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BEFORE THE  
Federal Communications Commission JAN 26 1999  
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Idaho Public Utilities Commission )  
 )  
Petition for Rulemaking Pursuant to )  
Section 251(h)(2) of the )  
Communications Act )

CC Docket 98-221

RESPONSE OF TIME WARNER TELECOM

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RESPONSE OF TIME WARNER TELECOM

Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby submits the following response to initial comments and oppositions addressing the petition filed by the Idaho Public Utilities Commission ("Idaho Commission")<sup>1</sup> requesting adoption of a rule providing for the treatment of CTC Telecom, Inc. ("CTC"), a local exchange carrier which plans to offer telephone exchange service to a new planned community located within U S WEST Communication, Inc.'s study area, and all "similarly situated" LECs, as "incumbent local exchange carriers" (ILECs), pursuant to Section 251(h)(2) of the Communications Act.<sup>2</sup>

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<sup>1</sup> Idaho Public Utilities Commission Petition for Declaratory Ruling Concerning Section 251(h)(2) of the Communications Act ("Petition"), filed November 23, 1998.

<sup>2</sup> This Commission has indicated that the Idaho Commission's request for a declaratory ruling will be treated as a Petition for Rulemaking. See Public Notice, "Pleading Cycle Established for Comments on Idaho Public Utilities Commission Petition for Rulemaking Pursuant to Section 251(h)(2) of the Communications Act," CC Docket No. 98-221, DA 98-2510, released December 8, 1998.

I. INTRODUCTION AND SUMMARY

A review of the comments and oppositions submitted by CTC and other interested parties in response to the Idaho Commission's Petition strongly reinforces the positions advanced by TWTC in its own initial filing. The additional information provided in CTC's Opposition and supporting documents, in particular, makes it even more apparent that there is no adequate factual or legal basis for this Commission to conclude that CTC or any other non-incumbent LEC that might be deemed to fall within the potentially broad, ill-defined "class" of carriers identified in the Idaho Commission's proposed rule should be treated as an incumbent LEC, as defined in Section 251(h) (1),<sup>3</sup> and thereby subjected to the additional regulatory burdens imposed on ILECs under Section 251(c).<sup>4</sup> Indeed, it is now clear that the arguments advanced in support of the Idaho Commission's Petition are based largely, if not entirely, on erroneous assumptions with respect to the nature of CTC's contractual arrangement with the Hidden Springs Development and other key factors which are critical to the Commission's assessment of the Petition under the legal standard set forth in Section 251(h) (2) of the Communications Act.<sup>5</sup>

As the discussion below indicates, the Development Agreement appended to CTC's Opposition in fact does not provide

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<sup>3</sup> 47 U.S.C. § 251(h) (1).

<sup>4</sup> 47 U.S.C. § 251(c).

<sup>5</sup> 47 U.S.C. § 251(h) (2).

that CTC will be the "exclusive" or "sole" provider of local exchange services or any other services to Hidden Springs, as the Idaho Commission and other parties supporting the Petition, including U S WEST, the entrenched incumbent LEC in the Boise area, have alleged.<sup>6</sup> To the contrary, the Development Agreement between CTC and Hidden Springs states explicitly that:

Nothing in this agreement affects the right of any end user customer within the Community to select the end user's telecommunications service provider(s) of choice.

Moreover, the senior engineer for Hidden Springs has stated, in an affidavit appended to CTC's Opposition, that TCI Communications, Inc. ("TCI") has in fact already installed conduit 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."<sup>8</sup> The affidavit further observes that U S WEST already has in place

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<sup>6</sup> See Petition at ii, 2, 10, repeatedly referring to CTC's "exclusive contract" with Hidden Springs, which makes it the "sole provider of local exchange and exchange access services to this community."; also see Comments of U S WEST Communications, Inc. ("U S WEST Comments) at 1-2, alleging that CTC "has a contract with the developer of Hidden Springs . . . to be the exclusive provider of telecommunications, cable television, and high-speed data services to the 900 homes and businesses to be located in the community."; Ameritech Comments at 4-5, asserting that "CTC has obtained exclusive rights to provide local exchange and exchange access in [Hidden Springs]."

<sup>7</sup> CTC Opposition, Exhibit B, Hidden Springs-CTC Telecom Development Agreement ("Development Agreement"), at 4, ¶ 16.

