

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Idaho Public Utilities Commission)
) CC Docket No. 98-221
Petition for Rulemaking Pursuant)
to Section 251(h)(2) of the)
Communications Act)

**REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS**

The Association for Local Telecommunications Services (“ALTS”), pursuant to Public Notice 98-2510 (released December 8, 1999) hereby files Reply Comments on the petition of the Idaho Public Utilities Commission asking this Commission to adopt a rule that would treat CTC Telecom, Inc. (“CTC”) and all similarly situated LECs as “incumbent local exchange carriers” (“ILECS”) pursuant to Section 251(h)(2) of the Communications Act.¹

ALTS is the national trade association representing facilities-based competitive local exchange carriers. For all the reasons articulated in the CTC, Electric Lightwave Inc., and Time Warner comments ALTS urges the Commission not to grant the petition. While Congress clearly contemplated that there may be instances in which new entrants may occupy a position in the market “comparable” to an ILEC, that situation is not before the Commission. The petition is premature and attempts to have the Commission impose regulatory requirements on CLECs that Congress choose not to impose on them unless and until unless very specific conditions were met. The Idaho Commission has not shown how CTC satisfies the requirements of Section

¹ ALTS did not file initial comments in this proceeding. Comments were filed by CTC, Time Warner, ELI, U S WEST, MCI Worldcom, AT&T, Telecommunications Resellers Ass’n and Ameritech.

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251(h)(2). The more general ruling that the Idaho Commission seeks with respect to all “similarly situated LECs” is at the same time both too vague and overly broad and there is no showing of why such a ruling would benefit consumers or be in the public interest.

I. THE COMMISSION MAY NOT GRANT THE PETITION WITH RESPECT TO CTC.

The Idaho petition is based entirely upon assumptions about CTC, what its position in the market will be, and actions that the Hidden Springs consumers may or may not take. Simply stated and putting all other factual and legal issues aside for the moment, the Idaho petition is premature. CTC is in the process of constructing telecommunications facilities capable of providing telecommunications services to the Hidden Springs residents. Service is not, however, being provided to anyone in the area today by CTC except for the Hidden Springs’ developer. While it is likely that many of the Hidden Springs residents will want to obtain local exchange service from CTC, and that is presumably why CTC has made the business decision to invest in the area, there is simply no guarantee that it will provide service to any resident. CTC has no “position in the market” at the moment. Therefore, it cannot possibly have a position “comparable” to that of an ILEC.

In addition to basing the petition on assumptions of market conditions that may or may not develop in the future, the Idaho PUC request is based upon a belief that CTC has an “exclusive” agreement with a developer of a new housing development and its belief that imposing the Section 251(c) requirements on the first carrier with facilities capable of providing local exchange service to customers is the only way to ensure that consumers in that geographic area have a choice in carriers. The members of ALTS generally have been extremely critical of contracts that are “exclusive” with respect to placement of facilities, whether between a

municipality and a carrier or between a landlord and carrier or any other contracts that give “exclusive” access to rights-of-way or other facilities necessary to the provision of service.² But, the Comments of CTC and the contract appended thereto, clearly establish that its agreement with the developer is in no way “exclusive” either in an attempt to have CTC be the sole provider of services³ or in an attempt to limit access to important rights-of-way. As noted in CTC’s comments, the developer has, in fact, granted to TCI access to utility trenches on the same terms and conditions as granted to CTC.⁴

In the Idaho petition and in the comments supporting the petition an attempt is made to show how the prerequisites of Section 251(h)(2) will be satisfied by CTC’s (hoped for) provision of service to residents of Hidden Springs. For example, MCI argues that “CTC will control the essential bottleneck facilities” and that “[i]n essence CTC will have the market power, economies of density, connectivity, scale, and control of the local network . . . that is comparable to that possessed by incumbent LECs under section 251(h)(1). Simply saying it does not make it so, however. The members of ALTS, who have spent the past three years attempting to establish themselves in many markets across the country are at a loss to understand

² See, e.g., Comments of the Association for Local Telecommunications Services in In re The Petition of the State of Minnesota for a Declaratory Ruling, CC Dkt No 98-1 (filed March 9, 1998).

