

#1998-01190

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IDAHO PUBLIC UTILITIES COMMISSION

*Mr. Wain*

Attorneys for Idaho Telephone Association

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE ADOPTION OF TEMPORARY AND PROPOSED RULES GOVERNING ACCESS AND INTERCONNECTION IN UNSERVED AREAS, IDAPA 31.42.01.401 *et seq.*

CASE NO. 31-4201-9801

IDAHO TELEPHONE ASSOCIATION'S COMMENTS

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The Idaho Telephone Association ("ITA"), by and through its attorneys Givens Pursley, LLP, submits the following Comments in the above entitled case. For the reasons stated below, the ITA urges the Commission to withdraw the proposed rules to be codified at IDAPA 31.42.01.401, *et seq.*

**A. The proposed rules attempt to impose the obligations of incumbent local exchange companies on certain competitive local exchange companies.**

With the passage of the Telecommunications Act of 1996 (the "Act"), Congress enacted a series of sweeping pro-competitive reforms of the Communications Act of 1934. In particular, the Act places upon all telecommunications carriers certain obligations designed to promote competition in local exchange telephone markets. See Iowa Utilities Bd. v. F.C.C., 109 F.3d 418, 421 (8th Cir. 1996), motion to vacate stay denied 117 S.Ct. 429 (1996). Sections 251(a) and (b) of the 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). Section 251(c) places additional, and more onerous, obligations on those carriers defined as "incumbent local exchange carriers" ("ILEC"). ILECs are defined as local exchange carriers that provided service on February 8, 1998 as members of a national exchange association, or their successors or assigns. *See* 47 U.S.C. § 251(h)(1). Under section 251(c), these companies are required 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. v. F.C.C., 109 F.3d 418 (8th Cir. 1996), motion to vacate stay denied 117 S.Ct. 429 (1996).

The Idaho Public Utilities Commission ("PUC") rules under consideration in this case attempt to impose section 251(c) ILEC duties on non-incumbent carriers. The proposed rules provide that, "a facilities based competitor [who] builds facilities to provide basic local exchange service within an unserved area" is subject to the 251(c) obligations of an ILEC. The rules carefully avoid an actual designation of competitive carriers as an ILEC because the authority to designate a non-incumbent as an ILEC is statutorily reserved for the Federal Communications Commission. *See* 47 U.S.C. § 251(h)(2). Instead the PUC attempts to skirt this statutory prohibition by simply restating each of the section 251(c) obligations and applying them to facilities based competitors that serve unserved areas.

Thus, proposed Rules 402 and 403 are virtually identical to 47 U.S.C. § 251(c)(2), which requires an ILEC to provide interconnection with a competitive

local exchange carrier ("CLEC") network. Proposed Rule 404 is virtually identical to 47 U.S.C. § 251(c)(3), which requires an ILEC to provide unbundled access. Proposed Rule 405 is virtually identical to 47 U.S.C. § 251(c)(4), which requires an ILEC to provide for resale of services on certain terms. Proposed Rules 406 and 407 are virtually identical to 47 U.S.C. § 251(c)(6), which requires an ILEC to provide for physical collocation. Finally, proposed Rule 408 is virtually identical to 47 U.S.C. § 251(c)(1), which requires an ILEC to negotiate in good faith regarding these provisions. In short, the PUC's rules have no other purpose than to list each of the section 251(c) duties and apply them to certain types of competitive local exchange carriers ("CLECs"). This is an obvious subterfuge and a thinly veiled attempt to circumvent the law.

