



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

November 19, 1998

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VIA FED EX

Federal Communications Commission
Office of the Secretary
Portals
445 Twelfth Street SW
Washington DC 20554

CC Docket No. 98-221

RE: Petition for Declaratory Ruling Concerning Section 251(h)(2)

Dear Secretary:

Enclosed for filing is an original and 14 copies of the Idaho Public Utilities Commission's Petition for Declaratory Ruling concerning Section 251(h)(2) of the Communications Act. Please acknowledge receipt of this document by date stamping the duplicate copy of this letter and returning it in the enclosed self-addressed, stamped envelope.

Sincerely,

Cheri C. Copsey
Deputy Attorney General

Enclosure

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**Before the
FEDERAL COMMUNICATIONS COMMISSION**

IN THE MATTER OF)	
)	CCB Pol.
IDAHO PUBLIC UTILITIES COMMISSION)	
)	
PETITION FOR DECLARATORY RULING)	CC Docket No.
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)	
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SUMMARY

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

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

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

I. INTRODUCTION

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

II. BACKGROUND

A. *CTC Telecom, Inc.*

On April 21, 1998, CTC Telecom, Inc. applied to the IPUC for a Certificate of Public Convenience and Necessity to provide basic local exchange service to a new residential and commercial planned community being constructed near Boise, Idaho. The area being developed is located within U S WEST Communications, Inc.'s existing study area in southern Idaho. U S WEST is the incumbent LEC, as defined in Section 251(h)(1). However, because this development is under construction, the incumbent LEC (U S WEST) has only limited facilities currently providing isolated

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

service in the general area. To meet the developer's needs, any LEC would be required to construct substantial new facilities, requiring a large investment of materials and capital. CTC was incorporated on February 17, 1998, and is a wholly-owned subsidiary of Cambridge Telephone Company, a rural incumbent LEC providing service in other areas in Idaho.²

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

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

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

² CTC also requested it be designated as a "rural competitive local exchange carrier" under state law. State law mirrors the language in the Telecommunications Act of 1996. *Compare Idaho Code* § 62-603(10) and 47 U.S.C. § 153(47).

to generally facilitate competition for its services. The Commission finds that this set of circumstances would not promote customer choice in service providers as mandated by the legislature.

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

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

Id. at 4-5.

The IPUC, therefore, promulgated new rules designed to promote competition and protect the public where the first and only facilities-based LEC in a geographic area would technically be a non-incumbent LEC only by virtue of the date it began providing service. (Appendix B). The IPUC was sensitive to the prohibitions contained in Section 253 and, therefore, carefully crafted its rules to only apply in instances where there was no local competition. For example, the IPUC specifically provided that any facilities-based competitor may petition the IPUC to be exempted from the rules if there is functionally equivalent, competitively priced basic local services reasonably available to both residential and small business customers within the undeveloped area from a telephone corporation unaffiliated with the petitioner, or where the IPUC finds that exemption is in the public interest. IDAPA 31.42.01.410.³ Appendix B. Therefore, by definition, these rules would

³ IDAPA 31.42.01.410. PETITION FOR EXEMPTION FROM RULES 402-409. (Rule 410) Any facilities-based competitor may petition the commission to exempt it from the application of Rules 402 through 409. The commission may grant the petition if the petitioner demonstrates there are

not “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” in violation of Section 253(a). On the contrary, the IPUC rules promote competition by inhibiting the first facilities-based LEC from effectively creating an economic disincentive for competitive entry. The rules are “competitively neutral,” consistent with Section 254 and adopted to ultimately safeguard the rights of consumers.

B. Relevant Provisions of the Telecommunications Act.

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

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

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

(B)

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

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

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

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

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.

- (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
- (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

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

C. Relevant Commission Rules.

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

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

III. ARGUMENT IN SUPPORT OF PETITION

As the Commission stated recently in *Guam*, Congress' intent was

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

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

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

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

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

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

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

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

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

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

Commission appeal, CTC can impede rather than advance the development of local exchange service competition.

