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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
IDAHO PUBLIC UTILITIES COMMISSION	)	
PETITION FOR RULEMAKING PURSUANT	)	CC Docket No. 98-221
TO SECTION 251(h)(2) OF THE	)	
COMMUNICATIONS ACT	)	
	)	

REPLY COMMENTS OF ELECTRIC LIGHTWAVE, INC.

Electric Lightwave, Inc. ("ELI"), by its attorneys, hereby files its reply comments in the Idaho Public Utilities Commission's ("IPUC") Petition for a Declaratory Ruling concerning Section 251(h)(2) of the Communications Act, as amended by the Telecommunications Act of 1996 ("the Act").[1] ELI filed its initial comments in opposition to the Petition with the Commission on January 11, 1999.

I. INTRODUCTION

In its Petition, the IPUC requests the Federal Communications Commission ("Commission") to declare, pursuant to Section 251(h)(2) of the Telecommunications Act of 1996 ("Act") that: (1) CTC Telecom, Inc. ("CTC") should be treated as an incumbent local exchange carrier ("ILEC") for the purposes of Section 251(c); and (2) all similarly situated facilities-based local exchange carriers should be treated as ILECs. The IPUC asserts that CTC should be regulated as an ILEC because it has entered into an "exclusive" agreement with the developer of a new planned community to provide local exchange service to residential and business customers within the new development.

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[1] Idaho Public Utilities Commission, Petition for Declaratory Ruling Concerning Section 251(h)(2) of the Communications Act, Treatment of CTC Telecom, Inc., and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, CC Docket No. 98-221.

ELI strongly urges the Commission to deny the IPUC's petition. As ELI stated in its initial comments, there are more pro-competitive alternatives available to the IPUC to address its concerns with exclusive arrangements that would not result in encumbering all competitive local exchange carriers ("CLECs") that venture into new territory with de jure ILEC status. Furthermore, CTC's comments in this proceeding demonstrate that it does not have an "exclusive" agreement with the developer of Hidden Springs, and that, in fact, at least one other facilities-based provider has already taken steps to compete with CTC.

Moreover, the IPUC's petition has not satisfied any of the requirements of Section 251(h)(2) and it has utterly failed to present any compelling reasons as to why its proposed rule would be in the public interest. A blanket ruling that imposes ILEC status and regulation on an CLEC simply because the company took the initiative to invest where an ILEC would not do so, will not only be counter-productive, but in direct conflict with the pro-competitive policies expressed in the Telecommunications Act. There is simply no basis in law or public policy for the Commission to extend incumbent regulation to CTC and the IPUC's proposed class of similarly situated CLECs.

II. THERE IS NO EXCLUSIVE ARRANGEMENT CONTEMPLATED OR EXPRESSED BY THE AGREEMENT BETWEEN CTC AND THE DEVELOPER.

Several commenters share the IPUC's concern that an "exclusive" contract for a particular area could provide a carrier with the ability to prevent other carriers from competing to serve customers in that area.[2] MCI WorldCom expresses concern that CTC's "exclusive agreement with Hidden Springs" would "afford it all of the advantages of a traditional ILEC."[3] The concern that an exclusive agreement would preclude the entry of other competitors was largely the basis for the IPUC's concerns with CTC's provisioning of service to the Hidden Springs Development.

[2] See e.g., MCI WorldCom Comments at 2; AT&T Comments at 3-4.

[3] See MCI WorldCom Comments at 2.

It is clear from CTC's comments, however, that no such exclusive arrangement is contemplated. CTC provided the Commission with a copy of the Development Agreement between CTC and Hidden Springs that states at paragraph 16, "Nothing in this Agreement affects the right of any end user customer within the Community to select the end user's telecommunications services provider(s) of choice."[4] Furthermore, CTC confirms that it cannot prevent other carriers from overbuilding facilities to compete with it and that, in fact, TCI has already begun to install competing facilities.[5] Clearly, there is no intention on the part of either CTC or the Hidden Springs Development to prevent end-user customers from choosing to receive services from any other provider in the market.

III. A COMPETITIVE PROVIDER WILL NOT OCCUPY A POSITION THAT IS COMPARABLE TO AN ILEC SIMPLY BECAUSE IT IS THE FIRST PROVIDER IN A PREVIOUSLY UNSERVED AREA.

US West states in its comments that because CTC will be the only provider of local exchange service in Hidden Springs, it will control the bottleneck and thus hold a dominant position in the market comparable to an ILEC.[6] MCI states that CTC will have the "market power, economies of density, connectivity, scale and control.....comparable to that possessed by incumbent LECs."[7] ELI believes it is important for the Commission to note that CTC may very well be the first provider of telecommunications service to Hidden Springs, but there is no way to know whether it will be the only provider, as suggested by MCI and US West. In fact, for MCI to assert that a new entrant obtains market power and economies of scale comparable to an ILEC simply because it is the first to stick its nose under the tent is absurd. The Commission has not determined that a single residential development inside an ILEC's existing service territory is

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[4] See CTC Opposition at Exhibit B.

[5] TCI has announced that pending its merger with AT&T, it will provide competitive local exchange services over its local cable plant. Other cable companies, such as Cablevision Lightpath, have already demonstrated that competitive telecommunications can be provided by cable companies. See http://www.cablevision.com/cvhome/frame/fphone.htm

[6] See US West Comments at 2-3.

