

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

RECEIVED

JAN 11 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 98-221

In the Matter of )  
)  
IDAHO PUBLIC )  
UTILITIES COMMISSION )  
)  
Petition for Rulemaking )  
Pursuant to Section 251(h) (2) )  
of the Communications Act )

OPPOSITION OF CTC TELECOM, INC.

Conley Ward  
Kenneth R. McClure  
Cynthia A. Melillo

Givens Pursley LLP  
277 North 6th Street, Suite 200  
PO Box 2720  
Boise, Idaho 83701

Benjamin H. Dickens, Jr.  
Gerard J. Duffy  
Michael B. Adams, Jr.

Blooston, Mordkofsky,  
Jackson & Dickens  
2120 L Street, N.W.  
Washington, D.C. 20037

*Its Attorneys*

January 11, 1999

No. of Copies rec'd \_\_\_\_\_  
List ABCDE \_\_\_\_\_

0+4

Table of Contents

	<u>Page</u>
<b>Summary</b> . . . . .	iii
<b>I. Background</b> . . . . .	1
A. Description of the Hidden Springs Development . . . . .	1
B. Description of CTC Telecom, Inc. . . . .	4
C. Actions of the Idaho Public Utilities Commission . . . . .	6
<b>II. Regulating CTC as an ILEC Is Inconsistent With the Broad Aims of the Telecommunications Act of 1996</b> . . . . .	7
<b>III. The IPUC's Petition to Classify CTC as an ILEC Fails to Satisfy the Specific Requirements of Section 251(h) (2) of the Telecommunications Act of 1996</b> . . . . .	12
A. CTC Will Not Occupy a "Comparable Market Position" to an ILEC Regulated Under Section 251(h) (1)4 . . . . .	12
1. CTC Is Neither an ILEC Nor the Functional Equivalent of an ILEC . . . . .	13
2. The Hidden Springs Development Is Not a "Market" Within the Meaning of Section 251(h) (2) . . . . .	15
3. CTC Does Not and Will Not Enjoy Market Power . . . . .	17
B. CTC Has Not "Substantially Replaced" an Existing ILEC Regulated Under Section 251(h) (1) (B) . . . . .	20
C. Regulating CTC as an Incumbent LEC Is Not Consistent With the Public Interest, Convenience and Necessity . . . . .	21
1. Regulating as an ILEC Would Serve No Legitimate Consumer Protection Interest . . . . .	21
2. The IPUC's Proposed Rule Will Perpetuate Existing ILEC Markets and Frustrate Facilities-Based Competition . . . . .	25

Table of Contents (cont'd)

	<u>Page</u>
3. The IPUC's Proposed Rule Is Essentially Unenforceable . . . . .	28
<b>IV. Conclusion . . . . .</b>	<b>31</b>
Exhibit A -- Affidavit of Jay Decker	
Exhibit B -- Hidden Springs-CTC Telecom Development Agreement	
Exhibit C -- Affidavit of Rick Wiggins	

### Summary

CTC Telecom, Inc. ("CTC") opposes the petition of the Idaho Public Utilities Commission ("IPUC") to regulate CTC and similarly situated carriers as incumbent local exchange carriers ("ILECs") for purposes of Section 251(c) of the Telecommunications Act of 1996 ("1996 Act"). As shown in CTC's Opposition, the IPUC's request is unwarranted on its facts, urges a fundamentally unsound policy, and wholly fails to satisfy the three-part test for such relief established in Section 251(h)(2). The Commission should therefore deny the IPUC's ill-considered rulemaking request.

The IPUC's Petition specifically addresses the Hidden Springs development, a planned suburban community that is currently under construction near Boise, Idaho. CTC has agreed with Hidden Springs' developer to provide bundled telecommunications, data and Internet services on a facilities-based basis. This agreement is nonexclusive (and indeed, TCI Communications, Inc. has already been granted permission to build its own facilities within the development).

The Hidden Springs project came to the IPUC's attention when, as a matter of course, CTC applied for a certificate of public convenience and necessity from the IPUC. The IPUC granted CTC's application, but thereafter issued rules which essentially regulate facilities-based local exchange carriers ("LECs") which enter unserved areas as incumbent carriers under Section 251(c). The IPUC apparently felt that this rule did not go far enough, however.

It has now petitioned the Commission for a rulemaking that would: (1) specifically treat CTC as an ILEC for purposes of Section 251(c); and (2) would regulate all competitive LECs ("CLECs") as incumbent carriers. Both rulemaking requests are unfounded and must be rejected.

Regulating CTC and other CLECs as incumbent carriers is fundamentally inconsistent the pro-competitive policies underlying the Telecommunications Act of 1996 ("1996 Act"). In the 1996 Act, Congress deliberately distinguished between the regulatory obligations of incumbent LECs (which enjoy an array of entrenched competitive advantages) and CLECs (which do not). This difference in market power and competitive strength is the fundamental reason why incumbent LECs ("ILECs") are regulated more stringently than CLECs under Section 251.

Although Section 251(h)(2)(B) allows the Commission to regulate non-incumbent carriers as ILECs if three certain narrowly-drawn conditions are met, the IPUC does not sustain its burden of proof on any element of this test. First, contrary to the IPUC's claims, CTC will not occupy a "comparable market position" to an ILEC in the Hidden Springs development due both to its functional lack of market power, its incomparability to a traditional ILEC, and due to the fact that the development cannot be considered a "market" in the accepted definition of the term. Second, since CTC will lack the market power to act as a monopolist, the IPUC fails to show that CTC has "supplanted" or "substantially replaced" an ILEC within Hidden Springs. Third, a rule which regulates CTC and

like carriers as ILECs would be fundamentally inconsistent with the public interest: it would not protect consumers, would needlessly frustrate the growth of competition (while perpetuating existing ILEC markets) and would be almost completely unenforceable (due to the vagueness of the IPUC's proposed market boundaries).

Due to these strong factual, statutory, and policy concerns, it is therefore clear that the IPUC fails to justify regulating CTC and similarly situated CLECs as ILECs for purposes of Section 251(c). The Commission should therefore deny the IPUC's Petition.

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

In the Matter of )  
 )  
**IDAHO PUBLIC** )  
**UTILITIES COMMISSION** )  
 ) CC Docket No. 98-221  
Petition for Rulemaking )  
Pursuant to Section 251(h) (2) )  
of the Communications Act )

**OPPOSITION OF CTC TELECOM, INC.**

CTC Telecom, Inc. ("CTC"), by its attorneys, hereby opposes the petition of the Idaho Public Utilities Commission ("IPUC") to regulate CTC and similarly situated carriers as incumbent local exchange carriers ("ILECs") for purposes of Section 251(c) of the Communications Act of 1934, as amended ("Communications Act"). The facts, underlying policies, and applicable law each demonstrate that the IPUC's petition is unfounded. Consequently, the Commission should deny the ill-considered request for rulemaking.

**I. Background.**

**A. Description of the Hidden Springs Development.**

Hidden Springs is a suburban planned community under construction in an area known as the Dry Creek Valley, located approximately four miles from the municipal boundaries of the City of Boise, the state of Idaho's capital and largest city. At completion by the year 2008, the Hidden Springs development will have approximately 915 residential lots, plus a handful of light commercial lots. The development lies within the boundaries of the Boise School District. Utility services will be provided by Idaho

Power Company, Intermountain Gas Company, and United Water-Idaho (formerly Boise Water Company). The development also falls within the certificated service territory of the incumbent local exchange carrier, U S WEST Communications, Inc. ("U S WEST"), which provides local exchange service and related telecommunications services from its Eagle wire center to the customers that currently occupy the land under development. The entire area has been included within the Boise extended area service ("EAS") region for many years.

In late 1997, Hidden Springs' developer, Hidden Springs Community L.L.C., approached U S WEST regarding the provision of local exchange telephone service to the development. The developer was particularly anxious to obtain state of the art telecommunications services that would enhance the marketability and value of its development. Accordingly, the developer requested that U S WEST provide traditional multi-line local telephone services ("POTS") as well as Internet service, cable television and video programming, video conferencing, and enhanced data transmission services such as xDSL. U S WEST offered to provide POTS, subject to the standard tariff provisions requiring a substantial contribution in aid of construction, but it stated that it would not, or could not, provide the enhanced network capabilities and other services the developer required. See Affidavit of Jay Decker (attached as Exhibit A) at ¶ 10.

Following U S WEST's rejection of its request, the Hidden Springs developer solicited alternative proposals from a number of competitive local exchange carriers ("CLECs") and rural independent

local exchange companies. After evaluating the proposals, the developer entered into a Development Agreement with CTC on April 7, 1998. (A copy of the Development Agreement is attached as Exhibit B). The Development Agreement states, *inter alia*, that CTC will provide, at a minimum, up to six access lines per lot, cable television service, and high speed Internet access service (512 kbps minimum) to each lot. In return, the developer agrees to provide CTC with a refundable facilities charge of \$35,250, plus a nonrefundable payment of \$60,000 for interim telephone service to the construction site, right of way acquisition, and related items. Each party also agrees to allow use of its name and a description of its services in the promotional efforts of the other party.