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

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

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

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

Given the exclusive contract with the development, CTC will be the incumbent provider of local exchange service, not a viable competitor. It therefore will control the bottleneck local

exchange network in the Hidden Springs Development and possess substantial economies of density, connectivity, and scale that, absent compliance with the obligations of Section 251(c), can impede the development of telephone exchange service competition in the Hidden Springs Development. It, therefore, occupies a position in the market for telephone exchange service in the Hidden Springs Development that is comparable to the position typically occupied by incumbent LECs. Therefore, CTC satisfies the requirement of Section 251(h)(2)(A).

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

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

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

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

Under Section 251(h)(2)(C), in order for the Commission to treat CTC as an incumbent LEC for purposes of Section 251, “such treatment [must be] consistent with the public interest, convenience, and necessity and the purposes of [section 251].” As described above, Congress has

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

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

In the Commission's *Guam* decision, the Commission interpreted Section 251(h)(2) to include "any LEC that provides telephone exchange service to all or virtually all of the subscribers in its service area, where, as here, no NECA member served the area at issue as of the date of the enactment of the 1996 Act." *Guam* at ¶41. In this case, CTC will provide telephone exchange service to all or virtually all of the subscribers in its service area (Hidden Springs Development), approximately 900 residential subscribers and an unidentified number of small business customers.

U S WEST, the incumbent LEC in the larger study area, has no customers. Therefore, the Commission should treat CTC as an incumbent LEC for the purposes of Section 251(c).

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

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

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

By filing this Petition, the IPUC is not conceding that the Commission has broad authority to preempt state utility commissions from imposing additional interconnection and access requirements on LECs that are not classified as incumbent LECs, as defined by Section 251(h)(1) of the Communications Act, in the absence of a Commission finding that such additional requirements violate Section 253. *See Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374-375, 106 S. Ct. 1890, 1901-1902 (1986). In fact, the IPUC asserts that Congress did not intend to preempt state utility commissions from imposing

competitively neutral interconnection and access standards on LECs that provide the only facilities-based local service in order to promote competition. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 253(b). Moreover, by promulgating 47 C.F.R. §51.223, the Commission did not intend to preempt state utility commissions from imposing legitimate rules designed to promote competition and to protect the public interest in situations like the one facing the Commission in this Petition where the LEC in question stands in the same position as an incumbent LEC.

IV. CONCLUSION

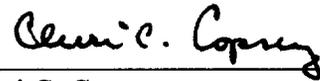
Based on this Petition and the material included in the attached appendices, the IPUC requests:

1. That the Federal Communications Commission find that the statutory criteria for the Commission to treat CTC Telecom, Inc. as an incumbent local exchange carrier for section 251 purposes set 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 20th day of November, 1998.

ALAN G. LANCE
Attorney General



Cheri C. Copsey
Deputy Attorney General
for the Idaho Public Utilities Commission

N:fcc-ctc.pet

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF) CASE NO. GNR-T-98-4
CTC TELECOM, INC. FOR A CERTIFICATE)
OF PUBLIC CONVENIENCE AND NECESSITY .)
TO PROVIDE LOCAL EXCHANGE SERVICE)
AS A COMPETITIVE LOCAL CARRIER AND) ORDER NO. 27673
FOR DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)
)

On April 21, 1998, the Commission received an Application from CTC Telecom, Inc. seeking a Certificate of Public Convenience and Necessity to provide facilities-based local exchange service and toll access telephone service as a competitive local exchange carrier. CTC also requested it be designated as an eligible telecommunications carrier ("ETC") pursuant to Section 214(e)(2) of the federal Telecommunications Act of 1996 and claimed it was a rural telephone company as defined under state and federal law. It also requested that its service area, for the purposes of universal service obligations, be limited to the geographic boundaries of the development.

Notice of Modified Procedure was issued on June 3, 1998. Order No. 27548. Two extensions of time were granted to the Staff for filing its comments and recommendation. Order Nos. 27601 and 27629.