<sup>8</sup> CTC Opposition, Exhibit A, Affidavit of Jay Decker ("Decker Affidavit") at 3-4, ¶ 12.

facilities that were previously used to provide service to residential customers who lived in the area near Hidden Springs.<sup>9</sup>

Indeed, prior to entering into its agreement with CTC, the developer of Hidden Springs solicited proposals from a number of service providers, including U S WEST.<sup>10</sup> At that time, U S WEST apparently was not willing to provide the advanced network facilities which the developer was seeking, 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.)."<sup>11</sup> Ultimately, Hidden Springs entered into the agreement with CTC, under which 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."<sup>12</sup> However, there is nothing in the CTC's agreement with Hidden Springs which precludes U S WEST, TCI, or any other potential competitor from providing service to the community. In this regard, Mr. Decker expressly states in his affidavit that "Hidden Springs is keenly interested in the provision of the best possible

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<sup>9</sup> Id. In its own comments, U S WEST acknowledges that its study area in Idaho "includes the geographic area to be covered by the Hidden Springs Development," and that it also has previously deployed network facilities which it employed to provide service to a "former school" located "in the geographic area to be covered by the development." U S WEST Comments at 2, n.1 and 4, n.3.

<sup>10</sup> Decker Affidavit at 3, ¶ 10.

<sup>11</sup> Id.

<sup>12</sup> Id. at 3, ¶ 11.

telecommunications services for its residents" and "[a]ny company which wishes to provide telecommunications services to residents of Hidden Springs is welcome to do so."<sup>13</sup>

When the true nature and history of the relationship between CTC and Hidden Springs is considered, it is readily apparent that neither this particular arrangement nor the possibility of other similar contractual arrangements provides sufficient grounds for this Commission to take action pursuant to Section 251(h)(2) which would result in the imposition of ILEC regulation on CTC and other non-incumbent LECs that may contract to provide service to a new residential and/or business development. Arrangements of the sort reflected in the CTC- Hidden Springs Development Agreement plainly do not conflict with the pro-competitive purposes embodied in Section 251 and the other local competition provisions included in the Telecommunications Act of 1996. Rather, they reflect precisely the result which Congress sought to achieve, i.e., the deployment of local exchange and exchange access facilities by non-incumbent LECs who seek to compete to provide service to new residential

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<sup>13</sup> Id. at 4, ¶ 13. In connection with CTC's commitment to provide facilities and services specified to Hidden Springs, the Development Agreement authorizes the developer to utilize CTC's name in connection with its marketing efforts, and restricts Hidden Springs from entering into a "promotional arrangement" with another local provider of telecommunications services for a limited (3-year) period, "as long as CTC's service and schedule commitments are achieved." See Development Agreement at 4, ¶ 16. However, nothing in the agreement bars U S WEST, TCI, or other alternative service providers from deploying and marketing their services directly to residents and businesses within the community.

and business customers which is superior in price, quality, or features to that available from the entrenched incumbent ILECs.

Moreover, as CTC and other commenting parties have observed, the broad rule proposed by the Idaho Commission in its Petition does not, in any meaningful way, address or conform to the standards set forth in Section 251(h)(2), but instead would "automatically" impose ILEC regulation on the initial provider of facilities to any "geographic area," without regard to whether the statutory criteria have been met.<sup>14</sup> Accordingly, the potential scope of the proposed rule would extend even to non-incumbent ILECs who do not have an "exclusive" provider arrangement of the sort which CTI has (erroneously) been assumed to have with Hidden Springs.<sup>15</sup> As CTC and other commenting parties have observed, an expansive, ill-defined rule of the sort described in the Idaho Commission's Petition would be difficult, if not impossible to enforce.<sup>16</sup> More fundamentally, however, as the discussion below demonstrates, the proponents of the proposed rule have failed to satisfy any of the statutory criteria set forth in Section 251(h)(2).

In the absence of the "clear and convincing showing" which this Commission has previously indicated will be required as a condition precedent to the imposition of ILEC obligations on

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<sup>14</sup> See CTC Opposition at 10; also see Comments of Electric Lightwave, Inc. ("ELI Comments") at 3-4; AT&T Comments at 4-5.

<sup>15</sup> See ELI Comments at 4.

