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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In The Matter of )

IDAHO PUBLIC UTILITIES )  
COMMISSION )

PETITION FOR DECLARATORY )  
RULING concerning Section 251(h)(2) )  
of the Communications Act )

Treatment of CTC Telecom, Inc. And )  
Similarly Situated Carriers as Incumbent )  
Local Exchange Carriers under Section )  
251(h)(2) of the Communications Act )

CC Docket No. 98-221

**COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION  
ON PETITION FOR DECLARATORY RULING**

The Telecommunications Resellers Association ("TRA"),<sup>1</sup> through undersigned counsel and pursuant to *Public Notice*, DA 98-2510 (released December 8, 1998), hereby comments in support of the Petition for Declaratory Ruling concerning Section 251(h)(2) (the "Petition"), filed by the Idaho Public Utilities Commission ("Idaho PUC") in the captioned docket on November 23, 1998. The Commission has indicated that it "will treat the Idaho Commission's

<sup>1</sup> A national trade association, TRA represents nearly 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

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petition as a petition for rulemaking."<sup>2</sup> TRA supports the initiation of a rulemaking proceeding for the purpose of addressing the issues presented in the Petition. In its *Notice of Proposed Rulemaking*, TRA urges the Commission to tentatively conclude that CTC Telecom, Inc. ("CTC") will functionally fulfill the role of incumbent local exchange carrier ("ILEC") within its authorized service area, the Hidden Springs Development outside Boise, Idaho ("Hidden Springs"), and that pursuant to Section 251(h)(2) of the Telecommunications Act of 1996 ("Telecommunications Act"),<sup>3</sup> CTC should be deemed to be an ILEC subject to the obligations of Section 251(c). Inasmuch as the situation described in the Petition will arise with ever increasing frequency as carriers seek out opportunities to install original facilities-based networks which will serve newly constructed residential and/or commercial developments (i.e., areas not previously served by an ILEC), TRA also urges the Commission to utilize the rulemaking proceeding for the purpose of developing and implementing specific rules pursuant to which it will exercise its explicit Section 251(h)(2) rulemaking authority in future instances where a local exchange carrier seeks to establish itself as the original facilities-based provider to newly constructed residential and/or commercial developments.

TRA agrees with the Idaho PUC that in order to foster rather than impede the development of local telecommunications competition, telecommunications service providers like CTC which will constitute the only facilities-based presence within a geographically identifiable area must be deemed to be an ILEC with respect to those geographic areas. Such a determination is necessary in order to ensure that these local exchange carriers will be subject to the interconnection, resale, collocation and other obligations set forth in Section 251(c), and

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<sup>2</sup> Public Notice, DA 98-2510, ¶ 1 (December 8, 1998).

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56, § 251(h)(2) (1996).

would thus be precluded from "freezing out" alternative service providers -- and thus unduly limiting the telecommunications service choices available to consumers -- in derogation of the principles underlying the Telecommunications Act. Section 251(h)(2) provides a means by which the Commission may ensure that consumers living (or working) in developments constructed subsequent to February 8, 1996, will nonetheless be afforded the same choices with respect to telecommunications services as those secured by the Telecommunications Act to all other consumers. The Commission should not hesitate to exercise its Section 251(h)(2) rulemaking authority to compel this result.

The Commission has previously considered and granted a petition seeking to treat a local exchange carrier, Guam Telephone Authority ("GTA"), as an ILEC pursuant to Section 251(h)(2) notwithstanding that carrier's failure to fall within the literal definition of "incumbent local exchange carrier" contained in the Telecommunications Act. In considering whether to treat GTA as an ILEC for purposes of Section 251, the Commission held that even though GTA was "not an 'incumbent local exchange carrier' within the meaning of section 251(h)(1)" and did meet the statutory definition of "'rural telephone company' within the meaning of section 3(37)",<sup>4</sup> it was necessary to confer ILEC status upon GTA, the sole provider of local telephone service to the more than 130,000 residents of Guam",<sup>5</sup> in order to "ensure that the Territory of Guam (Guam)" has the same opportunity as the rest of our Nation to benefit from the pro-competitive,

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<sup>4</sup> In the Matter of Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act (Report and Order), 13 FCC Rcd. 13765, ¶ 2 (1998) ("Guam Report and Order").