U S WEST was granted intervention on July 24, 1998. Order No. 27655. CTC and Staff filed comments on July 21, 1998. Staff also filed a discovery motion on July 21, 1998. Oral argument was held on July 24, 1998. At oral argument and in its comments, CTC agreed to defer consideration of its ETC status pending the Commission's decision in GNR-T-98-8 in which the Commission will consider how service areas are designated for the purposes of ETC designation.

Based on a review of the Application, CTC's comments, Staff's comments and on oral argument, the Commission grants CTC's Application and defers its consideration of its ETC designation. The Commission denies the Staff's discovery motion as moot.

BACKGROUND

CTC applied for a Certificate of Public Convenience and Necessity to serve approximately 900 homes and small businesses in a new development called Hidden Springs Development to be located in Ada County near Boise, Idaho, off Dry Creek Road. CTC alleges that if it is certificated to provide local exchange service in Hidden Springs, it will meet the definitions of "common carrier," "telecommunications carrier," and "rural telephone company" under the federal Telecommunications Act. U S WEST Communications, Inc. is currently certificated to provide service in the area in question but does not have facilities in place there. On May 26, 1998, CTC filed a price list with the Commission for information purposes pursuant to *Idaho Code* § 62-606. No interconnection agreements in Idaho have been negotiated by CTC. CTC will provide basic local exchange service, as well as, additional Title 62 services.

CTC was issued a certificate of incorporation on February 17, 1998, and is a wholly-owned subsidiary of Cambridge Telephone Company. Cambridge is a fully regulated rural telephone company providing Title 61 services and receiving Idaho Universal Service Funds pursuant to *Idaho Code* § 62-610. CTC stated that its parent company, Cambridge, will provide the initial capital required by CTC. It has no assets or capital of its own.

CTC entered into its contract with Hidden Springs Development on April 7, 1998. CTC's contract requires it to provide the telecommunications, cable television, high speed data transfer capabilities and other services to the development and its residences. According to the contract, CTC was to have dial tone service to each residential lot by October 1, 1998, with interim phone service by May 15, 1998.

Hidden Springs Development is a new planned development of approximately 900 residences and light commercial businesses to be located north of Boise near Idaho State Highway 55. Hidden Springs is within the Boise School District. Children from Hidden Springs will attend Cynthia Mann Elementary, Hillside Junior High and Boise High. Boise is the largest metropolitan area in Idaho. Because this development is under construction, no other local exchange carrier has provided service to the development, although U S WEST does provide local exchange service to existing customers in the Dry Creek area. Only CTC will have facilities-based service in the Hidden Springs Development.

CTC stated it intends to provide basic local exchange service, extended area service ("EAS") to U S WEST's Boise calling area, touch-tone service, high speed data services, access to toll services, access to emergency services (911), and Lifeline and Link-up services for low income residents. This development, however, does not appear to include low income housing. CTC stated it will construct the telephone plant in accordance with standards established by the federal Rural Utilities Services (formerly the REA).

COMMISSION FINDINGS

The Commission finds that this Application presents unique legal and financing issues for the Commission that the Commission has not previously considered.

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

CTC is also a wholly-owned subsidiary of a fully regulated Title 61 Idaho USF rural local exchange carrier — Cambridge Telephone Company. *Idaho Code* § 62-613 prohibits Cambridge from subsidizing nonprice-regulated telecommunication services with those telecommunication services price-regulated by the Commission. In this case, CTC, submitted no financial data in support of its Application. It simply stated as follows:

As a recently formed corporation, CTC does not have current financial statements to provide to the Commission. CTC's parent company, Cambridge Telephone Company ("Cambridge"), will provide the initial capital required by CTC, and Cambridge's financial statements are on file with the Commission. The Applicant respectfully requests that the Commission take official notice of those filed documents.

Application at p. 3. The Commission requires all applicants for Certificates to provide sufficient information to establish the applicant possesses adequate financial resources to provide the proposed services. In this case, CTC has no independent resources or assets and CTC's reliance on Cambridge raised several questions for the Staff.

The Commission will address each of these issues below.