<sup>16</sup> See CTC Opposition at 28-30; also see AT&T Comments at 4.

non-incumbent LECs,<sup>17</sup> the Idaho Commission's Petition must be rejected. Moreover, given the significant adverse effect which the imposition of ILEC obligations is likely to have on the deployment of local exchange facilities by non-incumbent LECs, the Commission should strongly reaffirm that in the absence of an affirmative determination by the FCC pursuant to Section 251(h) (2), the states may not subject non-incumbent LECs to additional interconnection and access obligations similar to those adopted by the Idaho Commission, which track the requirements of Section 251(c),<sup>18</sup> or otherwise exceed the limits described in Section 251(d) (3) of the Communications Act.<sup>19</sup>

**II. THE ARGUMENTS ADVANCED IN SUPPORT OF THE IDAHO COMMISSION'S PETITION MISCONSTRUE THE RELEVANT FACTS AND THE APPLICABLE LAW, AND CLEARLY FAIL TO SATISFY ANY OF THE STATUTORY CRITERIA ESTABLISHED IN SECTION 251(h)(2).**

In their filings, the entrenched incumbent LECs and other parties who have expressed support for the Idaho Commission's proposed rule all purport to address the three factors identified in Section 251(h) (2) (A) - (C). However, their arguments, like those set forth in the Petition itself, generally proceed from the same erroneous factual assumptions described in

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<sup>17</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16110, ¶ 1248 (1996) ("Local Competition Order").

<sup>18</sup> Id. at 16609-16610, ¶¶ 1247-1248; also see 47 C.F.R. § 51.223 (a).

<sup>19</sup> 47 U.S.C. § 251(d) (3).

Section I above, coupled with the equally flawed assumption that the relevant "market" to be employed by the Commission, in assessing whether the non-incumbent LEC occupies a position in the local exchange market that is "comparable" to that of an incumbent LEC and has "substantially replaced" an ILEC, should be limited to the geographic area encompassed by the new facility or development which the non-incumbent LEC plans to serve.<sup>20</sup> As the submissions by CTC and other commenting parties demonstrate, this narrow definition of the relevant market ignores established antitrust precedents and principles,<sup>21</sup> and "there is no basis for it in any Commission precedent."<sup>22</sup>

Once the actual facts with respect to the particular contractual arrangement which is the focus of the Idaho Commission's Petition are taken into account and the statutory criteria have been applied in an appropriate manner, it is clear the proponents of the proposed rule have failed to make the "clear and convincing showing" required to justify the imposition

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<sup>20</sup> See e.g., Petition at 9, asserting that Section 251(h)(2)(A) is met because CTC allegedly "occupies a position in the market for telephone exchange services in the Hidden Springs Development that is comparable to the position typically occupied by non-incumbent LECs." [Emphasis added]; U S WEST Comments at 3, asserting that "CTC will have the only telephone exchange network in Hidden Springs" and "will be 'supplanting' U S WEST with respect to the Hidden Springs Development." [Emphasis added]; Ameritech Comments at 5-6, arguing that "CTC occupies a position in the Hidden Springs area that is comparable to that of an ILEC" and "has 'replaced' an incumbent LEC in Hidden Springs." [Emphasis added]

<sup>21</sup> See CTC Opposition at 15-20.

<sup>22</sup> ELI Comments at 7.

of ILEC obligations pursuant to Section 251(h)(2). Neither CTC nor any similarly-situated non-incumbent LEC will occupy a position in the relevant market that is remotely "comparable" to that held by U S WEST and other entrenched incumbent LECs, by virtue of their long-standing, government-protected monopoly status. Moreover, the mere deployment of facilities and provision of initial local exchange service to a new development such as Hidden Springs, pursuant to an arrangement similar to CTC's Development Agreement, is plainly insufficient in itself to demonstrate that CTC or any other non-incumbent LEC has "substantially replaced" or "supplanted" an incumbent LEC, such as U S WEST. Finally, as the initial filings by TWTC, CTC, and others make clear, it is unnecessary and indeed would be contrary to the public interest and the pro-competitive purposes of Section 251 to impose ILEC regulation on CTC or other "similarly situated" non-incumbent LECs.