<sup>5</sup> In the Matters of Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act (Declaratory Ruling and Notice of Proposed Rulemaking), 12 FCC Rcd. 6925, ¶ 6 (1997) ("Declaratory Ruling").

market-opening effects of the Telecommunications Act of 1996."<sup>6</sup> This ruling was particularly critical since, as the Commission noted, GTA's status as a rural telephone company might otherwise have allowed the carrier to "permanently avoid the interconnection, unbundling, resale and other obligations imposed on incumbent LECs by section 251(c) of the Communications Act."<sup>7</sup>

The factual situation presented in the Petition raises very similar concerns. CTC has been granted a Certificate of Public Convenience and Necessity to provide local exchange services solely to Hidden Springs, a new planned community outside Boise, Idaho, which will consist of residences and light commercial businesses. This discrete geographic area is within an existing U S WEST study area; the ILEC's physical network, however, does not extend to this area. According to the Idaho PUC, "CTC is the first applicant to request a Certificate of Public Convenience and Necessity in order to provide . . . 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."<sup>8</sup> Thus, upon installation of its physical network, CTC will provide the only facilities-based presence within the geographic boundaries of its authorized service area. As the record also indicates, CTC asserts that like GTA, it qualifies as a "'rural telephone company' under the federal Telecommunications Act."<sup>9</sup>

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<sup>6</sup> Id. at ¶ 1.

<sup>7</sup> Guam Report and Order, 13 FCC Rcd. 13765 at ¶ 3.

<sup>8</sup> In the Matter of the Application of CTC, Telecom, Inc., for a Certificate of Public Convenience and Necessity to Provide Local Exchange Service as a Competitive Local Carrier and for Designation as an Eligible Telecommunications Carrier, Case No. GNR-T-98-4, Order No. 27673, p. 3 (August 10, 1998).

<sup>9</sup> Id. at 2.

The Commission is empowered to "by rule, provide for the treatment of a local exchange carrier . . . as an incumbent local exchange carrier" in circumstances where

"(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent local exchange carrier];

"(B) such carrier has substantially replaced the incumbent local exchange carrier . . . ; and

"(C) such treatment is consistent with the public interest, convenience and necessity and the purposes of this section."<sup>10</sup>

Section 251(h) further states that "[f]or purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that . . . on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area . . . and . . . on such date of enactment, was deemed to be a member of the exchange carrier association. . ."<sup>11</sup>

Although CTC's authorized service area lies within a U S WEST study area, U S WEST as the ILEC has provided no telephone exchange service to the geographical area now known as Hidden Springs. Precisely because U S WEST does not have facilities serving this new development, should CTC actually construct its network for the provision of "telecommunications, cable television, high speed data transfer capabilities and other services to the development and its residences"<sup>12</sup>, it will become the sole facilities-based telecommunications carrier within the Hidden Springs geographical area. CTC will also be every bit as vested in control of bottleneck facilities throughout the totality of its authorized service area as any incumbent LEC has ever been. There can be little doubt, then, that CTC will, with respect to

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<sup>10</sup> 47 U.S.C. § 251(h)(2).

<sup>11</sup> 47 U.S.C. § 251(h)(1).

<sup>12</sup> Petition at 2.

Hidden Springs, "occupy a position in the market for telephone exchange service . . . comparable to the position occupied by" an incumbent local exchange carrier, including "dominance in the local exchange and exchange access markets . . . and economies of density, connectivity and scale" which are counted among the "potentially anticompetitive characteristics of incumbency that Congress designed section 251(c) specifically to redress."<sup>13</sup>

CTC also satisfies the second requirement of Section 251(h)(2): upon completion of its physical network, CTC, which "has an exclusive contract with the developer of Hidden Springs Development,"<sup>14</sup> will have "substantially replaced the incumbent local exchange carrier" within Hidden Springs. As the Commission has held, a local exchange carrier satisfies this "substantial replacement" requirement "where the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of the enactment of the 1996 Act."<sup>10</sup>

Finally, declaring CTC to be an ILEC for purposes of Section 251 is not only consistent with the public interest, convenience and necessity, it is actually mandated thereby. With a fully operational facilities-based network in place, CTC faces little likelihood that U S WEST or any other telecommunications carrier will go to the considerable expense of installing a duplicative physical network of its own within CTC's Hidden Springs service area. The Telecommunications Act, in recognition of the economic futility of requiring carriers to create such superfluous networks -- and the unacceptable barrier to entry that such an obligation would

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<sup>13</sup> Guam Declaratory Ruling, 12 FCC Rcd. 6925 at ¶ 15.

<sup>14</sup> Petition at 2.

<sup>10</sup> Guam Declaratory Ruling, 12 FCC Rcd. 6925 at ¶ 25. In so holding, the Commission specifically rejected "an overly literal reading of the statutory language that would produce absurd results at odds with manifest Congressional intent." Id.

entail, specifically provides alternative means of competitive entry, including "the use of unbundled elements of the incumbent's network, and resale."<sup>11</sup>

As the Commission is also fully aware, absent prohibitions to the contrary, local exchange carriers with the ability to control bottleneck facilities (an ability which CTC will have in Hidden Springs) would also possess the ability to unilaterally eliminate the usefulness of these alternative entry strategies. To avoid this result, the Congress enacted Section 251, pursuant to which "incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold."<sup>12</sup>