³ The CTC Agreement explicitly states that “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.”

⁴ It is precisely this type of non-discriminatory access to poles and ducts that the Commission ought to be enforcing to ensure competitive access in new developments. Regulators need to promote and enforce non-discriminatory access to rights-of-way and to the customers of multi-tenant buildings (through access to the buildings and inside wire) rather than imposing the full panoply of ILEC regulation on new entrants.

how how these commenters could compare CTC to the majority of the ILECs with whom they have been dealing. While the importance of control over a local loop cannot be overstated, there are many advantages that established ILECs in this country have that CTC does not have. In general the ILECs have tremendous financial resources, an entrenched presence in the community, and significant economies of scale that no CLEC has.⁵

II. EVEN IF CTC WERE TO SATISFY THE REQUIREMENTS OF SECTION 151(h)(2), THE COMMISSION CANNOT GRANT THE FURTHER REQUEST TO EXTEND ANY RULING TO ALL “SIMILARLY SITUATED” LECs .

In addition to asking for a ruling on CTC, the Idaho petition asks the Commission to issue a ruling that all “similarly situated” carriers be treated as incumbents. The Idaho petition apparently views a telecommunications carrier as “similarly situated” if it is a carrier that provides service “to customers in a geographic area in which no other telephone corporation has facilities capable of providing local exchange service to customers.”⁶ There is no definition of geographic area proposed, nor does the Idaho PUC define what is meant by “facilities capable of providing local exchange service.” The requested rule is simply too vague to be adopted.

At the same time, because the requested ruling is vague, it can be read very broadly. What the Idaho petition and supporting comments appear to seek is a ruling that could result in every CLEC that has facilities that extend to even one customer (when those facilities are the only

⁵ In this particular case, of course, Hidden Springs is in the U S WEST territory. If U S WEST wanted to serve the Hidden Springs area it would have all the advantages of an incumbent because it has served the surrounding area for years.

⁶ IPUC Petition at 13.

facilities to that customer) being treated as an ILEC.⁷ And, apparently, the CLEC would be treated as an ILEC for all purposes, based upon those facilities. There is nothing in the Act or legislative history that would indicate that that result is what Congress was seeking when it adopted Section 251(h)(2). If Congress had wanted any carrier which owns the only connection to a building or area to be treated as an ILEC, it could have easily written that into the law. But it did not.

It must be remembered that the third prong of the Section 251(h)(2) test is whether treatment of the comparable carriers is “consistent with the public interest, convenience, and necessity and the purposes of this section.” Therefore, before ever making a determination under this section, the Commission must balance the benefits to competition of requiring new entrants to comply with the Section 251(c) requirements with the adverse effects such a requirement would have on investment and the desire of competitive carriers to take the risks that they are taking. This the Idaho petition has not done.

CONCLUSION

There may be circumstances when a CLEC acquires a position in the market comparable to an ILEC. The facts of this case do not merit such a finding, however. Clearly, CTC cannot occupy a position in the market similar to an ILEC when there isn't even a market at this time.

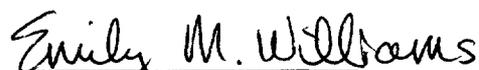
⁷ Ameritech specifically states:

Whether it is an island, a community, or simply a building, the principle is the same: the first carrier to deploy facilities to that area has all the attributes of an incumbent LEC, and unless it is treated as such, consumers will thereafter be captive customers. The Commission should rule that any LEC that . . . owns the only loops that have been deployed to a new community or structure will be treated as an ILEC under section 251(h)(2)

Comments of Ameritech at 3.

The Idaho petition seeks a broad ruling that could result in virtually all facilities based CLECs being treated as ILECs for all purposes. The Commission should not take such precipitous action when there is no showing of need for such a ruling and when the Commission has not established any guidelines for doing so.

Respectfully Submitted,

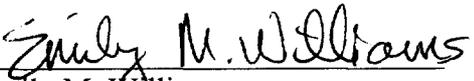


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January 21, 1999

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments of the Association for Local Telecommunications Services was served January 26, 1999, on the following persons by first-class mail or my hand service, as indicated.


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