**A. Section 251(h)(2)(A)**

As the Oppositions filed by TWTC and CTC observe, the additional regulatory obligations imposed on ILECs under Section 251(c) were designed to enable new entrants to compete with well-entrenched incumbent LECs,<sup>23</sup> in particular the Regional Bell Operating Companies and other large incumbents, whose extensive existing local exchange network, "built to serve (and largely paid for by) captive ratepayers during the monopoly era," provides them with "a tremendous competitive advantage in the

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<sup>23</sup> TWTC Opposition at 9.

competitive market."<sup>24</sup> Indeed, in the Guam decision cited by the Idaho Commission in its Petition, this Commission recognized that as a result of decades of regulatory protection from competition,<sup>25</sup> the incumbent LECs identified in Section 251(h)(1) "typically occupy a dominant position in the market for telephone exchange service within their respective operating areas," and also "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)."<sup>26</sup>

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<sup>24</sup> CTC Opposition at 9.

<sup>25</sup> In discussing the need for legislation to facilitate competition in local services, the House Commerce Committee observed that "[i]n providing local telephone service, telephone companies have historically been protected from competition by state and local government barriers to entry" and that as a result "[f]or much of the past 60 years, the provision of local telephone service has been a monopoly service, and the telephone companies operating today have been the monopoly suppliers." H.R. Rpt. No. 104-204, Part 1, 104th Cong., 1st Sess. (1995) at 49-50.

<sup>26</sup> Declaratory Ruling and Notice of Proposed Rulemaking, In the Matters of Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act and Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, CCB Pol. 96-18, CC Docket No. 97-134, 12 FCC Rcd 6925, 6941, ¶ 26 (released May 19, 1997) ("Guam Ruling/NPRM"), citing Local Competition Order, 11 FCC Rcd at 15505-12 ¶¶ 1-20. As TWTC explained in its initial submission, the Idaho Commission's assertion that this Commission's decision in the GTA proceeding somehow "dictates" that CTC and other "similarly situated" non-incumbent LECs must be treated as ILECs for purposes of Section 251 is without merit, given the significant factual distinctions which serve to differentiate GTA's "virtually unique" situation from the scenario addressed in the instant Petition. See TWTC Opposition at 12-15; also see AT&T Comments at 4, n.7, noting that "the IPUC's suggestion that

In applying the statutory criteria set forth in Section 251(h)(2) to the specific situation addressed in the Idaho Commission's Petition, the Commission must first make a determination as to whether CTC's position in the relevant "market for telephone exchange services" is "comparable" to that of an incumbent LEC described in Section 251(h)(1).<sup>27</sup> As TWTC has previously observed, the most relevant ILEC for purposes of making this comparison is clearly U S WEST, whose study area includes the new development which CTC intends to serve.<sup>28</sup> In addition, as CTC demonstrates in its Opposition, the relevant geographic market for purposes of the Section 251(h)(2) analysis, in light of established antitrust principles and precedents, is much larger than the Hidden Springs Development, and encompasses at least the entire Boise local exchange market.<sup>29</sup> The geographic scope of the relevant market thus includes, at the very least, all of the Boise extended area service ("EAS")

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CTC has 'market power, economies of density, connectivity and scale comparable' to incumbents like U S WEST and even GTA appears to be vastly overstated."; ELI Comments at 8, explaining why "the IPUC's reliance on the Commission's decision declaring ILEC status for [GTA] is misplaced."

Instead, as TWTC and other commenting parties have observed, application of the analytical approach adopted by the Commission in the GTA proceeding tends to reinforce the view that the imposition of Section 251(c) obligations in this instance is unnecessary and inappropriate. TWTC Opposition at 14-15; also see CTC Opposition at 9; ELI Comments at 8.

<sup>27</sup> See 47 U.S.C. § 251(h)(2)(A).

<sup>28</sup> TWTC Opposition at 5.

<sup>29</sup> See CTC Opposition at 15-20.

region, which encompasses the area occupied by the Hidden Springs Development.<sup>30</sup>

Applying the analytical factors identified by the Commission in the GTA proceeding, it is obvious that CTC will not occupy a position in the relevant market that is "comparable" to that occupied by U S WEST. CTC is a "newly established carrier which expects to serve approximately 900 access lines within the boundaries of a specific development," which "has not yet realized any revenues, and expects to realize only modest profits after five years of operation (after several years of net losses)."<sup>31</sup> In contrast, according to CTC, U S WEST "has been in operation for over 100 years" and currently serves 451,798 access lines in Idaho, with a substantial percentage located in the Boise metropolitan area.<sup>32</sup> Accordingly, it is clear that CTC will not have anywhere near the market share, or the "economies of density, connectivity, and scale," enjoyed by U S WEST in the Boise market and throughout its operating region.