**B. The Idaho Public Utilities Commission is prohibited from enacting the proposed rules by the doctrine of preemption.**

It is black letter law that, pursuant to the authority of the supremacy clause of the United States Constitution, Congress may preempt state laws. U.S. Const. Art. 6, cl.2. In determining whether Congress has in fact preempted state law, the courts must look to congressional intent. Such intent can be either express or implied. Clearly, an express preemption clause in a federal statute is the best evidence of congressional intent to preempt state law. "However, `p]re-emption . . . is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Time Warner Cable v. Doyle, 66 F.3d 867, 875 (7th Cir. 1995) (citations omitted). Preemption may also arise in other ways, as where Congress "manifests its intent to occupy an entire field of regulation." Id. Finally, federal regulations which are properly promulgated

and in accordance with statutory authorization “are equally as preemptive of state law as federal statutes.” Still v. Michaels, 791 F.Supp. 248, 252 (D. Ariz. 1992);

In the present case, the PUC’s proposed rules are clearly preempted by both the federal Act and the FCC’s regulations. The federal Act defines the obligations of ILECs with great specificity, and it further provides that the FCC alone has the power to designate non-incumbents as ILECs. 47 U.S.C. § 251(h)(2). The exclusive designation of the FCC as the sole agency with this power is in marked contrast to other portions of the Act where Congress expressly reserved certain powers to the states and their regulatory commissions. Under these circumstances, it is abundantly clear that Congress did not intend to provide states with the discretion to alter, either directly or indirectly, the respective statutory duties of incumbents and non-incumbents. This is particularly true when, as is the case here, the local agency’s rules are generally duplicative of the superior jurisdiction’s statutory language. In such cases, the courts have routinely held that the very act of duplication indicates that Congress has fully occupied a particular area, and all state regulations on the subject are automatically preempted.

As it happens, there is an Idaho case that is directly in point on this issue. In Envirosafe Services of Idaho v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987), the state of Idaho adopted the Hazardous Waste Management Act of 1983, and designated the Board of Health and Welfare as the enforcing regulatory agency. Owyhee County thereafter adopted a county ordinance that was “largely duplicative of the HWMA.” *Id.* at 690-691. The court unanimously struck down the county ordinance on preemption grounds even though there was no direct conflict between the county rule and the state statute. The court noted that, “such extensive

duplication leads to the inescapable conclusion that the area has already been fully regulated” and therefore preempted. *Id.* at 691. *See also Heck v. Commissioners of Canyon County*, 123 Idaho 826, 853 P.2d 571 (1993). This rule is all the more compelling in this case where the regulations in question are not only duplicative, but also at odds with, superior federal law.

Even a cursory reading of the FCC’s regulations leads to the same conclusion.

The FCC’s rules state, in pertinent part, that

(a) A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission [FCC] issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.

(b) A state commission, or any other interested party, may request that the Commission [FCC] issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs pursuant to section 251(h)(2) of the Act.

47 CFR ch.1 § 51.223. These regulations not only preempt a state’s attempt to designate a non-ILEC as an ILEC, they also explicitly prohibit an attempt to accomplish the same ends indirectly. The FCC has anticipated exactly the type of gamesmanship the PUC is attempting in this case by forbidding any attempt to, “impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act.” 47 CFR ch.1 § 51.223 (emphasis added).

The language of this regulation could not be more clear. It directly preempts the PUC’s proposed rules in the plainest possible terms. There can be no doubt that this regulation is absolutely binding upon the PUC in the same manner as any other law. *Metropolitan Dade County v. TCI TKR of S. Florida*, 936 F. Supp. 958,

959 (S.D. Fla. 1996) (“An order or regulation of the FCC has. . . the force and effect of law”); Still v. Michaels, *supra*. Consequently, the PUC has no jurisdiction to act on this subject, and its proposed regulations are void *ab initio* as a result of preemption by the FCC. See Southwestern Bell v. Public Utility Commission of Texas, 812 F.Supp. 706 (W.D. Tex. 1993).

The PUC cannot justify its patently unlawful rules as an attempt to test the validity of the FCC’s regulations. If the PUC persists in its present course, any aggrieved party will be entitled to seek enforcement of the FCC’s order through an action in federal district court. 47 U.S.C. § 401(b). In such a case the PUC will not be allowed to question the validity of the FCC’s preemptive regulations.