Contrary to the IPUC's assertion, neither the Development Agreement nor any other agreement between the developer and CTC provides that CTC will be the exclusive provider of any services to Hidden Springs. On the contrary, the Development Agreement explicitly states, "Nothing in this Agreement affects the right of any end user customer within the Community to select the end user's telecommunication service provider(s) of choice." See Exhibit B at 4, at ¶ 16. The legitimacy of this provision was quickly tested by TCI Communications, Inc. ("TCI") which demanded, and was granted, access to utility trenches during construction on the same terms and conditions as other service providers, including CTC.<sup>1</sup>

---

<sup>1</sup> TCI's actions show its apparent disagreement with the IPUC's fervent claim that, "[O]bviously, no customer would be willing to pay for that overbuilt facility." See Petition at 8

See Exhibit A at ¶ 12. To date, U S WEST has not requested access to utility rights of way or trenches, nor attempted to install facilities to serve the development. However, it has the statutory right to secure access at any time by using the public right of way or its statutory condemnation authority, if necessary. See Idaho Code §§ 7-701 & 62-701.

**B. Description of CTC Telecom, Inc.**

CTC is a wholly owned subsidiary of Cambridge Telephone Company ("Cambridge"). The parent company and its affiliate Council Telephone Company ("Council") provide incumbent local exchange carrier ("ILEC") service to approximately 2,039 access lines in rural southern Idaho. Cambridge and Council also offer cable television service and Internet service, both within and without their certificated telecommunications territories. All of these ILEC service territories are located more than 75 miles in distance from Boise and the Hidden Springs development.

CTC was created to provide competitive local exchange service in U S WEST's southern Idaho service territory. Shortly after its incorporation on February 12, 1998, CTC entered into discussions with Hidden Springs' developer regarding the provision of competitive local exchange service to Hidden Springs. These discussions ultimately led to a formal proposal by CTC and the execution of the Development Agreement on April 7, 1998. See Affidavit of Rick Wiggins (attached as Exhibit C) at ¶ 3. Two weeks later, on April 21, 1998, CTC filed its application with the

---

(emphasis in original).

Idaho Public Utilities Commission for a certificate of public convenience and necessity to provide CLEC service to Hidden Springs. See id.; see also In the Matter of the Application of CTC Telecom, Inc., IPUC Case No. GNR-T-98-4, Order No. 27673 (Aug. 10, 1998). CTC began construction in Hidden Springs immediately after the IPUC issued it the requested certificate on August 10, 1998.

CTC plans to offer Hidden Springs customers a full menu of state-of-the-art communications services. Specifically, CTC is installing a central office with switching facilities and an open architecture system using a fiber cable backbone to nodes, and terminating in copper loops limited to approximately 300 feet in length. These facilities will carry both telephone and video signals and provide high speed Internet access using ADSL technology. CTC will offer customers both bundled and unbundled service options, ranging from four digit basic telephone service to full utilization of its broadband facilities for telecommunications, cable TV, and Internet access. CTC also plans to implement additional sophisticated communications services as demand dictates. See Exhibit B at 1-3.

CTC obtained its startup funding from Cambridge Telephone Company. Long term financing is being arranged through CoBank. At full buildout, CTC anticipates a total investment in Hidden Springs of approximately \$3,200,000. The company's business plan projects a negative cash flow during the first year of operation, net losses for the first four years, and profitable operations in the succeeding years.

**C. Actions of the Idaho Public Utilities Commission.**

Upon receipt of CTC's application for a certificate of public convenience and necessity, the IPUC scheduled the matter for notice and comment without hearings. See In the Matter of the Application of CTC Telecom, Inc., IPUC Case No. GNR-T-98-4, Order No. 27548 (June 3, 1998). Comments were timely filed by U S WEST and the IPUC Staff ("Staff"). Neither commenting party opposed the Application, but Staff argued that it should be conditioned by requiring CTC to offer interconnection to competing carriers in accordance with the provisions of Section 251(c) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("1996 Act"). Staff argued that the proposed conditions were necessary to ensure Hidden Springs' customers a choice of telecommunications service providers.

In its final Order granting CTC's application, the IPUC declined to condition CTC's certificate as Staff recommended, on the grounds that the proposed conditions, "would not address future applications or those local exchange carriers that have already received certificates." See In the Matter of the Application of CTC Telecom, Inc., IPUC Case No. GNR-T-98-4, Order No. 27673 (Aug. 10, 1998) at 4. But the IPUC also opened a rulemaking docket and adopted emergency rules on one day's notice. These emergency rules, which were made permanent on November 9, 1998, essentially provide for the application of the Communications Act's Section 251(c) interconnection requirements to any facilities based CLEC that offers local exchange service to "a geographic area in which

no telephone corporation . . . has facilities capable of providing basic local exchange service to customers." See IDAPA 31.42.01.401 and 31.42.01.411.

By its Petition in this case, the IPUC now seeks a Commission rulemaking which would treat CTC as an ILEC for the purposes of Section 251 of the Communications Act. Apparently convinced that CTC represents the leading edge of a dangerous competitive trend, the IPUC further requests that the Commission extend this rule to all "similarly situated" CLECs nationwide. As demonstrated below, both of the IPUC's rulemaking requests are unfounded and must be rejected.

**II. Regulating CTC as an ILEC Is Inconsistent With the Broad Aims of the Telecommunications Act of 1996.**

With the passage of the 1996 Act, Congress enacted a sweeping pro-competitive reform of the Communications Act. In particular, the Communications Act now places upon all telecommunications carriers certain obligations designed to promote competition in local exchange telephone markets. See Iowa Utilities Bd. v. FCC, 109 F.3d 418, 421 (8th Cir. 1996), motion to vacate stay denied, 117 S.Ct. 429 (1996) ("Iowa Utilities Bd."). Sections 251(a) and (b) of the Communications Act impose, *inter alia*, a duty upon all carriers to provide interconnection and access to poles, conduits and rights-of-way to competing carriers, and a duty not to impose unreasonable or discriminatory conditions or limitations on the resale of telecommunications services. See 47 U.S.C. §§ 251(a)-(b).

As the Commission is aware, Section 251(c) of the Communications Act places additional, and more onerous, obligations on those carriers--and only those carriers--that are deemed "incumbent local exchange carriers" ("ILECs"). ILECs are defined as local exchange carriers that provided service on February 8, 1996 as members of a national exchange association, or their successors or assigns. See 47 U.S.C. § 251(h)(1). Section 251(c) requires these companies to provide competitors with collocation, unbundled network elements, interconnection at any technically feasible point, and resale, all at prices to be established through arbitration and the use of long run incremental cost models. See 47 U.S.C § 251(c); see also Iowa Utilities Bd. Section 251(f)(1), however, provides an automatic exemption from the Section 251(c) requirements for ILECs that are designated as a "rural telephone company" pursuant to 47 U.S.C. § 153(37), and this rural exemption can be extended indefinitely upon a finding by the state regulatory commission that the exemption is unduly economically burdensome, technically infeasible, or necessary to protect consumers, and is consistent with the public interest. See 47 U.S.C. § 251(f)(2).

As the Commission has previously noted, this "three-tiered hierarchy of escalating obligations based on the type of carrier involved" was knowingly crafted by Congress as a "carefully-calibrated regulatory regime." See In the Matter 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, Declaratory Ruling and Notice of Proposed Rulemaking, CC Pol. 96-18, CC Docket No. 97-134, 12 FCC Rcd 6925 at ¶ 19 (1997) (hereafter "Guam Declaratory Ruling"). Congress deliberately restricted application of the extraordinary remedy embodied in 251(c) to incumbent LECs that:

[T]ypically 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).

See Guam Declaratory Ruling at ¶ 26. Stated another way, Section 251(c) was aimed primarily at the Regional Bell Operating Companies ("RBOCs") and other large incumbents whose preexisting plant built to serve (and largely paid for by) captive ratepayers during the monopoly era now gives them an tremendous competitive advantage in the competitive market.

Congress also recognized, however, that the *status quo* of 1996 is not immutable. Unforeseeable circumstances might cause a succeeding entity to acquire the same monopoly position, "substantial financial resources," and the "economies of density, connectivity, and scale" that make the existing large incumbents virtually impregnable to competition in the absence of the Section 251(c) remedies. See Guam Declaratory Ruling at ¶ 32. Accordingly, Section 251(h)(2) of the Communications Act authorizes the Commission to treat non-ILECs as ILECs if certain criteria are met:

Section 251(h)(2) allows the Commission to treat a LEC

(or class or category of LECs) as an incumbent LEC for purposes of section 251, when the LEC "occupies a position in the market for telephone exchange service within an area that is comparable to a position occupied by a carrier described in [section 251(h)(1)]"; the LEC has substantially replaced an incumbent local exchange carrier described in [section 251(h)(1)]"; and such treatment is consistent with the public interest, convenience and necessity and the purposes of [Section 251].

See Guam Declaratory Ruling at ¶ 24. This provision, however, is not to be freely employed to disrupt Congress's regulatory scheme. As the Commission noted in its Local Competition Order, it "will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing" that the Section 251(h)(2) criteria are satisfied. See Local Competition Order, 11 FCC Rcd at 16110, ¶ 1248 (emphasis supplied).

The IPUC's Petition in this case does not even remotely meet its burden of proof on this issue. The IPUC seeks a Section 251(h)(2) ruling by the Commission that Section 251(c) obligations apply to CTC and any other CLEC:

That, after February 8, 1996, began to provide telephone exchange service . . . to customers in a geographic area in which no other telephone corporation has facilities capable of providing basic local exchange service to customers.