Moreover, as the Development Agreement and other documents submitted by CTC demonstrate, under the terms of its agreement with Hidden Springs, CTC cannot prevent U S WEST and other providers from providing alternative local service to

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<sup>30</sup> Id. at 15-16.

<sup>31</sup> CTC Opposition at 14.

<sup>32</sup> Id. at 11, 14-15. CTC further notes that U S WEST serves a total of 16,132,321 access lines in fourteen states, and realized total revenues of \$10.3 billion in 1997. Id. at 15.

customers within the development.<sup>33</sup> Indeed, according to the Decker Affidavit described in Section I above, TCI already has conduit buried in the rights of way at Hidden Springs, through which it intends to install facilities for use in providing "high speed data transmission and telecommunications services."<sup>34</sup> U S WEST itself acknowledges that it has previously installed network facilities which were used to serve a former school located "in the geographic area to be covered by the development."<sup>35</sup> CTC further observes that while "[t]o date, U S WEST has not requested access to utility rights of way or trenches, nor attempted to install facilities to serve the development," 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."<sup>36</sup> In addition, CTC notes that it is "subject to the interconnection, resale, access, and dialing parity requirements imposed on all LECs under Sections 251(a) and (b)."<sup>37</sup> Accordingly, CTC observes, it is "vulnerable to overbuilding by facilities-based competitors or to being undercut by resale competitors."<sup>38</sup>

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<sup>33</sup> See CTC Opposition at 3, 16; also see discussion of the CTC-Hidden Springs Development Agreement in Section I, infra.

<sup>34</sup> CTC Opposition at 16, n.5, citing Decker Affidavit at 4, ¶ 12.

<sup>35</sup> U S WEST Comments at 1, n.2.

<sup>36</sup> CTC Opposition at 4.

<sup>37</sup> Id. at 16.

<sup>38</sup> Id.

In light of all of these factors, it is apparent that CTC will not occupy a position in the relevant market that is "comparable" to that held by the incumbent LEC in the Boise market, i.e., U S WEST. Even assuming arguendo that CTC is at the time it commences service the only facilities-based provider of local telephone service within the Hidden Springs Development, this fact alone plainly does not suffice to give CTC market power of the sort which led Congress to impose additional regulatory obligations on U S WEST and other entrenched incumbent LECs, as defined in Section 251(h) (1).<sup>39</sup> Given the presence of several significant potential competitors, as well as the other market forces, contractual provisions, and existing regulatory obligations described herein and in TWTC's Opposition, there is simply no valid basis for concluding that the proponents of the proposed rule have made the requisite "clear and convincing showing" that CTC or other "similarly situated" non-incumbent LECs are "comparable" to incumbent LECs and should be subjected to the additional obligations imposed on ILECs under Section 251(c).

**B. Section 251(h) (2) (B)**

In a vain effort to satisfy the criteria set forth in Section 251(h) (2) (B),<sup>40</sup> which provides that a non-incumbent LEC may be treated as an ILEC for purposes of Section 251 only if it has "substantially replaced" an incumbent LEC, as defined in

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<sup>39</sup> See CTC Opposition at 17-18.

<sup>40</sup> 47 U.S.C. § 251(h) (2) (B).

Section 251(h) (1), the parties supporting the Idaho Commission's proposed rule once again base their arguments on the flawed assumption that the relevant market for purposes of Section 251(h) (2) is limited to the geographic area encompassed by the new development which the non-incumbent LEC, in this case CTC, plans to serve.<sup>41</sup>

As the discussion in Section II.A. above indicates, this approach to market definition is wholly unrealistic and inconsistent with established antitrust principles and precedent. Moreover, as TWTC and others have observed, adoption of such an approach would lead to absurd results, trivialize the language of the statute, and effectively render the requirement that a non-incumbent must have "substantially replaced" the ILEC meaningless.<sup>42</sup> A market analysis which is limited to the area encompassed by the new facility or development which the non-incumbent LEC seeks to serve also ignores the analytic approach to Section 251(h) (2) (B) adopted by the Commission in the GTA

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<sup>41</sup> See U S WEST Comments at 4, asserting that Section 251(h) (2) (B) is satisfied because "CTC clearly will be 'supplanting' U S WEST with respect to the Hidden Springs Development"; Ameritech Comments at 6, arguing that CTC has "replaced" an incumbent LEC in Hidden Springs."