CTC's Certificate of Public Convenience and Necessity

Staff recommended that the Commission condition this Certificate to ensure customer choices. CTC objected, suggesting the Commission had no authority to impose conditions.

The Commission has carefully considered whether conditioning CTC's Certificate is the best method for protecting the public interest and promoting competition. Contrary to CTC's assertion, the Commission finds that it clearly has the authority to condition CTC's Certificate to ensure customer choice as recommended by the Staff. *Idaho Code* §§ 61-528, 62-615(3) and 62-622(5). The Commission rejects CTC's assertion that the Commission has no authority over it because it is a competitive local exchange carrier and that the Commission's authority is preempted by federal law. Nothing in the federal Telecommunications Act of 1996 preempts the Commission's authority to impose appropriate and competitively neutral conditions on competitive local exchange carriers where those conditions are necessary to protect the public interest. 47 U.S.C. §§ 151, 152(b), 251(d)(3), 252(e)(3), and 253(b); *See Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374-375, 106 S.Ct. 1890, 1901-1902 (1986); *See Iowa Utilities Board v. Federal Communications Commission*, 135 F.3d. 535, 541 (8th Cir. 1998). The Commission finds, however, that conditioning CTC's Certificate is not the best method for protecting the public and advancing the legislature's plan to create competition. *See Idaho Code* § 62-602(2).

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

providing basic local exchange service in unserved areas will have the same standards for providing interconnection and access in those areas.

CTC's Financial Responsibility

Staff urged the Commission only grant a conditional Certificate and proposed several conditions designed to ensure there is no cross subsidy between the fully regulated Title 61 parent company, Cambridge, and its subsidiary, CTC, in violation of *Idaho Code* § 62-613. CTC objected and again suggested the Commission has no authority to impose conditions.

The Commission finds that it has continuing authority to impose financial requirements on all applicants for Certificates of Public Convenience and Necessity. *Idaho Code* §§ 61-528, 62-615(3) and 62-622(5); Order No. 26665 as clarified by Order No. 26738. Moreover, where the applicant is the wholly owned subsidiary of a Title 61 fully regulated company, the Commission may require additional verification that *Idaho Code* § 62-613 requirements are being met. Based on Staff's recommendation and review, the Commission is satisfied that Staff's concerns about cross subsidization can be addressed by Staff continuing to verify that the controls and allocations for CTC recommended by Staff have been implemented by Cambridge. The Commission orders Staff to notify the Commission when these requirements are met. At this time, however, the Commission is satisfied that the Certificate may be granted.

ORDER

IT IS HEREBY ORDERED that upon review of the filings in this case, the law, oral argument and determination of the Commission, that CTC Telecom, Inc. is granted a Certificate of Public Convenience and Necessity to provide local telecommunications service in Hidden Springs Development.

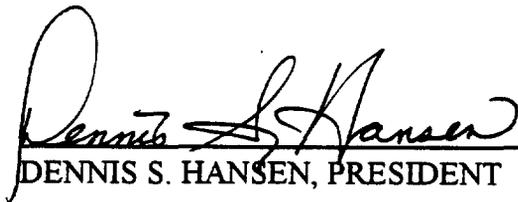
IT IS FURTHER ORDERED that CTC Telecom, Inc. shall provide the Commission with a draft legal description for its final Certificate.

IT IS FURTHER ORDERED that Rulemaking docket, Case No. 31-4201-9801, be opened for the purpose of adopting temporary and proposed rules governing the standards for access and interconnection in unserved areas and that CTC Telecom, Inc. is subject to these rules.

IT IS FURTHER ORDERED that Staff verify that the controls and allocations for CTC recommended by Staff are implemented by Cambridge Telephone Corporation and that Staff notify the Commission when these requirements are met.

THIS IS A FINAL 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. GNR-T-98-4 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. GNR-T-98-4. 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 22nd day of August 1998.


DENNIS S. HANSEN, PRESIDENT

Commissioner Nelson was out of the office on this date.