When asked to determine if a person, which includes a state public utility commission, has violated an FCC order, a district court must accept as valid the FCC order in question.

Southwestern Bell v. Public Utility Commission of Texas, 812 F.Supp. 706, 708 (W.D. Tex. 1993). The reason for this rule is that, “exclusive review of final FCC orders lies in the court of appeals.” Still v. Michaels, 791 F.Supp. 248, 253 (D. Ariz. 1992); Southwestern Bell v. Public Utility Commission of Texas, *supra*; 47 U.S.C. § 402. Consequently, if the PUC wishes to attack the FCC’s preemption rule, it must do so by initiating an action in the federal court of appeals rather than attempting to raise the issue by the promulgation of illegal rules.

Finally, if the PUC is operating under the mistaken impression that it can proceed in direct violation of the law without any adverse consequences other than eventual reversal in court, it should carefully reconsider its position. Pursuant to Section 12-117, Idaho Code, a prevailing party in any administrative or civil judicial proceeding is entitled to recover reasonable attorney’s fees and expenses from a

state agency if the court finds that the agency “acted without a reasonable basis in fact or law.” Idaho Code § 12-117(1). *See generally* Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994). These costs are to be recovered from the losing agency’s regular operating budget, and are to be accompanied by a report to the legislature detailing the amount of the fees and expenses awarded and paid.

In summary, the PUC has no jurisdiction or authority to take any action whatsoever regarding the subject matter of the proposed rules. This is doubly so where the proposed rules are expressly preempted in the clearest possible language. Nor can the PUC’s proposed rules be rationalized as an attempt to litigate the validity of the FCC’s preemptive rules because that issue can only be raised by bringing an original action against the FCC in the federal court of appeals. Under these circumstances, a decision by the PUC to permanently promulgate the proposed rules will be a costly and futile, as well as unlawful, exercise.

RESPECTFULLY SUBMITTED this 28th day of October, 1998.



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Conley Ward  
GIVENS PURSLEY LLP  
Attorney for Idaho Telephone Association

**CERTIFICATE OF SERVICE**

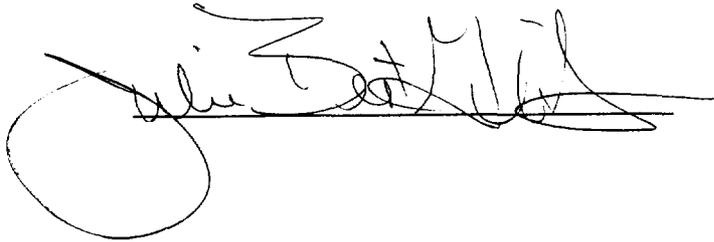
I hereby certify that on this 28th day of October, 1998, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Myrna Walters, Secretary  
Idaho Public Utilities Commission  
472 W. Washington Street  
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A handwritten signature in black ink, appearing to read "Alice B. Smith", is written over a horizontal line. A large, loopy flourish extends from the end of the signature down and to the left.

**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** )  
 )

CC Docket No. 98-221

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**AFFIDAVIT OF TERRI CARLOCK**

TERRI CARLOCK, being first duly sworn and upon oath, deposes and states as follows:

1. I am the Accounting Section Supervisor with the Staff of the Idaho Public Utilities Commission and was requested to explain how investments in new developments are treated in the regulatory process.

2. My understanding of the Hidden Springs Community Development is that when fully developed it will include as many as 915 residences with as many as six (6) access lines per home and an undetermined number of small businesses. I reviewed the development agreement between Hidden Springs and CTC Telecom. According to the agreement, the developer paid CTC a non-refundable initial payment of \$60,000 and a refundable facilities charge of \$35,250. The refund of the \$35,250 facilities charge is directly tied to the number of customers using CTC.