<sup>42</sup> See TWTC Opposition at 7, noting that under the approach reflected in the Idaho Commission's Petition, Section 251(h) (1) (B) would be deemed satisfied whenever a new entrant provides local service to even a single residence or business not previously served by the incumbent LEC but located within the ILEC's service area; also see CTC Opposition at 17, noting that under the market definition approach adopted in the Petition, "[i]ndividual developments, industrial parks, neighborhoods, blocks, or even individual streets within exchanges will provide the basis for declaring that CLECs are suddenly ILECs. . . ."

proceeding, which focused on the extent to which the non-incumbent LEC appeared to possess the "dominant market presence" and other characteristics of an incumbent LEC, including "substantial financial resources" and "significant economies of density, connectivity and scale."<sup>43</sup>

Once an appropriate analytical framework and definition of the relevant market is adopted, it is clear that the criteria set forth in Section 251(h)(2)(B) is not satisfied in the case of CTC or other "similarly situated" non-incumbent LECs. Clearly, the entrenched incumbent LEC, U S WEST, will remain the dominant provider of local service within the relevant geographic market, which encompasses at least the Boise EAS region, notwithstanding CTC's provision of local service to a single new development, such as Hidden Springs, located within that market.<sup>44</sup> As the discussion in Section II.A. above makes clear, CTC plainly will not, by virtue of its provision of service to Hidden Springs, suddenly acquire the market power and other attributes which would indicate that it is "comparable" to or has "substantially replaced" U S WEST as the incumbent LEC in the relevant market. Moreover, given the absence of the requisite showing with respect to CTC, the Commission plainly cannot conclude that other

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<sup>43</sup> See TWTC Opposition at 8, citing Guam Ruling/NPRM, 12 FCC Rcd at 6944, ¶ 33.

<sup>44</sup> As ELI observes, the "carrier of last resort" obligations imposed on U S WEST and other ILECs, pursuant to state law, also serve to undercut any argument that a non-incumbent LEC providing service to a new development has "substantially replaced" the incumbent LEC within its certificated service area. See ELI Comments at 10-11.

"similarly situated" non-incumbent LECs have "substantially replaced" the entrenched incumbent LEC in their respective markets.

As ELI indicates in its initial comments, "[t]he Commission should only consider applying ILEC status to a non-ILEC, or class of non-ILECs, where it has truly replaced an existing ILEC and not where a non-ILEC has simply competed against an ILEC for new customers by placing facilities first."<sup>45</sup> Indeed, the record suggests that what has in fact occurred in this instance is precisely what Congress hoped would occur, i.e., the deployment of new local network facilities by a non-incumbent LEC which will enable it to provide advanced telecommunications capabilities and services to residences and businesses that would otherwise be forced to rely on an entrenched incumbent LEC such as U S WEST, who may not be responsive to their needs. In any event, since there has been no "clear and convincing showing" that CTC or any other non-incumbent LEC has "replaced" the incumbent LEC within the relevant local exchange market, there is no basis for the Commission to impose ILEC regulation on CTC or other non-incumbent providers pursuant to Section 251(h)(2).

**C. Section 251(h)(2)(C)**

Applying the third prong of the Section 251(h)(2) standard, it is equally apparent that a decision to grant the Idaho Commission's Petition and thereby impose additional ILEC regulatory constraints on CTC or other non-incumbent LECs which

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<sup>45</sup> ELI Comments at 4.

fall within the scope of the broad, ill-defined rule proposed in the Petition would not be "consistent with the public interest, convenience, and necessity" or the pro-competitive purposes of Section 251.<sup>46</sup>