On its face, the proposed rule does not, in any way, attempt to correlate with, or address the criteria required by, Section 251(h)(2). In effect, the IPUC is proposing a rule that automatically makes the first provider of facilities to an undefined "geographic area" subject to an ILEC's duties and obligations. Clearly, if Congress had intended such a result it would have been a simple matter to draft a statutory provision that

mandated it in the plainest possible terms. The fact that Congress instead chose to carefully delineate specific provisions that must be met before Section 251(c) requirements can be applied to non-ILECs is powerful evidence that the IPUC's proposed rule is contrary to Congressional intent.

CTC's situation is a compelling example of the incompatibility of the IPUC's proposed rule and the statutory mandate of Section 251(h)(2). The uncontradicted facts are that CTC is by any measure a tiny start-up CLEC with very limited resources, financial or otherwise. It has accepted a developer's solicitation to provide advanced telecommunications services that the ILEC initially refused to provide. At present, however, it has no customers and no income other than temporary lines to the construction site, and it has no assurances that it will be successful in marketing its services to any customers within or without the development. In short, CTC is a typical entrepreneurial CLEC that possess very little in the way of resources other than technical expertise, a hopeful business plan, and the courage to compete with U S WEST in the economic heart of its southern Idaho service territory.

In contrast, as the incumbent RBOC, U S WEST previously served customers in the Hidden Springs area, and currently has 451,798 subscribers in southern Idaho (a substantial percentage of which are located in the Boise metropolitan area). U S WEST also has the financial and technical capability to install additional facilities and compete for the development's potential customers at any time, in which case it will bring all the advantages of incumbency to

bear in its competition with CTC. Moreover, one additional potential competitor (TCI), which also possesses enormous financial resources and economies of scale, is burying conduit through which it plans to install cable TV and telecommunications cable. Under these circumstances, the suggestion that CTC should be treated as an incumbent LEC is absurd.

**III. The IPUC's Petition To Classify CTC as an ILEC Fails to Satisfy the Specific Requirements of Section 251(h) (2) of the Telecommunications Act of 1996.**

Section 251(h) (2) of the Communications Act requires that in order to for the Commission to regulate CTC or similar local exchange carriers as incumbents, all three elements of the following test must be met:

(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 [Section 251(h) (2) (1)];

(B) such carrier has substantially replaced an incumbent local exchange carrier described in [Section 251(h) (2) (1)]; and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

The IPUC has failed to meet any of the statutory burden of proof set forth above. As a result, the IPUC's Petition cannot justify regulating CTC as an ILEC, much less justify adopting a nationwide policy addressing all CLECs. Under Section 251(h) (2), the Commission must therefore reject the IPUC's Petition.

**A. CTC Will Not Occupy a "Comparable Market Position" to an ILEC Regulated Under Section 251(h) (1).**

Contrary to the IPUC's argument that CTC "serves as a substitute [for an ILEC] and supplants U S WEST . . . in U S WEST's

existing study area," CTC simply does not occupy the same market position as an ILEC within the meaning of Section 251(h)(2)(A). As discussed above and as shown below, as a new market entrant serving a newly constructed residential and business development, CTC cannot possibly enjoy the dominant market position or possess the economies of density, connectivity, and scale that are truly characteristic of an ILEC. CTC is in fact the competitive carrier in a competitive market and should be regulated accordingly.

1. **CTC Is Neither an ILEC Nor the Functional Equivalent of an ILEC.**

Section 251 of the Communications Act was plainly drafted by Congress to distinguish between carriers enjoying market power (specifically, incumbent carriers) and carriers which do not.<sup>2</sup> This is the very reason why Section 251 distinguishes between the general obligations imposed on all telecommunications carriers and the more stringent requirements imposed on ILECs. As the Commission has recognized, Section 251 clearly establishes that an ILEC is an established carrier with market power (such as a RBOC) whose motive and ability to frustrate competition through its market advantages must be tempered by the stricter, compulsory interconnection requirements of Section 251(c).<sup>3</sup>

---

<sup>2</sup> See Conference Report at 122 and 123 (stating Congress' intent to preserve the equal access and nondiscrimination requirements imposed on the Bell Operating Companies under the now-abolished AT&T Consent Decree, as well as GTE, in the interest of promoting and preserving competition).

<sup>3</sup> See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 at ¶ 55 (finding that ILECs have no economic incentive, independent of the incentives set forth in Sections

CTC simply does not fit the profile of an ILEC, whether as a matter of market function or definition. By the same token, CTC does not enjoy the benefit of being a "successor" to an ILEC in terms of its market position. Contrary to the IPUC's assertions, as a new market entrant CTC does not enjoy "the same" advantages as an ILEC since--unlike an ILEC--CTC does not enjoy the leverage to insist on supracompetitive prices for interconnection, access, or unbundled service offerings. This point becomes particularly apparent when CTC's market position is compared with that of U S WEST.

CTC is a newly established carrier which expects to serve approximately 900 access lines within the boundaries of a specific development. CTC has not yet realized any revenues, and expects to realize only modest profits after five years of operation (after several years of net losses). See Exhibit C at ¶ 6. Moreover, CTC has entered an existing local exchange already served by U S WEST, and--since its contract with the development is non-exclusive--CTC does not have practical ability or the legal right to exclude other carriers from the Boise market or from Hidden Springs. See Exhibit B at 4, at ¶16.

In sharp contrast with CTC, U S WEST has been in operation for over 100 years (in the form of preceding business entities) and currently serves 451,798 access lines in Idaho. In addition,

---

271 and 274 of the Communications Act, to promote potential competitors with interconnection or services, and that the inequality of the ILECs' bargaining power requires rules equalizing their commercial relations with other carriers).

U S WEST serves a total of 16,132,321 access lines in fourteen states, provides services for over 25 million customers nationwide, and enjoyed total revenues of \$10.3 billion in 1997. See 1997 U S WEST ARMIS Infrastructure Report, All Study Areas (filed Apr. 1, 1998).

Absent Section 251(c), it would not take much effort for U S WEST to capitalize upon this disproportion in economic strength, business goodwill, name recognition, and established facilities and drive CTC from the market if it chose. As it is, U S WEST remains a formidable competitor for CTC in the Boise exchange area, even though its market power is tempered by its statutory obligations to CLECs. This fact illuminates the risks which a facilities-based CLEC undertakes when it enters a market, and underlines the differences between an ILEC and a CLEC within the context of the 1996 Act.

**2. The Hidden Springs Development Is Not a "Market" Within the Meaning of Section 251(h) (2).**

Close analysis shows that the Hidden Springs development is not a "market" within the meaning of Section 251(h) (1). When distinguishing a market and its boundaries, it is necessary to identify a specific product traded within a proximate geographic area, whose characteristics are not likely to shift in such a way as to allow consumers easy substitution.<sup>4</sup> In the present case, the IPUC erroneously claims that although the product is local exchange services--which are by definition provided within the

---

<sup>4</sup> See IIA Phillip E. Areeda et al., Antitrust Law ¶ 530(a) (1995).

bounds of the Boise EAS--the "market" is confined to the Hidden Springs development alone. This attempt to fragment Boise's local exchange market is unsupportable on its facts, on policy considerations, and under established antitrust law.

Hidden Springs is a development within an established exchange area centered on Boise, not a separate or discrete geographic market. Thus, while CTC will own and operate the facilities through which Hidden Springs' local exchange services are provided, and while U S WEST will largely own and operate the remainder of the local network in Boise, the facilities do not themselves delineate separate, distinct and non-fungible products.

The only possible way Hidden Springs could be split from the rest of the Boise market would be if no competitors could possibly enter the development to compete with CTC. It is a fact that despite the IPUC's fevered projections, CTC cannot exclude competitors. CTC is subject to the interconnection, resale, access, and dialing parity requirements imposed on all LECs by Sections 251(a) and (b). As a result, CTC is vulnerable to overbuilding by facilities-based competitors or to being undercut by resale competitors.<sup>5</sup>

Although the IPUC repeatedly asserts that CTC will be the "first" and "only" LEC in the Hidden Springs development many times in its petition (an assertion which is not true) the IPUC fails to demonstrate that CTC will actually enjoy an ILEC's market power

---

<sup>5</sup> Indeed, as discussed earlier, TCI is already installing facilities to compete with CTC. See Exhibit A at ¶ 12.

even if this were the case. The bare recitation that CTC will be Hidden Springs' "sole facilities-based provider of [LEC] services in the . . . development" falls woefully short of the "clear and convincing showing" that must be made by a party seeking CLEC reclassification. See Local Competition Order at ¶ 1248. Simply put, mere ownership and operation of facilities does not prove anticompetitive conduct, and nothing in Section 251 allows this leap of reasoning.

The policy implications of defining the "market" down to the level of the Hidden Springs development are also absurd. If each facilities-based CLEC service offering is construed to constitute a "market," the pro-competitive aim of the 1996 Act will be turned on its ear. Individual developments, industrial parks, neighborhoods, blocks or even individual streets within exchanges will provide the basis for declaring that CLECs are suddenly ILECs, with the consequence that business opportunity for CLECs will be scotched from the outset.

**3. CTC Does Not and Will Not Enjoy Market Power.**

CTC will not be able to control prices or exclude competition in the Hidden Springs development or within the Boise telecommunications exchange. As a result, CTC cannot be found to enjoy market power and, consequently, cannot be found the functional equivalent of an ILEC.