RALPH NELSON, COMMISSIONER


MARSHA H. SMITH, COMMISSIONER

ATTEST:


Myrna J. Walters
Commission Secretary

O:\gnrt984.cc5

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE ADOPTION OF)	
TEMPORARY AND PROPOSED RULES)	CASE NO. 31-4201-9801
GOVERNING ACCESS AND)	
INTERCONNECTION IN UNSERVED AREAS,)	ADOPTION OF PENDING
IDAPA 31.42.01.401 ETC. SEQ.)	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 rules no later than October 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. Copsy 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-incumbent LEC 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 rule¹ 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. Copsy 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.

¹ Proposed Rule 412, IDAPA 31.42.01.412. By amending the proposed rules, this proposed rule becomes pending Rule 410.

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 there 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. *See Louisiana 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.

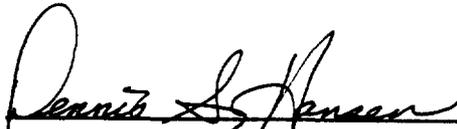
GENERAL ORDER

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.

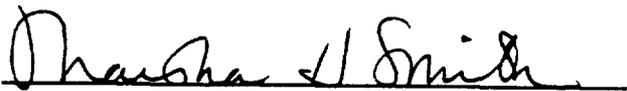
IT IS FURTHER ORDERED that the Commission amends the temporary rules adopted by the Commission on August 10, 1998, in Order No. 27673, to include the same revisions which are being made to the proposed rules, effective immediately.

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 17th
day of November 1998.


DENNIS S. HANSEN, PRESIDENT


RALPH NELSON, COMMISSIONER


MARSHA H. SMITH, COMMISSIONER

ATTEST:


Myrna J. Walters
Commission Secretary

N:42019801.cc2

IDAPA 31 - IDAHO PUBLIC UTILITIES COMMISSION

**31.42.01 - RULES FOR TELEPHONE CORPORATIONS SUBJECT TO THE
REGULATION OF THE IDAHO PUBLIC UTILITIES COMMISSION
UNDER THE TELECOMMUNICATIONS ACT OF 1988
(THE TITLE 62 TELEPHONE CORPORATION RULES)**

IDAPA 31.42.01

DOCKET NO. 31-4201-9801

NOTICE OF PENDING RULES & AMENDMENT TO TEMPORARY RULES

EFFECTIVE DATE: These rules have been adopted by the Idaho Public Utilities Commission and are now pending review by the 1999 Idaho State Legislature for final adoption. The pending rules become final and effective July 1, 1999, unless the rules are approved, rejected, amended or modified by concurrent resolution in accordance with Section 67-5224 and 67-5291, Idaho Code. If the pending rules are approved, amended or modified by concurrent resolution, the rules become final and effective upon adoption of the concurrent resolution or upon the date specified in the concurrent resolution.

AUTHORITY: In compliance with Section 67-5224 and 67-5226, Idaho Code, notice is hereby given that the Idaho Public Utilities Commission adopted pending rules and amended temporary rules. The action is authorized pursuant to the Commission's legal authority under the Public Utilities Law, Chapters 1 through 7, Title 61, Idaho Code and the Telecommunications Act of 1988, Chapter 6, Title 62, Idaho Code and the specific authority of Sections 62-602, 62-606, 62-611, 62-614, 62-615, 62-616 and 62-622, Idaho Code.

DESCRIPTIVE SUMMARY: The following is a non-technical explanation of the substance and purpose of the proposed rules:

The proposed new rules adopt interconnection and access standards for facilities-based telephone corporations that provide basic local service in new telecommunications development areas.

The proposed rules have been amended in response to public comment and are being amended pursuant to Section 67-5227, Idaho Code. Rather than keeping the temporary rules in place while the pending rules await legislative approval, the Idaho Public Utilities Commission amended the temporary rules with the same revisions which have been made to the proposed rules.

Only the sections that have changes are printed in this bulletin. The original text of the proposed rules was published in the Idaho Administrative Bulletin, Volume 98-10, pages 401-404.

ASSISTANCE ON TECHNICAL QUESTIONS: For assistance on technical questions concerning the proposed rules, contact Cheri C. Copsey, Deputy Attorney General at (208) 334-0314.