As the discussion of the arrangement between CTC and the Hidden Springs Development in Section I indicates, CTC entered into its Development Agreement with Hidden Springs only after the developer solicited proposals from a number of potential service providers, including U S WEST, and determined that U S WEST was not willing to provide the advanced network facilities required by the developer at a reasonable price.<sup>47</sup> The actual terms of the Development Agreement do not make CTC the "exclusive" provider of any service, but instead make it clear that end-user customers within the community retain the right to select the telecommunications service provider(s) of their choice.<sup>48</sup> Indeed, one of the supporting affidavits submitted by CTC states that TCI has installed conduit in the development which it plans to use to install coaxial cable and/or fiber optic cable for the provision of "high-speed data transmission and telecommunications services."<sup>49</sup> U S WEST has previously installed network facilities both in the area of Hidden Springs

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<sup>46</sup> See 47 U.S.C. 251(h) (2) (C) .

<sup>47</sup> See Decker Affidavit at 3, ¶ 10.

<sup>48</sup> Development Agreement at 4, ¶ 16.

<sup>49</sup> Decker Affidavit at 3-4, ¶ 12.

and "in the geographic area to be covered by the development."<sup>50</sup> Moreover, as CTC and other commenting parties have observed, "[i]f 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."<sup>51</sup>

Given the above-described contractual provisions, existing regulatory obligations,<sup>52</sup> and the presence of several potential competitors with substantial resources (i.e., U S WEST and TCI), it seems clear that CTC will not be able to wield the sort of market power which would warrant imposition of the additional ILEC regulatory constraints embodied in Section 251(c). As CTC has indicated, even assuming the CTC is the only facilities-based local service provider in the Hidden Springs Development at the time it commences service, the potential for a significant threat of anticompetitive abuses which cannot be contained by market forces and existing regulatory constraints is, at best, highly speculative.<sup>53</sup>

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<sup>50</sup> U S WEST Comments at 2, n.1; also see Petition at 2.

<sup>51</sup> CTC Opposition at 23, citing Idaho Code § 61-508; also see ELI Comments at 10-11.

<sup>52</sup> See 47 U.S.C. § 251(a) - (b).

<sup>53</sup> See CTC Opposition at 24.

On the other hand, as TWTC and other commenting parties have indicated,<sup>54</sup> adoption of the Idaho Commission's proposed rule -- which would impose ILEC regulatory burdens on any non-incumbent LEC that happens to be the initial provider of service to a new facility, development, or other "geographic area" not already served by an incumbent LEC -- would pose a very real and substantial threat to the public interest and the procompetitive purposes of Section 251 and the Telecommunications Act of 1996 as a whole. As CTC has observed:

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

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<sup>54</sup> See TWTC Comments at 11-12; CTC Comments at 25-28; ELI Comments at 11-12.

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 215(c).<sup>55</sup>

As a result, adoption of the broad rule proposed by the Idaho Commission would likely have a significant "chilling effect" on investment in local network facilities by new entrants.<sup>56</sup> As ELI explains:

[T]he IPUC's proposed rule creates a disincentive for CLECs to venture into any undeveloped portion of an ILEC's exchange territory, because to do so would result in the CLEC becoming a de jure ILEC for purposes of Section 251(c) of the Act, while shouldering the entire risk associated with its capital investment. The ILEC, on the other hand, would suffer no additional burden should it choose to further expand its already dominant presence by being the first facilities-based telecommunications service provider to enter into the same development. Rather than 'opening all telecommunications markets to competition' as Congress intended, the rule proposed by the IPUC punishes CLECs for opening up areas not currently 'served' by the market dominant ILEC. The unintended consequence of the IPUC's requested rule would be to create an additional barrier to competitive entry. CLECs would have a newly created disincentive to build out to new customer premises. This would, in effect, reserve new customer premises for the ILECs, who have nothing to lose by building out to new developments in [their local] exchange territories.<sup>57</sup>

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<sup>55</sup> CTC Opposition at 25-26.

<sup>56</sup> See TWTC Opposition at 12; CTC Opposition at 28. As CTC has indicated, the proposed rule is also "so vague as to be virtually unenforceable." CTC Opposition at 28.

<sup>57</sup> ELI Comments at 11-12.

Such a result would be wholly at odds with the procompetitive purposes of the 1996 Act as a whole and Section 251 in particular, and would not serve the public interest.

Accordingly, the Idaho Commission's Petition and proposed rule must be rejected.