According to accepted standards, the "substantial and durable" market power that raises antitrust concerns exists when a defendant (1) can profitably set prices above the competitive level and (2)

persist in doing so without challenge due to new entry or competition.<sup>6</sup> In the present case, there are multiple reasons why CTC neither enjoys such power at the present nor will do so in the future. CTC will not enjoy a monopoly on facilities in the Boise exchange, much less the specific geographic area in which the Hidden Springs development is being built. CTC will also not enjoy exclusivity as a carrier within the market; it will coexist uneasily with U S WEST, a much larger, richer and more established ILEC. Moreover, due both to the 1996 Act and its own nondominant market position, CTC can easily be overbuilt by competitors such as U S WEST (and as is the case with TCI) or be required to offer its facilities and services to competitors on a resale basis under Sections 251(a) and (b). Consequently, CTC is not in a position to control prices, exclude competitors, preserve any monopoly over facilities, or otherwise exercise market power to the detriment of the public interest.

Defining the Hidden Springs development as a "market" for purposes of Section 251(h)(2) would also contradict established antitrust precedents and principles. As the Supreme Court held in United States v. Grinnell Corp. when addressing geographic "stations" used by companies providing central alarm services:

[T]he relevant market for determining whether the defendants have monopoly power is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business.

---

<sup>6</sup> See IIA Phillip E. Areeda et al., Antitrust Law ¶ 501 (1995).

See 384 U.S. 563, 575-76 (1966). It is also apparent that even when a particular group of consumers is limited to a particular competitor--which, as shown above, is not the case at Hidden Springs--it is improper to define this subgroup as its own "market." See Redmond v. Missouri Western State College, 1988-2 Trade Cas. (CCH) ¶ 68, 323 (W.D. Mo. 1988) (scholarship students limited to college bookstore are a segment which cannot be separated from the broader group of the full student body).

The fact that consumers in Hidden Springs will be part of the Boise local exchange area also indicates the folly of defining the development as a separate "market" for purposes of Section 251(h)(2). It is established that where prices in various geographic areas are interrelated--such as within the Boise metropolitan area--the areas are considered a single market irrespective of whether customers in a specific location can switch to a supplier in a different area. See RSR Corp. v. FTC, 602 F.2d 1317, 1323 (9th Cir. 1979), cert. denied, 445 U.S. 927 (1980). Similarly, the absence of evidence of price independence between separate geographic areas is strong evidence that the various areas are in the same geographic market. See Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 219 (D.C. Cir. 1986), cert. denied, 476 U.S. 1033 (1987).

The Federal Trade Commission and Department of Justice use an analysis which similarly demonstrates the IPUC's error in defining Hidden Springs as a market under Section 251(h)(2). The 1992 Horizontal Merger Guidelines issued by the Federal Trade Commission

and Department of Justice provide that a market includes all competitors who currently sell in the market, as well as those who would enter in response to a small but significant non-transitory price increase. See id. at Section 1.32. In light of U S WEST's dominant presence in the Boise EAS, TCI's manifest plans to provide facilities-based services within the development, and CTC's substantial interconnection and resale obligations to competing carriers under Sections 251(a) and (b), it is clear that Hidden Springs should not be defined as a "market" simply because CTC is its "first" facilities-based carrier (as the IPUC asserts).

**B. CTC Has Not "Substantially Replaced" an Existing ILEC Regulated Under Section 251(h) (1) (B) .**

As the Commission established in the Guam Declaratory Ruling, to "substantially replace" an ILEC within the meaning of Section 251(h) (2) (B), a carrier must "supplant" and "take the place" and "serve as a substitute" for the ILEC in its service area. See Guam Declaratory Ruling at ¶ 28. Aside from making the bare assertion that CTC will "supplant" U S WEST by being the "first facilities-based provider" within Hidden Springs, the IPUC fails to make any such showing in its Petition. This is not an adequate showing under Section 251(h) (1) (B). As shown above, CTC lacks the established business good will, equivalent resources or the market power to act as a monopolist and thereby "substantially replace" U S WEST as the ILEC.

To overcome its problem with meeting the Guam Declaratory Ruling test, the IPUC tries to substitute and answer its own question. Specifically, the IPUC asserts that since CTC will be

the "first facilities-based provider" in the development it thereby "serves as a substitute and supplants" U S WEST within the terms of Section 251(h) (2) (B). This conclusion is nonsense. CTC cannot "supplant" the market position of a carrier which the IPUC itself admits still serves the area of the Hidden Springs development, and which continues to dominate the Boise market. Indeed, nothing in Section 251(h) (2) (B) states or even suggests that the "first" facilities-based provider should be regulated as an ILEC, simply because it has entered a previously unserved area. Such a result is especially absurd here since, as previously referenced, TCI will be a facilities-based competitor for telecommunications services within the development. Nothing in Section 251 suggests such a bizarre result, nor is it good policy, since Congress could not have intended new customers or developments to be off-limits to CLECs.

**C. Regulating CTC as an Incumbent LEC Is Not Consistent With the Public Interest, Convenience and Necessity.**

Just as it fails to prove the other two prongs of Section 251(h) (2)'s test, the IPUC similarly fails to show that "treating CTC as an incumbent LEC" will promote competition within the Hidden Springs community or otherwise serve the public interest. The IPUC's failure to articulate a legitimate policy basis for regulating CTC as an ILEC is extremely telling, and demonstrates the hollowness of its case.

**1. Regulating CTC as an ILEC Would Serve No Legitimate Consumer Protection Interest**

The IPUC's Petition repeatedly attempts to characterize its

proposed rule as a necessary consumer protection measure. In the absence of the application of the Section 251(c) requirements to CTC, the IPUC maintains, "there would be no real choice in providers for the customer." See IPUC Petition at 8. There are several fatal flaws in this assertion.

First, in arguing the public interest element of the statute, the IPUC only conclusorily equates CTC with "ha[ving] market power, economies of density, connectivity, and scale and control of the local network comparable to entities that are [ILECs] under Section 251(h) (1)." As previously discussed, this conclusion is apparently premised on nothing more than CTC's status as a facilities-based provider in Hidden Springs. It also happens to be factually incorrect, given the fact that TCI is presently a facilities-based competitor. The IPUC's sweeping conclusion additionally ignores CTC's substantial obligations to competing carriers as a non-ILEC under Section 251(a) and (b) of the Communications Act. As the Commission is aware, these obligations include providing interconnection, access to poles, conduits and rights-of-way to competing carriers at just and reasonable prices, reciprocal compensation, number portability and dialing parity.<sup>7</sup>

The second grating defect with the IPUC's professed concern with customer choice is that the perceived problem--if in fact it exists--can be resolved in a more straightforward and reasonable

---

<sup>7</sup> Moreover, the IPUC once more glosses the fact that U S West served the same exchange area prior to CTC's entry, already serves customers in the vicinity of the Hidden Springs development, and already qualifies as the area's incumbent LEC for purposes of Section 251(h).

manner than through a Commission rule. If CTC's service is unsatisfactory, the IPUC can order the incumbent, U S WEST, to offer a choice of providers, either through resale or through an extension of its facilities in the area. See Idaho Code § 61-508. Given the IPUC's ability to unilaterally impose this remedy, it is difficult to understand why the IPUC feels compelled to escalate this matter to the federal level.

Finally, and perhaps most importantly, the IPUC's position rests on a profound misunderstanding of the Congressional policy enacted through the 1996 Act. The 1996 Act does not embody a national policy that all customers have a mandated choice of telecommunications providers. If that were the goal of the 1996 Act, it would simply command regulators to compel at least two providers to offer service to every customer. Instead the 1996 Act's purposes are more profound and far reaching. Congress intended to phase out command and control regulation and allow "competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers." See AT&T Communications of the Southwest, Inc. v. City of Dallas, 1998 WL 309145 at 15 (N.D.Texas, June 8, 1998).

Unfortunately, competition does not always take a form that fits regulators' preconceived notions. In this case, it comes in the form of a developer using the marketplace to contract for superior telecommunications services that will enhance the value and marketability of its subdivision lots. This unanticipated market development obviously causes the IPUC some angst, and it

has resulted in regulatory intervention to forestall perceived market imperfections long before the feared harm actually occurs. The IPUC's syllogism is that the first telecommunications providers in a subdivision may have a competitive advantage, that may result in a de facto monopoly, that may be abused by the service provider, and competitive markets may not remedy this abuse unless the regulators change the rules at the outset to forestall all of these potential calamities.

Fortunately, there is a ready rejoinder to this parade of horrors. In a recent article in the Federal Communications Law Journal, Commissioner Michael K. Powell made the following observations, which are so cogent as to require quotation at length:

One reason that policymakers find it difficult, even after setting appropriate ground rules, to allow the market to run its course is, ironically, the fear of ceding control to the marketplace. The [1996] Act commands policymakers and industry to move away from the monopoly-oriented, over-regulatory origins of communications policy and toward a world in which the market, rather than bureaucracy, determines how communications resources should be utilized. Yet, so often we cannot actually bring ourselves to let go---to jump off our regulatory perch. It is true that risks await in free markets; risk that consumers will be harmed by anticompetitive conduct on the part of firms with market power; risk that communications companies may be acquired, downsized, or driven out of business; and risk that some individuals will not vie successfully for the many choice jobs the competition will create.