DATED this 18th day of November 1998.

Myrna J. Walters
Commission Secretary
Idaho Public Utilities Commission
PO Box 83720
Boise, ID 83720-0074
Telephone: (208) 334-0338
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Street Address for Express Mail:

472 West Washington Street
Boise, ID 83702-5983

IDAPA 31

TITLE 42

Chapter 1

Rules for Telephone Corporations Subject to the
Regulation of the Idaho Public Utilities Commission

Under the Telecommunications Act of 1988

(The Title 62 Telephone Corporation Rules)

IDAPA 31.42.01

**RULES 401 THROUGH 500. ACCESS AND INTERCONNECTION STANDARDS
IN ~~UNSERVED AREAS~~ NEW TELECOMMUNICATIONS DEVELOPMENT AREAS**

401. DEFINITIONS (Rule 401). As used in Rules 401 through 412:

01. Facilities-based competitor. "Facilities-based competitor" means a non-incumbent telephone corporation that offers basic local exchange service exclusively over its own telecommunications service facilities or predominantly over its own facilities in combination with the resale of telecommunications services of another carrier. (~~08-10-98~~) (08-10-98)

02. Incumbent telephone corporation. "Incumbent telephone corporation" means a telephone corporation or its successor which was providing basic local exchange service on or before February 8, 1996. (~~08-10-98~~) (08-10-98)

03. Network element. "Network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. (~~08-10-98~~) (08-10-98)

04. New Telecommunications Development Area. "New telecommunications development area" means a geographic area in which no telephone corporation, including a municipal, cooperative, or mutual non-profit telephone company, has facilities capable of providing basic local exchange service to customers. (08-10-98)

045. Non-incumbent telephone corporation. "Non-incumbent telephone corporation" means a telephone corporation which was not providing basic local exchange service on or before February 8, 1996. (~~08-10-98~~) (08-10-98)

~~05. Rural telephone company. "Rural telephone company" means a telephone corporation that: ()~~

~~a. Provides basic local exchange service to a service area that does not include either:~~

~~i. any incorporated place of ten thousand (10,000) inhabitants or more, or any part thereof, based on the most recently available population statistics of the bureau of the census; or~~

~~ii. any territory, incorporated or unincorporated, included in an urbanized area, as defined by the bureau of the census as of August 10, 1993;~~

~~b. Provides basic local exchange service including exchange access, to fewer than fifty thousand (50,000) access lines;~~

~~c. Provides basic local exchange service to any service area with fewer than one hundred thousand (100,000) access lines; or~~

~~d. Has less than fifteen percent (15%) of its access lines in communities of more than fifty thousand (50,000) on the date of enactment of the federal telecommunications act of 1996.~~

06. Telephone corporation. "Telephone corporation" means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, providing basic local exchange services for compensation within this state, except municipal, cooperative, or mutual nonprofit telephone companies, or telephone corporations providing radio paging, mobile radio telecommunications services, answering services (including computerized or otherwise automated answering or voice message services), or one-way transmission to subscribers of video programming, or other programming service, and subscriber interaction, if any, which is required for the selection of such video programming or other programming service or surveying are not included. (08-10-98) (08-10-98)

07. Unbundled element. "Unbundled element" means a single network element that a competitor telephone corporation may lease on its own, or if the competitor telephone corporation wishes, in combination with other elements. (08-10-98) (08-10-98)

~~08. Unserved area. "Unserved area" means a geographic area in which no incumbent telephone corporation has facilities providing basic local exchange service to customers.~~

402. INTERCONNECTION STANDARDS. (Rule 402)

If a facilities-based competitor builds facilities to provide basic local service within an ~~unserved~~ new telecommunications

development area , it shall provide interconnection with its network for the facilities and equipment of any telephone corporation requesting the transmission and routing of telephone exchange service. (~~08-10-98~~) (08-10-98)