**III. THE COMMISSION SHOULD STRONGLY REAFFIRM THAT, IN THE ABSENCE OF AN AFFIRMATIVE DETERMINATION BY THE FCC PURSUANT TO SECTION 251(h)(2), STATE REGULATORY AGENCIES ARE PRECLUDED FROM ESTABLISHING RULES LIKE THOSE ADOPTED BY THE IDAHO COMMISSION WHICH IMPOSE ILEC OBLIGATIONS ON NON-INCUMBENT LECS.**

As the discussion above indicates, the Idaho Commission's Petition and proposed rule do not satisfy any of the statutory criteria set forth in Section 251(h)(2), and accordingly, must be rejected. The Commission previously has determined that in the absence of a determination by the Commission, pursuant to Section 251(h)(2), that a particular LEC or class of LECs should be treated as ILECs, "allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as 'Additional Obligations on Incumbent Local Exchange Carriers,' distinct from obligations imposed on all LECs, would be inconsistent with the statute."<sup>58</sup> Accordingly, the Commission has adopted a rule which explicitly provides that unless and until the Commission makes such a determination, "[a] state may not impose the obligations set forth in Section 251(c) of the Act

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<sup>58</sup> Local Competition Order, 11 FCC Rcd at 16109, ¶ 1147.

on a LEC that is not classified as an incumbent LEC, as defined in Section 251(h)(1) of the Act. . . ."59

The rules adopted by the Idaho Commission and appended to its Petition<sup>60</sup> establish additional access and interconnection standards applicable to all facilities-based telephone corporations, including non-incumbent LECs, that provide local exchange service to a "new telecommunications development area," a term which is defined to include "a geographic area in which no telephone corporation . . . has facilities capable of providing basic local exchange service to customers."<sup>61</sup> These rules closely track the additional interconnection and access obligations imposed on incumbent LECs pursuant to Section 251(c) of the Communications Act.

In view of the potential adverse effects arising from the imposition of additional ILEC regulatory requirements on non-incumbent LECs, as described in Section II.C. above, TWTC believes it is important for this Commission to reaffirm that in the absence of an affirmative determination pursuant to Section 251(h)(2), the states are precluded from subjecting non-incumbent LECs to additional regulatory obligations, similar to those adopted by the Idaho Commission, which track the requirements imposed on incumbent LECs under Section 251(c) of the Act. In this regard, the Commission also should make it clear that,

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<sup>59</sup> 47 C.F.R. § 51.223(a).

<sup>60</sup> See Petition, Appendix B; IDAPA 31.42.01.401-411.

<sup>61</sup> See IDAPA 31.42.01.401.04.

consistent with the provisions of Section 251(d)(3), it is prepared to take whatever further action may be necessary to ensure that non-incumbent LECs are not subjected to additional access and interconnection obligations which conflict with the requirements of Section 251, or which otherwise serve to substantially prevent implementation of the requirements of Section 251 and the pro-competitive purposes of the local competition provisions set forth in Part II of Title II of the Communications Act.<sup>62</sup>

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<sup>62</sup> See 47 U.S.C. § 251(d)(3).

**IV. CONCLUSION**

For the foregoing reasons, it is clear that the Idaho Commission's Petition and the comments filed in support thereof do not provide a valid factual or legal basis for action by this Commission which would subject CTC and other non-incumbent LECs to the additional regulatory obligations imposed on incumbent LECs under Section 251(c) of the Communications Act.

Accordingly, TWTC urges the Commission to reject the Idaho Commission's Petition and proposed rule.

In doing so, the Commission should strongly reaffirm that in the absence of a determination by this Commission that the statutory criteria set forth in Section 251(h)(2) have been satisfied, states may not impose additional interconnection and access obligations on non-incumbent LECs which track the requirements of Section 251(c), or which otherwise conflict with or substantially prevent implementation of the requirements of Section 251 and the procompetitive purposes of the local competition provisions adopted in the Telecommunications Act of 1996.

Respectfully submitted,



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January 26, 1999

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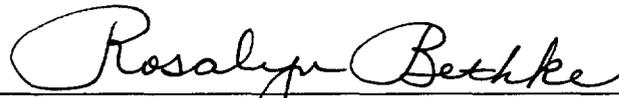
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