Though these fears are not inconsequential, they nearly always are overstated and tend to paralyze us from taking action that would allow markets to flourish and competition to grow. Instead we speculate about possible anticompetitive effects and then adopt policies intended to protect new entrants and consumers from them. Rather than protect these interests, however, we more often, in practical effect, handicap the market and postpone the

arrival of competition and consumer choice. Communications leaders must not give in to these fears so lightly, but instead must have the courage to trust the market. Besides, if feared anticompetitive conduct actually occurs, it usually can be adequately addressed by the antitrust authorities.

See Michael K. Powell, Communications Policy Leadership for the Next Century, 50 Fed.Com.L.J. 529, 534-35 (May, 1998).

**2. The IPUC's Proposed Rule Will Perpetuate Existing ILEC Markets and Frustrate Facilities-Based Competition.**

Throughout its Petition, the IPUC repeatedly asserts that its proposed rule is designed to promote telecommunications competition by neutralizing the first facilities-based entrant's perceived competitive advantage. As shown above, this proposed addendum to Section 251 is unfounded at law. But the IPUC's assertion is also based upon a serious mistake of fact. The competitive realities are such that providing the first telecommunications service to a new development does not constitute the type of economic advantage that requires regulatory intervention in order to protect subsequent competitors.

It is true that new subdivisions, residential apartments, office buildings, and the like constitute one of the best opportunities for a CLEC to obtain a toehold in an entrenched ILEC's market. In such cases, the ILEC does not have the full economic advantage of a pre-existing system constructed primarily during the *de jure* monopoly era. Of course, the ILEC still has the inherent advantages of *in situs* backbone plant, an overwhelming market presence, and immense financial resources, but at least the CLEC can compete with the incumbent on an equal footing with

respect to the installation of new cable, pedestals, drops, and other facilities.

On the other hand, the downside of competing in the new construction market is that the early years of service are often unprofitable until infill finally produces enough customers to provide a return on the capital investment. In such cases, the incentive to compete is the hope that long term gains, and the establishment of a market presence, will compensate for losses in the early years of operation. This incentive is tempered by the knowledge that a competitor may subsequently overbuild or resell the initial CLEC facilities without incurring the initial losses that generally confront the first entrant. This is a significant economic disadvantage for the first provider, and it is greatly compounded if subsequent competitors can also force the initial entrant to provide interconnection pursuant to Section 251(c).

Thus, contrary to the IPUC's implicit assumption, the first telecommunications service provider faces a mixed bag of advantages and disadvantages. Under these circumstances, the IPUC's attempt to "level the playing field" for subsequent competitors is, at best, ill advised. As a commentator recently wrote:

[T]he Commission should refuse to adopt proposals that are described as being fair and leveling the playing field without economic or antitrust analysis or a tightly reasoned connection to promoting competition or consumer welfare. In any real world marketplace, different competitors will have their own strengths and weaknesses, none of which makes success or failure certain . . . Even being first does not always doom the second entrant: the second cellular carrier in most markets did well . . . The playing field is never even to begin with, and bringing in a lot of regulatory landscape architects and earth-moving equipment will in most cases only

postpone the emerging competition and the benefits it brings to consumers.

See John W. Berresford, The Future of the FCC: Promote Competition, Then Relax, 50 Fed.Com.L.J. 731, 747-48 (Fall, 1998).

The burdens imposed by Section 251(c) would prove particularly onerous for small CLECs such as CTC. Small CLECs can generally manage the negotiation and arbitration process with an incumbent LEC by using prior agreements as a template. But a small company does not have either the financial or technical resources to perform cost studies and meet all the other burdens imposed on an incumbent in the negotiation and arbitration process. This disparity in resources is particularly one-sided if the CLEC is faced with a demand for Section 251(c) interconnection from a large national firm that conducts such negotiations as a routine matter. These same considerations led Congress to provide for exemptions or suspensions of the Section 251(c) obligations for rural ILECs upon a proper showing. It would be ironic indeed if, as the IPUC's proposal would require, small CLECs such as CTC find themselves subject to an incumbent's interconnection obligations, while much larger rural ILECs enjoy suspensions or exemptions.

Competing with an entrenched incumbent such as U S WEST is a daunting prospect under the best of circumstances. The fact that so few competitors have elected to provide facilities based competition in the residential market is testimony to the obvious conclusion that this particular form of competition is viewed by the industry as the least profitable and most perilous form of competition. It would be unfortunate if the Commission added yet

another obstacle in the form of Section 251(c) requirements to the formidable roadblocks already confronting would-be competitors for this market. Declaring a CLEC to be an ILEC before it becomes successful, and regulating it accordingly, will certainly chill investment in the CLEC market. Thus, far from promoting competition, the IPUC's policy initiatives will squelch it. The IPUC's attempts to erase the distinctions between CLECs and ILECs, and thus strip market opportunities from CLECs even before they gain a toehold, represents anything but the public interest.

**3. The IPUC's Proposed Rule Is Essentially Unenforceable.**

As pointed out above, the IPUC's Petition is both unlawful and contrary to the public interest. Even if this were not the case, however, the Commission should reject the Petition as an impractical and unenforceable proposal. The IPUC requests a Commission rule that treats CLECs as incumbents if they provide telecommunications service "to customers in a geographic area in which no other telephone corporation has facilities capable of providing local exchange service to customers." See IPUC Petition at 13.

On its face, the proposed rule is so vague as to be virtually meaningless. What is meant by the term "geographic area?" Is it a county? A city? A subdivision? An apartment house? A cluster of houses? A single house? One can answer, of course, that the Commission could define this term by rule, but it is not immediately apparent what principles of law or policy would inform such a rulemaking proceeding. If it is appropriate to treat the

initial telecommunications provider to a subdivision as an incumbent, is it any less appropriate to apply the same standard to an office suite complex, a duplex, or even a single family dwelling? It seems the IPUC has not considered the implications.

The phrase "facilities capable of providing local exchange service" is similarly troubling. In the overwhelming majority of new construction cases, the incumbent already has local exchange facilities serving the land under development, or at least immediately adjacent parcels. Consequently, the rule would have virtually no applicability if read literally. In fact, it is ironic (but true) that a literal interpretation of the proposed rule would not address CTC's situation because, as the IPUC itself admits, U S WEST previously served residential customers in the Dry Creek Valley. By definition, therefore, U S WEST has "facilities capable of providing local exchange service" in the area under development, and the rule would not apply.

But perhaps the IPUC intends that a CLEC should be treated as an incumbent whenever the existing ILEC has insufficient facilities in place to serve the new customer? This interpretation also proves nonsensical. It is almost invariably the case that an ILEC must add some facilities to meet the needs of new customers or expanded service requests. Consequently, if the Commission adopted this interpretation, a CLEC would automatically be treated as an ILEC whenever it serves a new service entrance or provides a quality of service the ILEC is unable to provide with existing facilities.

Finally, the Commission should carefully assess how it would enforce this rule even if it could be rendered intelligible. In Idaho, scores of CLECs have been routinely granted competitive certificates of convenience and necessity that are geographically coterminous with U S WEST and GTE's study areas. Once these certificates are granted, the IPUC has little contact with the CLECs thereafter. It has no way of determining who is providing the initial telecommunications service to the thousands of construction projects completed each year. This situation could only be rectified by undertaking a massive policing effort, either on the state or federal level. This way lies madness, and the almost certain wrath of the public and elected lawmakers.

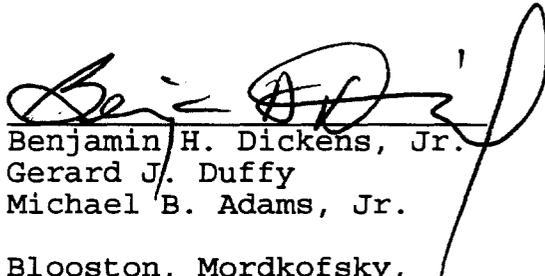
**IV. Conclusion.**

Based on the foregoing, it is clear that the IPUC's Petition fails to justify regulating CTC as an ILEC. The Petition is unwarranted on its facts, urges a fundamentally unsound policy, and wholly fails to satisfy the three-part test established in Section 251(h)(2). Furthermore, the same facts, policies and statutory questions addressed in CTC's case prove that the IPUC's request for a ruling that all "similarly situated LECs" be regulated as ILECs is baseless. The IPUC's Petition must consequently be denied.

Respectfully Submitted,  
**CTC TELECOM, INC.**

Conley Ward  
Kenneth R. McClure  
Cynthia A. Melillo

Givens Pursley LLP  
277 North 6th Street, Suite 200  
PO Box 2720  
Boise, Idaho 83701

  
Benjamin H. Dickens, Jr.  
Gerard J. Duffy  
Michael B. Adams, Jr.

Blooston, Mordkofsky,  
Jackson & Dickens  
2120 L Street, N.W.  
Washington, D.C. 20037

*Its Attorneys*

January 11, 1999

Exhibit A

Affidavit of Jay Decker

Conley Ward  
GIVENS PURSLEY LLP  
277 North Sixth Street, Suite 200  
P.O. Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1201  
S:\Clients\5101\6\Decker Affidavit.wpd  
Attorneys for CTC Telecom, Inc.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

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

CCB Pol.

CC Docket No. 98-221

**AFFIDAVIT OF JAY DECKER**

STATE OF IDAHO            )  
  : ss.  
County of Ada             )

JAY DECKER, being first duly sworn upon oath, deposes and states as follows:

1. My name is Jay Decker. My address is 5215 W. Dry Creek Road, Boise, Idaho 83703. I make this affidavit of my own personal knowledge.