[7] See MCI Comments at 3.

a "market" for purposes of market power concern; and moreover, one would be hard-pressed to argue that there are economies of scale realized from an investment in a small part of a larger service territory that are comparable to those economies of scale possessed by an ILEC after nearly a century of investment in the larger encompassing territory.

IV. A COMPETITIVE PROVIDER SHOULD NOT BE DEEMED TO HAVE REPLACED AN ILEC SIMPLY BY SERVING PREVIOUSLY UNSERVED TERRITORY.

US West comments attempt to portray the Commission's ruling in the Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act[8] as supporting a finding in this proceeding that CTC has "substantially replaced" an ILEC because it will provide local exchange service "to all or virtually all of the subscribers in an area that did not receive telephone exchange service from an ILEC."[9] Although it is correct that in defining "substantially replaced" the Commission "rejected an overly literal translation of the statutory language that would produce absurd results at odds with the manifest Congressional intent;"[10] the Commission was fairly specific in the Guam Order as to its reasoning. The Commission was attempting to resolve an issue where a provider, that was not a NECA member, was providing service to all or virtually all of the subscribers on the island of Guam. True, the area (the Territory of Guam) was not served by a NECA member as of the date of enactment of the 1996 Act, but it was receiving service. The GTA had not literally "replaced" an ILEC, because it was already there as a non-NECA member, serving customers. Nevertheless, the Commission concluded that the GTA had "substantially replaced" an ILEC because the GTA was providing service in lieu of a NECA member and therefore stood in the shoes of an ILEC.

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[8] See In the Matter of Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 25(h) of the Communications Act, Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 25(h)(2) of the Communications Act, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket No. 97-134 (rel. May 16, 1997) ("Guam Order").

[9] See US West Communications Comments at 3-4.

[10] Guam Order at para. 25.

In contrast, the Hidden Springs development was not receiving service from a NECA member or anyone else on the date of enactment of the 1996 Act. In fact, Hidden Springs didn't even exist on the date of enactment; therefore, there is no "replacement" of an ILEC by a non-NECA member in the provisioning of any service by any definition contemplated by the Guam Order; there is simply a new provider in an area where the ILEC has heretofore decided not to serve. And under these circumstances, the Commission should not find that CTC or any similarly situated carrier has replaced an incumbent under Section 251(h)(2)(B).

V. TREATING A COMPETITIVE PROVIDER AS AN INCUMBENT UNDER THESE CIRCUMSTANCES IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

ELI understands that the IPUC is interested in ensuring that competitive opportunities are available in all areas of the state so that end-user customers have a choice of providers. ELI agrees whole-heartedly with that objective. The entire purpose of the Telecommunications Act of 1996 is to promote competition in the local exchange market. However, a ruling such as that contemplated by the Petition does not promote competition; it discourages investment by small, start-up companies like CTC to take the initiative to serve previously unserved areas. It would likely have the effect of ensuring that only ILECs would build facilities into new areas and such an anti-competitive result be contrary to the pro-competitive purposes of the Telecommunications Act.[11]

Finally, Congress, and the Commission did not intend to place additional, unnecessary burdens on new entrants or they would have done so. Sections 251 (a) and (b) of the Act set out the interconnection and resale requirements applicable to CLECs. Section 251(c) sets out a higher level of obligations for ILECs because Congress recognized that ILECs have and will continue to have overwhelming market power even after new entrants begin to provide

[11] The facts of this proceeding also demonstrate that encouraging competition in building facilities to new unserved areas will have a positive impact on the deployment of advanced services. As CTC states in its comments, unlike U S WEST, CTC was willing to make an investment in facilities that could support the delivery of advanced telecommunications services to the Hidden Valley development.

competition. Congress specifically did not impose the higher level of obligations of Section 251(c) on CLECs because Congress recognized that there would be a clear difference in market power between ILECs and CLECs for some time to come. It is simply not reasonable, therefore, to assert that a CLEC has a market advantage comparable to an ILEC simply because it was the first to invest in facilities to serve a previously unserved area.

VI. CONCLUSION

For the reasons stated herein and in ELI's initial comments, the Commission should deny the IPUC's request for a rule of general applicability that treats all facilities-based local exchange carriers as ILECs that, after February 8, 1996, "began to provide telephone exchange service exclusively over their own telecommunications service facilities, or predominantly over their own facilities in combination with the resale of telecommunications services of another carrier, to customers in a geographic area in which no other telephone corporation has facilities capable of providing basic local exchange service to customers." The IPUC has failed to demonstrate that its proposed class of carriers meets the standards of Section 251(h)(2). The IPUC has other remedies available under Idaho state law to protect Idaho consumers from arrangements between carriers and developers that are truly exclusive, and the Act provides subsequent carriers with a number of other means for competitive entry.

Respectfully submitted,
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January 26, 1999

CERTIFICATE OF SERVICE

I, Tracey A. Bogans, a Legal Assistant in the law firm of Davis Wright Tremaine LLP, do hereby certify that a copy of the aforesaid "Comments of Electric Lightwave, Inc." was served on the persons specified below, by U.S. Mail, First Class Postage Prepaid, on January 26, 1999:

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