ENT-T-09-01 (Order No. 30950), Case No. ITN-T-09-01 (Order No. 30995) and Case No. MNT-T-08-02 (Order No. 30794).

Anecdotally, Staff recalls that it held numerous discussions with representatives for ALEC prior to submitting its recommendation that ALEC receive a CPCN to provide local exchange telecommunications services in Idaho. During those discussions, ALEC indicated that it intended to provide local exchange services to small business customers and to eventually expand its offerings to include residential customers. This statement was supported by the Company's illustrative tariff and price list pages 50 through 52, and on pages 47 through 49 in the Company's final tariff currently on file with the Idaho Public Utilities Commission. Among the various service offerings, the ALEC's tariff lists monthly rates for: Business Exchange Access Line Service, optional custom calling features, directory listings (including non-published and non-listed numbers), directory assistance, busy line verification and interrupt service. These services are typically associated with end-users. *See Application* of ALEC, Inc., Idaho PUC Tariff No. 1.

Thus, TWCIS' Application can be easily distinguished from ALEC. The Company's representatives have explicitly stated that its intent was to be a provider of wholesale services in Idaho, and the Company did not intend to offer end-user services.

¹ "These conditions were adopted after Eltopia was granted a certificate, and included in the order for ALEC's certification." *Hearing Transcript* at p. 65, lines 3-5.

The proposed price list submitted in TWCIS' Application and Ms. Laine's testimony at hearing confirm this business strategy. Nothing in the TWCIS' proposed price list suggests that the Company plans to offer end-user services. The only reference to end-user services in the price list is a reference to employee rates where it states that the "Company may offer special rates or rate packages to its employees or employees of its affiliates." See *Supplemental Application*, Proposed Price List, page 41.

TWCIS also referenced the Application of Eltopia, Case No. ECL-T-07-01, as support for its argument that the Commission's denial of its Application for a CPCN constituted "blatant discrimination against TWCIS . . ." *TWCIS Petition* at p. 5. In response, Staff reiterates the assessment it made in its Comments regarding Eltopia's 2007 Application for a CPCN: "Eltopia's service has the capability to provide both voice and data services over the same trunk, and in some cases, the customer may desire fewer than five voice lines, which would qualify as basic local exchange service." See *Staff Comments*, Case No. ECL-T-07-01 (emphasis added).

In contrast, TWCIS' Application and testimony before the Commission does not reveal any promissory intent by the Company to offer services which would qualify as basic local exchange service. Instead of offering "access lines [directly] to residential and small business customers," *I.C.* § 62-603(1), TWCIS "will be essentially a carrier's carrier." *Hearing Transcript* at p. 23, lines 1-2. TWCIS' Local Interconnection Service "will be offered on a wholesale basis to facilities-based providers of interconnected VoIP services . . ." and not to end use customers. *TWCIS' Petition* at p. 6 (emphasis added).

Serving as the wholesale provider of services that may ultimately qualify as basic local exchange service once they are delivered by a third party to residential and small

business customers does not constitute the provision of ‘basic local exchange service,’ as outlined in *Idaho Code* § 62-603(1). *See Staff Comments*, Case No. TIM-T-08-01, at p. 5.

The Commission should evaluate TWCIS’ Application based solely upon its content and in accordance with the existing statutory criteria and legal authority. Allowing TWCIS to bootstrap its Application to that of a successful Applicant would create a dangerous and legally untenable precedent for the Commission. Fundamental norms of due process embodied in the Idaho Administrative Procedures Act demand that each Applicant be evaluated according to the merits of their own Application and not that of another party. *See I.C. §§ 67-5201 et seq.* Moreover, inasmuch as other “similarly situated entities” have been granted a CPCN in contravention of Idaho Code, the Commission is not bound by its prior rulings. *See Commission Rule 326; IDAPA 31.01.01.326.*

3. *A CPCN is not a Prerequisite for Entry into the Idaho Telecommunications Market.*

TWCIS is not prejudiced by the Commission’s decision to deny its Application for a CPCN. The denial of the Application does not discourage “effective competition” because it does not prevent TWCIS from obtaining interconnection with Incumbent Local Exchange Carriers. *See Idaho Code* § 62-602 (emphasis added).