2. I am a senior engineer employed by Hidden Springs Community, LLC, the owner of Hidden Springs planned rural community (“Hidden Springs”).

3. Hidden Springs is a planned unit development in Ada County, Idaho, approximately four miles outside the city limits of the City of Boise.

4. As senior engineer for Hidden Springs, I am responsible for the infrastructure development, including, among other things, utilities.

5. Hidden Springs is served by Intermountain Gas Company, Idaho Power Company and United Water Idaho, the same utilities which provide natural gas, electric, and municipal water supply within the City of Boise.

6. Hidden Springs lies within the Boise School District. A site has been set aside in it for the construction of a public elementary school to be owned and operated by the Boise School District.

7. In establishing a planned unit development at Hidden Springs we have attempted to create a natural environment with a rural, small-town feel with the most modern of conveniences.

8. As part of our marketing plan, Hidden Springs needs to have the most modern telecommunications facilities possible in order to attract the sophisticated technology users and telecommuters we perceive to be a significant portion of our target market.

9. The residents we seek to locate in Hidden Springs will be “up-scale” and will demand technological amenities which have not traditionally been associated with rural living. Accordingly, it is important for Hidden Springs to obtain a state of the art

telecommunications network to attract our target market. In fact, our marketing materials state, "The latest technology in energy efficiency and telecommunications will be a part of every home."

10. As senior engineer with the responsibility for infrastructure development within Hidden Springs, I solicited proposals for telecommunications services from several potential providers, including U S WEST Communications and CTC Telecom, Inc. ("CTC"). Even though Hidden Springs lies within the U S WEST service territory, U S WEST was not willing to provide the advanced network facilities we sought. It was interested only in providing dial-tone and other facilities commonly known as "plain old telephone services" ("POTS"), and demanded an unreasonable price premium even to increase the number of POTS lines to each lot to accommodate today's telephone uses (kids' lines, faxes, PC modems, etc.).

11. Hidden Springs ultimately entered into a contract with CTC under which CTC agreed to provide telecommunications infrastructure to Hidden Springs. CTC agreed to provide, at a minimum, multi-line local exchange service, high-speed data transmission service and cable television service with at least six telephone lines per residence.

12. The agreement between Hidden Springs and CTC is not an exclusive agreement. Other telecommunications providers may provide services to residents of the Hidden Springs community. In fact, TCI already has two inch conduit buried in the rights of way at Hidden Springs through which it intends to install coaxial cable and/or fiber optic cable for high speed data transmission and telecommunications

services. Additionally, U S WEST already has facilities to the few residential customers who lived near Hidden Springs before the development commenced, though these customers were poorly served and, to date, there are no U S WEST lines available to prospective customers or existing customers desiring additional service lines. The only provision in the contract which could be characterized as exclusive is an agreement that for the first three years, Hidden Springs will not market the services of a telecommunications provider other than CTC.

13. Hidden Springs is keenly interested in the provision of the best possible telecommunications services for its residents and has chosen CTC as the best option to provide those services at this time. CTC is in the process of fulfilling its obligations under our contract in a fashion which meets our exacting standards. Any company which wishes to provide telecommunication services to residents of Hidden Springs is welcome to do so.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 8<sup>th</sup> day of January, 1999.

  
Jay Decker

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of January, 1999.

  
Notary Public for State of Idaho  
Residing at Boise, ID  
My Commission expires: 10/31/2002

Exhibit B

Hidden Springs-CTC Telecom Development Agreement

**DEVELOPMENT AGREEMENT  
(Hidden Springs - CTC Telecom)**

This Agreement ("Agreement") is entered into effective this 7<sup>th</sup> day of April, 1998, by CTC TELECOM, INC., an Idaho corporation, (hereinafter referred to as "CTC") and HIDDEN SPRINGS COMMUNITY L.L.C., an Idaho limited liability company (hereinafter referred to as "HS"). CTC and HS are sometimes referred to herein collectively as the "parties" or individually as "party."

**RECITALS**

A. HS plans to undertake construction of a development known as the Hidden Springs Community (the "Community") on that real property legally described on Exhibit A, attached hereto. CTC has been requested by HS to provide telecommunications facilities as further described herein for the Community.

B. The Community will be completed in multiple phases within the project site as shown on Exhibit B attached hereto. HS and CTC desire that the telecommunications facilities for the Community be developed in phases in conjunction with HS's development activities. This Agreement governs the development of the telecommunications facilities for the first phase of the Community ("Phase I"). The parties intend to enter into further agreements in the same or a substantially similar form to this Agreement governing telecommunications facilities for the subsequent phases of the Community subject to the terms hereof.

C. The proposed Community area is such that CTC is willing to undertake provision of such facilities upon payment of the facilities charges hereinafter specified.

**AGREEMENT**

In consideration of the mutual covenants and conditions herein set forth, it is hereby agreed by and between CTC and HS as follows:

1. **Agreement Subject to Price List.** This Agreement is entered into subject to the price list of CTC to be filed with the Idaho Public Utilities Commission (the "Commission"). In the event that the price list is changed, superseded or suspended prior to any performance by CTC, then this Agreement shall be amended by mutual agreement of the parties to conform to such price list as may be in effect after the aforesaid change, suspension or supersedure. Absent any such list, one shall be developed by the mutual agreement of the parties, subject to the approval of the Commission, if required.

2. **Facilities Charges.** Within thirty (30) days of execution hereof, HS shall pay to CTC facilities charges equal to \$250.00 for each of the approximately 141 residential lots to be developed as part of Phase I of the Community, or \$35,250.00, which facilities charges shall be refunded as set forth in Section 6 below.

**3. Facilities and Services.** Upon payment by HS of the facilities charges set forth in Section 2, CTC shall undertake the installation of all facilities required to provide the following levels of service to each lot in Phase I of the Community, including the non-residential lots within the Phase I area:

(a) Dial Tone service with provisions to provide each residential lot with up to six (6) access lines ("Access Lines") by October 1, 1998.

(b) Cable television service including local broadcast television channels and 19 non-broadcast television channels shall be implemented by October 1, 1998. One community service channel shall be implemented by April 1, 1999. A minimum of 4 additional channels shall be added each year of the following five years. Programming shall be determined by mutual agreement of the parties and shall be based upon customer request. CTC shall have the option of purchasing a programming feed from another provider or installing their own head-end.

(c) High speed internet access service that supports a minimum data transfer rate of 512 kbps to each subscriber. This service shall be implemented by June 30, 1999. Additionally, a Hidden Springs Community home page shall be provided.

(d) Interim telephone service during construction of the Community shall be provided by May 15, 1998.

**4. Interim Service Facilities Payment.** In addition to the payment described in Section 2, above, HS will pay CTC a one time fee of \$60,000 within thirty (30) days of execution hereof for the following: (a) to pay for the cost of obtaining the ACHD right of way, described in Section 5; (b) to cover the costs of the installation of the facilities and equipment required to provide the interim telephone service pursuant to Section 3(d); and (c) to cover certain of CTC's initial expenses in connection with the provision of telecommunication services to the Community.

**5. Easements and Rights of Way.** Any easements, rights-of-way or property required by CTC in the Community shall be furnished by HS without cost or restriction to CTC subject to architectural and landscaping review and approval provided, CTC, at its own cost, shall obtain a right-of-way from the Ada County Highway District from State of Idaho Highway 55 to the Community on Dry Creek Road (the "ACHD Right of Way"). All survey property stakes will be placed by HS as required to identify the physical location of said easements and rights-of-way within the Community. In the event of replatting, rezoning, or change of use during the term of this Agreement, HS or the permitted assignee shall bear the full expense of relocation or replacement of all affected telecommunication facilities. This amount is not refundable.

**6. Reimbursement of Facilities Charges.** Every quarter, on or before January 31, April 30, July 31 and October 31, CTC shall notify HS of the number of Access Lines in Phase I which were placed into service during the previous quarter. Within ten (10)

days of such notice, CTC will provide HS with a refund of \$250.00 per Access Line placed into service during such quarter, subject to the following:

- a. In no case will the refund be greater than the total facilities charges assessed by CTC for Phase I; and
- b. No interest shall be payable to HS upon the amounts subject to refund under this Agreement.

**7. Facilities Charge Limitations.** It is understood and agreed that the facilities charges paid by HS are charges for the cost of providing telecommunication facilities and is not a deposit for security for individual customers, nor are such payments applicable to installation charges or the regular monthly charges for such service as provided in the filed price list of CTC, and the charge does not vest ownership of the facilities in HS or a subscriber nor do the charges reserve dial tone.

**8. Customer Charges.** The facilities charges and refund procedure provided for pursuant to this Agreement do not satisfy the connection and construction charges which may be payable by the individual customers. HS shall not represent that the payment of the facilities charges by HS alleviates the individual customer's responsibility to pay other appropriate charges.

**9. Additional Construction Charges.** Any type of construction requested by HS other than normal construction proposed by CTC shall be subject to additional charges, and such charges shall not be subject to refund, unless agreed upon by both parties in writing.

**10. Continued Obligations.** In the event that fifty percent (50%) of the residential lots in Phase I do not have Access Lines in service within 5 years from the date of this Agreement, CTC shall have no obligation to continue to provide the facilities not in use which were placed pursuant to this Agreement; provided, CTC shall continue to serve its existing customers within the Community with substantially the same level and quality of service, unless the Commission designates a replacement telecommunications carrier for the Community. In the event of a lack of Access Line development as provided above, CTC may remove or otherwise utilize any facilities which are in excess of the amount in service on the 5th anniversary date of this Agreement, and CTC shall have no obligation to enter into any further development agreements with HS or serve subsequent customers in the Community other than pursuant to applicable tariffs then on file and in effect, with the Commission.