3. Rate regulated companies are at risk for facilities they build on speculation. Every investment in plant by a rate regulated company must be justified as "used and useful" before it can be included in rate base for the purposes of earning a rate of return. Where a rate regulated company has a tariff addressing speculative investments, such as building facilities in a new development, it must comply with that tariff or run the risk that the investment will be disallowed.

4. As a regulated company, U S WEST is required to follow its own tariff. In this case, where CTC negotiated an exclusive marketing agreement, U S WEST would have been assuming

a large risk that even if it could have built its facilities at the time of construction, its investment may not be deemed a prudent expenditure.

5. Under the U S WEST tariff in effect at the time the Hidden Springs Community Development contract was being negotiated, U S WEST was required to have a development contract with the Developer/Builder of any development of more than four lots. The minimum terms and conditions that must be contained in such agreement were set forth in Advice No. 97-15-S, section 4.4 and what is now section 104. Section 104 contains those tariff conditions that were in effect during the relevant period -- CTC's contract was signed April 7, 1998. (These sections were removed from the tariff effective July 7, 1998.) A comparison of CTC's development contract with U S WEST's tariffed facility charges (section 104.4.1) illustrates that any development agreement with U S WEST would have required the Hidden Springs Developer to match his payment to CTC (\$60,000) with a similar payment to U S WEST. The Developer did not contract with U S WEST.

FURTHER YOUR AFFIANT SAITH NAUGHT.

RESPECTFULLY submitted at Boise, Idaho this 25<sup>th</sup> day of January 1999.

Jenni Carlock  
TERRI CARLOCK  
Accounting Section Supervisor  
Idaho Public Utilities Commission Staff

State of Idaho     )  
                          ) ss  
County of Ada     )

SUBSCRIBED AND SWORN to before me this 25<sup>th</sup> day of January 1999.

Mary Jo Nelson  
Notary Public for Idaho, residing at Boise Idaho  
My Commission expires: 6-27-2004

**U S WEST COMMUNICATIONS**  
**Basic Local Exchange**  
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IDAHO PUBLIC UTILITIES COMMISSION  
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*Theresa J. Stalena* SECRETARY

**4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

**4.1 GENERAL**

1. The provision of telephone service may require the payment of a Line Extension, special or temporary construction charge by the customer ordering telephone service. These charges are in addition to the regular rates and charges applicable for the exchange service provided. If facilities are requested by a developer/builder for single family residential dwellings, a Provisioning Agreement for Housing Developments is required. (C)  
(C)  
(C)  
(C)
2. Advance payments or deposits for exchange service, if required under the regulations contained in Section 2 of this Tariff, shall be paid at the time agreement is made between the applicant and the Company to provide such exchange service.
3. With approval of the Company, arrangements may be made for the payment of Line Extension charges in monthly installments spread over a reasonable period, not to exceed one year. All unpaid installments become due upon termination of service. (C)  
(T)
4. With approval of the Company, a customer may furnish material, transportation, labor, board or lodging as all or part payment of the charge in lieu of cash.
5. Except as specifically provided for service station lines, the ownership of any pole line, circuit or other facilities provided wholly or in part at the expense of an applicant under this Tariff shall at all times be vested exclusively in the Company or another company with which the Company has a joint agreement.
6. Except as otherwise provided herein, the regulations in this Tariff contemplate that the type of construction required to provide the quantity and grade of telephone service involved will be determined by the Company. The customer will be required to pay the added costs involved when a different type of construction than that proposed by the Company is desired.
7. Where applicants are so located that it is necessary or desirable to use private and/or government right-of-way to furnish service, such applicants may be required to provide or pay the cost of providing such right-of-way including survey costs, in addition to any applicable charges.