403. EXCHANGE ACCESS QUALITY STANDARDS. (Rule 403)

If a facilities-based competitor builds facilities to provide basic local service within an ~~unserved~~ new telecommunications development area, it shall provide exchange access at any technically feasible point within its network that is ~~at least~~ equal in quality to that provided to itself or to any subsidiary, affiliate, or any other party to which it provides interconnection. (~~08-10-98~~) (08-10-98)

404. UNBUNDLED ACCESS STANDARDS. (Rule 404).

If a facilities-based competitor builds facilities to provide basic local service within an ~~unserved~~ new telecommunications development area, it shall provide nondiscriminatory access to network elements to any telephone corporation requesting provision of a telecommunications service on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and non-discriminatory and shall provide such unbundled network elements in a manner that allows requesting telephone corporations to combine such elements in order to provide basic local exchange service. (~~08-10-98~~) (08-10-98)

405. RESALE STANDARDS. (Rule 405).

If a facilities-based competitor builds facilities to provide basic local service within an ~~unserved~~ new telecommunications development area, it shall offer any telecommunications service for resale at wholesale rates that it provides at retail to subscribers who are not telephone corporations and shall not prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service. (~~08-10-98~~) (08-10-98)

406. PHYSICAL COLLOCATION STANDARDS. (Rule 406).

Subject to Rule 407, if a facilities-based competitor builds facilities to provide basic local service within an ~~unserved~~ new telecommunications development area, it shall provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the ~~telephone corporation~~ facilities-based competitor, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. (~~08-10-98~~) (08-10-98)

407. EXEMPTION FOR VIRTUAL COLLOCATION. (Rule 407).

If a facilities-based competitor builds facilities to provide basic local service within an ~~unserved~~ new telecommunications

development area, it may provide for virtual collocation if it demonstrates to the commission that physical collocation is not practical for technical reasons or because of space limitations.

(~~08-10-98~~) (08-10-98)

408. VOLUNTARY NEGOTIATION. (Rule 408).

Upon receiving a request for interconnection, services, or network elements, a facilities-based competitor that built facilities to provide basic local service within an ~~unserved~~ new telecommunications development area may negotiate and enter into a binding agreement with the requesting telephone corporation without regard to the standards set forth in Rules 402 through 407. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement and shall be submitted to the commission for approval. Any party negotiating an agreement under this Rule may, at any point in the negotiation, petition the commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(~~08-10-98~~) (08-10-98)

409. ~~VOLUNTARY NEGOTIATION~~ ARBITRATION. (Rule 409).

~~Any party negotiating an agreement under Rule 408 may, at any point in the negotiation, ask the commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation. No earlier than ninety (90) days after the date on which a facilities-based competitor receives a request for negotiation pursuant to Rule 408, any party to the negotiation may petition the commission to arbitrate any open issues. The commission shall provide for the resolution of each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required.~~

(~~08-10-98~~) (08-10-98)

~~410. REFUSAL TO NEGOTIATE. (Rule 410).~~

~~The refusal by any party to negotiate pursuant to Rule 408, to cooperate with the commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the Commission shall be considered a failure to negotiate in good faith.~~

~~411. PETITION FOR SUSPENSION OF RULES 402-410. (Rule 411).~~

~~If any facilities-based competitor that is a rural telephone company petitions the commission to suspend the application of Rules 402 through 410, the Commission shall grant the petition and suspend the application of Rules 402 through 410 for a period of not less than three (3) years nor more than five (5) years.~~

4120. PETITION FOR EXEMPTION FROM RULES 402-41009. (Rule 4120). Any facilities-based competitor may petition the commission

to exempt it from the application of Rules 402 through ~~41009~~. 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.

~~(08-10-98)~~ (08-10-98)

4131. EFFECTIVE DATE. (Rule 4131).

~~The commission adopted Rules 401 through 413 by Order No. 27674 issued on August 10, 1998, in docket number 31-4201-9801. The effective date for these rules is the date of that Order, August 10, 1998.~~

~~(08-10-98)~~ (08-10-98)

4142. -- 999 (RESERVED).

~~(08-10-98)~~ (08-10-98)