**11. Assignment.** This Agreement may not be assigned by either party except to a subsidiary or affiliated entity of a party or by HS to the Community homeowner's association, without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

**12. Binding Effect.** This Agreement shall inure to the benefit of and be binding upon the successors in interest and permitted assignees of the parties hereto.

13. **Excess Capacity.** CTC reserves the right to construct excess capacity into the facilities being constructed pursuant to this Agreement. The additional costs of the excess facilities are not included in the charges set forth above, and HS will not be liable for such additional costs. In the event that additional persons apply for service subsequent to the construction of facilities pursuant hereto, CTC may charge to such subsequent applicants, fees and construction charges and HS shall not be entitled to any refund or reduction in charges by reason of the provision of such service to such additional applicants unless such additional applicants are from other HS developments or developments of Grossman Family Properties, in which case the facilities charges reimbursement provisions of this Agreement shall apply.

14. **Attorneys' Fees.** In the event any legal action is required to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover all costs of the suit, including reasonable attorneys' fees.

15. **Notices.** Any notice between the parties and payment of facilities charges and refund, pursuant to this Agreement, shall be given in writing, hand delivered, sent by overnight courier (such as Federal Express) or mailed by United States Certified mail, postage prepaid, return receipt requested, addressed, if to CTC to:

CTC TELECOM, INC.  
130 SUPERIOR STREET  
P.O. BOX 88  
CAMBRIDGE, ID 83610

ATTN: Rick Wiggins RW  
FW

And if to HS to:

HIDDEN SPRINGS COMMUNITY L.L.C.  
ATTN: FRANK MARTIN  
118 S. FIFTH STREET  
BOISE, ID 83702

and shall be effective when hand delivered or postmarked, whichever is earlier. Changes by either party in the designations delivered by overnight carrier, must comply with the above.

16. **Promotion.** CTC hereby authorizes HS to use CTC's name and a description of CTC's proposed service for the Community in connection with HS's marketing efforts for the Community. HS hereby authorizes CTC to use HS' name in connection with the promotion of CTC's services in the Community. CTC shall not use HS' name except in connection with services being provided to the Community. HS agrees not to enter into a promotional arrangement with another local provider of telecommunications services for a period of thirty-six (36) months after the execution of this Agreement. Nothing in this Agreement affects the right of any end user customer within the Community to select the end user's telecommunication services provider(s) of choice.

As long as CTC's RW  
service and schedule FW  
commitments are  
achieved.

17. **Indemnity.** CTC agrees to indemnify and hold HS harmless from any damage, loss or expense including attorneys' fees HS may suffer or incur as a result of any activities of CTC in connection with the Community. HS agrees to indemnify and hold CTC harmless from any damage, loss or expense including attorneys' fees CTC may suffer or incur as a result of any activities of HS in connection with the Community. This mutual indemnity shall survive the termination of this Agreement.

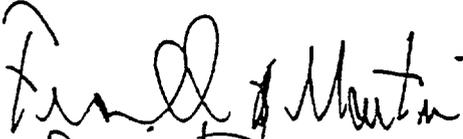
18. **Subsequent Phases.** HS and CTC each hereby agree to enter into further development agreements, in the same form or substantially similar form to this Agreement, for each subsequent phase of the Community providing for CTC's development of telecommunications facilities for all phases of the Community. It is the intent of both parties that CTC provide the telecommunications facilities for the entire Community; provided, in the event there is a material default in the performance of this Agreement by either party, and this Agreement is terminated as a result thereof, the other party shall have no further obligation to enter into development agreements for the subsequent phases of the Community.

19. **Commission Approval.** The parties acknowledge and agree that certain services contemplated to be provided by CTC hereunder are subject to Commission review and approval. Obtaining all necessary reviews and approvals of the Commission is a condition precedent to CTC's obligations to provide such services under this Agreement. CTC agrees to use commercially reasonable efforts to obtain any necessary reviews and approvals of the Commission expeditiously so that the services contemplated hereby can be provided within the time frames set forth herein. If Commission approval is not granted, CTC will immediately notify HS and refund all Facilities Charges and the Interim Service Facilities payment within 30 days of such notification. P.L.

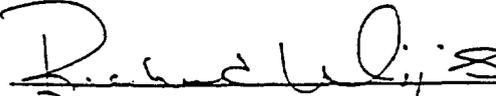
20. **Amendment.** This Agreement shall not be amended except by a writing signed by both parties.

The parties have executed this Agreement effective the day and year first above written.

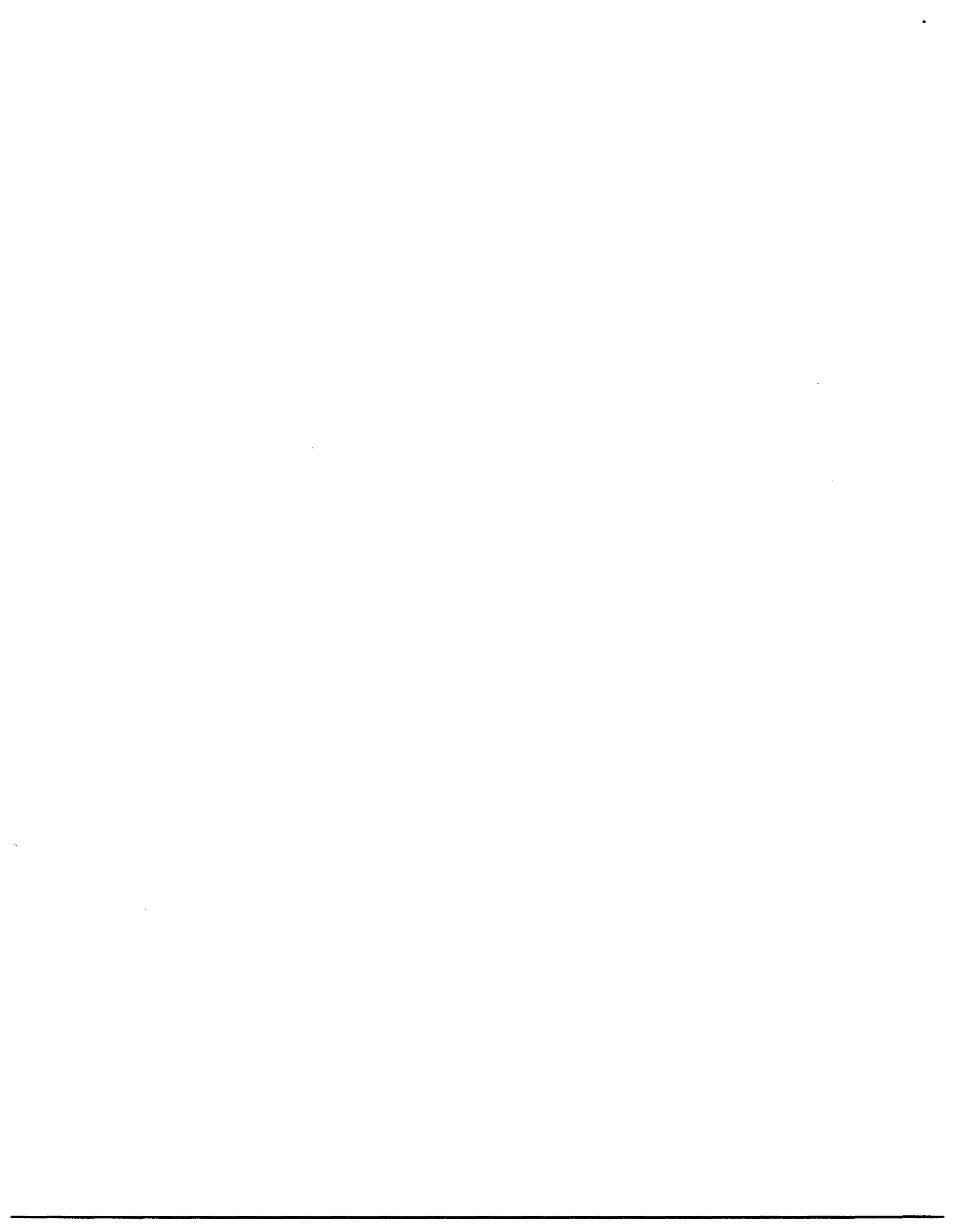
HIDDEN SPRINGS COMMUNITY L.L.C.

By:   
Its: President

CTC TELECOM, INC.