Absent a determination that CTC will be treated as an ILEC for purposes of Section 251, CTC will not be subject to the obligation to negotiate interconnection agreements in good faith; the obligation to provide requesting telecommunications carriers interconnection with its network at any technically feasible point, with quality at least equal to its own, on rates, terms and conditions that are just, reasonable and nondiscriminatory; the obligation to provide unbundled network elements to requesting telecommunications carriers; the obligation to provide for physical collocation of equipment or access to unbundled network elements; or the obligation to offer telecommunications service for resale at wholesale rates to requesting carriers.<sup>13</sup> It will,

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<sup>11</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 12 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.* 12 FCC Rcd. 12460 (1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd. v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d (8th Cir. 1996), *cert. granted* 118 S.Ct. 879 (Jan. 26, 1998) ("First Report and Order").

<sup>12</sup> *Id.* at ¶ 4.

<sup>13</sup> *See* 47 U.S.C. § 251(c).

however, continue to possess the ability to "discourage entry and robust competition . . . by insisting on supracompetitive prices or other unreasonable conditions for terminating calls."<sup>14</sup>

In short, notwithstanding the Telecommunications Act's enunciated goal of "opening of all telecommunications markets to all providers,"<sup>15</sup> unless the Commission holds that CTC will be treated as an ILEC for purposes of Section 251, CTC will exist within a clearly unintended area of insulation from competition. CTC will continue to enjoy its status as bottleneck provider of local exchange and exchange access services to Hidden Springs consumers unfettered by the duties so critical to the emergence of competition contained in Section 251(c), and to a corresponding degree, Hidden Springs residents will be precluded from fully enjoying the "new packages of services, lower prices and increased innovation"<sup>16</sup> which the opening of all telecommunications markets to competition is meant to encourage. This is not a result which the Commission should sanction.

As demonstrated above, CTC satisfies the elements set forth in Section 251(h)(2) and should thus be treated as an ILEC subject to the requirements of Section 251(c) with respect to its provision of service within Hidden Springs. TRA notes, however, that especially in less densely populated areas of the country, residential and commercial consumers in developments constructed subsequent to the passage of the Telecommunications Act may increasingly find themselves in the same position as Hidden Springs residents -- not served by an incumbent, yet unable to access alternative service providers without the facilities-based provider's acquiescence

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<sup>14</sup> Guam Declaratory Ruling, 12 FCC Rcd. 6925 at ¶ 32; see also First Report and Order, 11 FCC Rcd. 15499 at ¶¶ 1-20.

<sup>15</sup> First Report and Order, 11 FCC Rcd. 15499 at ¶ 4.

<sup>16</sup> Id.

and assistance. In light of the manifest benefits associated with controlling the sole facilities-based network to serve a discrete residential or commercial development in an area previously unserved by the incumbent provider, it is a given that while CTC may be the first such local exchange carrier to occasion a State Commission petition that the Commission "issue an order declaring that a particular LEC be treated as an incumbent LEC . . . pursuant to section 251(h)(2) of the Act,"<sup>17</sup> it will hardly be the last.

While TRA supports the Commission's continued individualized analysis of such petitions, administrative efficiency would be better served, and the precepts of the Telecommunications Act better advanced, by the enunciation of specific guidelines and rules clarifying and streamlining the obligations of local exchange carriers which, like CTC, functionally occupy the role of an incumbent carrier in a clearly-identifiable residential or commercial development previously unserved by the incumbent. Formulation of such rules would go a long way toward discouraging potentially anticompetitive behavior on the part of carriers desirous of securing the ability to construct and control bottleneck facilities in such developments and would assist in ensuring the ability of consumers to fully enjoy the benefits of competition even in service areas which did not exist prior to the passage of the Telecommunications Act.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to establish a rulemaking proceeding for the purpose of issuing the rule sought by the Idaho PUC in the Petition; that is, that the statutory criteria set forth in Section 251(h)(2) are met here; that treatment of CTC as an ILEC for purposes of Section 251 is necessary to avoid frustrating the Congressional directive that competition must be encouraged in all areas of

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<sup>17</sup> 47 C.F.R. § 51.223(b).

telecommunications services; and accordingly, that CTC is deemed to be an ILEC subject to the obligations set forth in Section 251(c) of the Telecommunications Act of 1996. TRA further urges the Commission to utilize that rulemaking proceeding to develop and implement broad-based rules pursuant to which facilities-based local exchange carriers which, like CTC, functionally occupy the role of an ILEC in a residential and/or commercial development constructed subsequent to the passage of Telecommunications Act will be deemed to be ILECs for purposes of Section 251.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Evelyn Correa, hereby certify that copies of the foregoing Comments of the Telecommunications Resellers Association were mailed this 8th day of January, 1999, by United States First Class mail, postage prepaid, to the following:

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