As the Commission noted in its Order, “a CPCN is not required for telephone corporations offering non-basic local exchange services or to obtain interconnection with the network of an Idaho ILEC.” Order No. 31012. “Telephone corporations ‘providing other non-basic local exchange telecommunications services as defined in *Idaho Code* §

62-603' need only comply with the notice and price list or tariff requirements found in *Idaho Code* §§ 62-604 and 62-606.” *Id.*(citing Order No. 30991 at p. 3.)

TWCIS has acknowledged that Staff and the Commission support the Company's quest to secure an interconnection with an Idaho ILEC. *See Hearing Transcript* at p. 27, lines 22-25, p. 28, lines 1-2. Indeed, TWCIS is not averse to petitioning a regulatory body for a declaratory order establishing the Company's right to gain interconnection with local exchange carriers and has done so at the federal level. *See Time Warner Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd (WCB 2007).

However, when queried as to whether TWCIS contemplated filing a formal complaint against Verizon for their alleged denial of interconnection in Idaho Ms. Laine offered the following: “No, because they – it was related to the CPCN, so, no . . . [I]t was our understanding of Verizon's position that it's legitimate . . .” *Hearing Transcript* at p. 32, lines 18-23. Notwithstanding her previous acknowledgement that the Commission has historically held that a CPCN is not required for interconnection, Ms. Laine seemed to opine that only certificated CLECs are entitled to interconnection. *See id.*, lines 23-25.

Ms. Laine's opinion is at odds with federal law and federal and state court decisions interpreting the federal Act. These courts have all confirmed that the federal Act established an affirmative duty, owed by local exchange carriers, to provide interconnection unless the incumbent carrier can prove that the interconnection is not “technically feasible.” *In re Ryder*, 141 Idaho 918, 925, 120 P.3d 736, 743 (Idaho)(citing

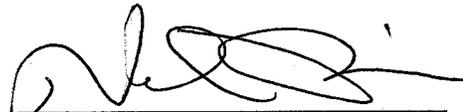
US West Communications, Inc. v. Jennings, 304 F.3d 950, 960-61 (9th Cir.2002); 47 C.F.R. § 51.305(e).

Thus, it is clear that there are existing avenues for relief which would allow TWCIS to redress its apparent inability to secure an interconnection agreement in Idaho. TWCIS has neglected to avail itself of the formal complaint process provided for by Idaho law and in the Commission's Rules of Procedure. *See I.C. § 61-612*; IDAPA 31.01.01.054. Additionally, TWCIS is permitted to petition the Commission for a declaratory ruling pursuant to the Idaho Administrative Procedures Act. *See I.C. § 67-5232*. Both the complaint process and the petition for a declaratory ruling would most likely lead to a favorable ruling from this Commission, not unlike the favorable decision the Company received from the FCC, *see supra* p. 10-11, declaring that the Company was entitled to interconnection with an incumbent carrier.

CONCLUSION

Therefore, pursuant to the foregoing reasons and rationale described more fully above Staff respectfully requests that the Commission affirm its prior ruling set forth in Order No. 31012 and deny TWCIS' Petition for Reconsideration.

Respectfully submitted this 9th day of July 2010.



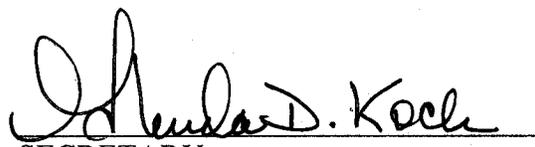
Neil Price
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 9TH DAY OF JULY 2010,
SERVED THE FOREGOING **POST-HEARING BRIEF**, IN CASE NO. TIM-T-08-01,
BY EMAILING AND MAILING A COPY THEREOF, TO THE FOLLOWING:

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