By:   
Its: President

**Exhibit A**  
**Legal Description**



In Ada County, Idaho

Township 4 North, Range 2 East, Boise Meridian

In Section 4: Northwest half of Lot 4

In Section 5: Lots 1, 2, 3, and 4

In Section 6: Lots 1 and 2; West 1/2 Southeast Quarter; South 1/2 Northeast Quarter

Township 5 North, Range 2 East, Boise Meridian

In Section 28: South half Northwest Quarter, West 1/2 Southwest Quarter, Northeast Quarter  
Southwest Quarter; Except that portion lying East of the centerline of the County Road

In Section 29: Southeast Quarter Northeast Quarter; Southeast Quarter Southwest Quarter;  
Southwest Quarter Southeast Quarter; East 1/2 Southeast Quarter

In Section 31: Southeast Quarter

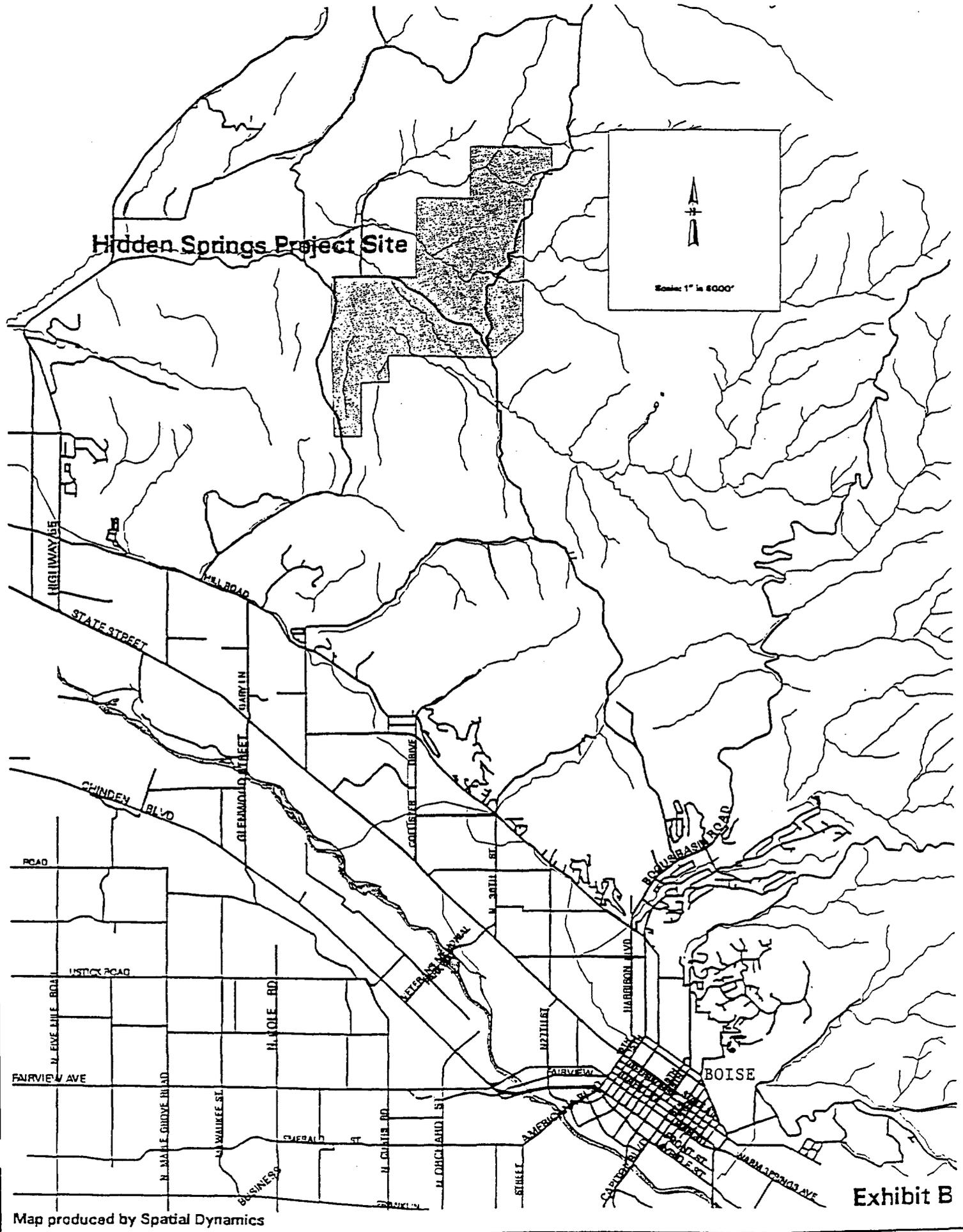
In Section 32: East 1/2; East 1/2 West 1/2; West 1/2 Southwest Quarter

In Section 33: West 1/2 West 1/2

EXCEPTING: Therefrom all of the oil, gas and other minerals as reserved in Deeds recorded July 9, 1941, March 13, 1942 and September 18, 1972, as Instrument Nos. 206007, 211002, and 820468 respectively, Official Records.

**Exhibit B  
Site Plan**

# Hidden Springs Community LLC



Map produced by Spatial Dynamics

Exhibit B



Exhibit C

Affidavit of Rick Wiggins

---

Conley Ward  
GIVENS PURSLEY LLP  
277 North Sixth Street, Suite 200  
P.O. Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1201  
S:\Clients\5101\6\Wiggins Affidavit.wpd  
Attorneys for CTC Telecom, Inc.

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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

CCB Pol.

CC Docket No. 98-221

AFFIDAVIT OF RICK WIGGINS

STATE OF IDAHO            )  
                                      : ss.  
County of Ada             )

RICK WIGGINS, being first duly sworn upon oath, deposes and states as follows:

1. My name is Rick Wiggins. My address is 130 Superior Street, Cambridge, Idaho 83610. I make this affidavit of my own personal knowledge.

2. I am a shareholder in Cambridge Telephone Company ("Cambridge") and am also vice president and general manager of Cambridge Telephone Company, which, together with its subsidiary, Council Telephone Company, provides incumbent local exchange service to approximately 2,200 rural access lines. I am also President of Cambridge's subsidiary, CTC Telecom, Inc.

3. In late 1997, I was approached by representatives of Hidden Springs Community, LLC ("Hidden Springs") soliciting proposals for construction of a telecommunications infrastructure in a planned unit development Hidden Springs proposed to build in Ada County, Idaho, just outside the City of Boise. Hidden Springs sought a proposal for the construction of an advanced network with high-speed data transmission and internet access in addition to multi-line local exchange service. CTC entered into negotiations and, in April, 1998, entered into a contract with Hidden Springs under which it agreed to construct a telecommunications infrastructure to meet Hidden Springs' specifications.

4. In April, 1998, Hidden Springs applied to the Idaho Public Utilities Commission ("IPUC") for a Certificate of Convenience and Necessity as a competitive local exchange provider. A Certificate was issued on August 10, 1998, immediately following IPUC's adoption of rules under the Idaho Administrative Procedures Act earlier that day subjecting companies such as CTC to the requirements of Section 251(c) of the Telecommunications Act of 1996. CTC understands that it is obligated under that Act to comply with the requirements of Section 251(a) and (b), however, does not believe it may be subjected to the requirements of Section 251(c) under federal law.

5. CTC is a small, start-up company with fewer than \$1 million in net assets. Its cash flow projections for the Hidden Springs development anticipate four years of rather significant losses before it begins to earn a return on its investment.

6. CTC's financial strength, even in combination with its affiliates, does not even approach a level which "enables it to serve new customers within the area at a much lower incremental cost than a facilities-based interest that must install its own switches, trunking, and loops to serve its customers." IPUC Petition at 6. This would be particularly so if the facility-based competitor were to have the financial resources of U S WEST, TCI or other larger companies. In fact, because of the time frames for the projected build out of Hidden Springs, which anticipates very low densities for the first several years of the development, a facilities- based competitor which installs its equipment three or four years from now will avoid the years of loss associated with low subscriber levels in the development.

7. Through my experience with Cambridge, I am familiar with the advantages of an incumbent local exchange carrier and can confirm emphatically that CTC does not enjoy those advantages.

8. CTC has installed an advanced network in Hidden Springs using fiber hybrid architecture consisting of fiber cable to digital loop carriers (ADSL), from which copper and coaxial cable will connect each residence.

9. Hidden Springs is located in the Boise local exchange telephone market and does not constitute a separate market.

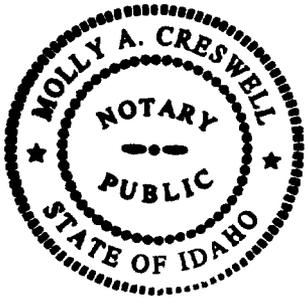
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 8 day of January, 1999.

R. Wiggins  
Rick Wiggins

SUBSCRIBED AND SWORN to before me this 8 day of January, 1999.

Molly A. Creswell  
Notary Public for Idaho  
Residing at Boise  
My Commission expires: 9-24-99



CERTIFICATE OF SERVICE

I, Craig A. Costa, hereby certify that I am an employee of the law firm of Blooston, Mordkofsky, Jackson & Dickens and that a copy of the foregoing **Opposition of CTC Telecom, Inc.** was served this 11th day of January 1999, via hand delivery, to the following persons:

Chairman William E. Kennard  
Federal Communications Commission  
445 12th Street, SW 8-B201  
Washington, D.C. 20554

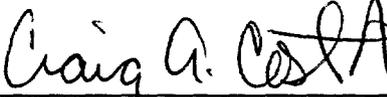
Commissioner Susan E. Ness  
Federal Communications Commission  
445 12th Street, SW 8-B115  
Washington, D.C. 20554

Commissioner Michael K. Powell  
Federal Communications Commission  
445 12th Street, SW 8-C302  
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, SW 8-A302  
Washington, D.C. 20554

Commissioner Gloria Tristani  
Federal Communications Commission  
445 12th Street, SW 8-C302  
Washington, D.C. 20554

International Transcription Service  
1231 20th Street, NW  
Washington, D.C. 20036

  
\_\_\_\_\_  
Craig A. Costa