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**4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

**4.1 GENERAL (Cont'd)**

8. Applicants who request service at a location where facilities have never existed, and the Company must extend facilities in order to provide the requested service may be required to pay Line Extension charges in addition to the rates and charges applicable to establish service. Additional charges may apply as provided in paragraphs 6 and 7 preceding, and for special types of construction, new areas of land development and temporary construction. (C)
9. All necessary construction will be undertaken at the discretion of the Company consistent with budgetary responsibilities and consideration for the impact on the general body of subscribers. (C)
10. Service station customers who request local exchange service will be classed as new applicants for the application of Line Extension charges. New service station customers will be assessed the appropriate Line Extension charge applicable at the point of connection. (C)

**4.2 LINE EXTENSION CHARGES**

1. Applicants who request service at a location where facilities have never existed,, and the Company must extend facilities in order to provide the requested service, may be required to pay Line Extension charges in addition to the rates and charges applicable to establish service. (C-M)
2. The Company will grant a one - time credit allowance of \$1,600 for the premises. Charges for the Line Extension in excess of the credit allowance shall be based on the cost to the Company to place the facilities. The credit allowance will be applied towards the written quote to determine customer charges. (C-M)
3. The terms and conditions stated in 4.1 also apply to the provision of Line Extensions. (N)  
(N)  
(D)

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4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.4 PROVISIONING AGREEMENT FOR HOUSING DEVELOPMENTS

(D)  
(N)

A. Description

A Provisioning Agreement for Housing Developments (PAHD) is a contractual arrangement between the Company and the Developer/Builder for the provision of distribution facilities, including conduit for the service lateral trench within new areas of residential development.

B. Terms and Conditions

1. A PAHD is required where Developers/Builders plan to develop four or more lots. Less than four lots will be treated according to the terms set forth under Line Extension Charges.
2. The Developer/Builder will provide trench and backfill for the facilities and be responsible for those costs. In areas where the Company has trench and backfill agreements with other utilities, the Developer/Builder is responsible for the Company's trench and backfill cost.
3. To accommodate Developer/Builder coordination schedules, with the Company's approval, the Developer/Builder has the option of placing Company provided facilities in the trench.
4. The PAHD will include, but is not limited to: a description of the development; an addressed, recorded plat; trench and backfill specifications; easements; surface grade requirements; and coordination of inspection schedules.
5. If the Developer is not the Builder, the Builder or premises owner will be responsible for the provision of the trench including, at a minimum, one inch conduit with adequate pull string, for the service drop to the living unit.
6. The Company will provide the facilities at no charge to the Developer/Builder as long as the cost does not exceed the established cap, which shall equal the distribution and drop portion of the average exchange loop investment, times the number of lots in the development. The Company may require payment by the Developer/Builder of all costs in excess of the cap prior to the start of any required construction.

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**4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

**4.4 PROVISIONING AGREEMENT FOR HOUSING DEVELOPMENTS (M)**

**B. Terms and Conditions (Cont'd)**

7. Distribution facilities covered in the PAHD cannot be used for subsequent developments until they are covered by a new PAHD. (N)

8. The PAHD may vary terms and conditions as appropriate. (N)

**4.5 SPECIAL SERVICE ARRANGEMENTS (M1)  
(M2)**

**4.5.1 SPECIAL ASSEMBLIES, FACILITIES AND FINISHES OF EQUIPMENT**

Rates and charges in connection with special assemblies, special facilities and special finishes of equipment will be based on the costs involved in each individual case. (M2)

- (M) Material moved to Page 2.
- (M1) Material moved to Section 104.
- (M2) Material moved from Page 12.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)**

**104.4 UNUSUAL INSTALLATIONS (T)**

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)**

**A. Facility Charges for New Areas of Residential Land Development**

1. A facility charge (refundable) applies to the developer when the Company undertakes the provision of facilities for exchange service or other services to a residential development of 4 or more lots or living units before telephone demand is known within the development. Extensions into or additions of 4 or more lots or living units to new or existing Mobile Home, Trailer, and RV Parks requiring telephone facilities to individual spaces will be considered residential developments. This Tariff applies to projects both inside and outside the base rate area.
2. The facility charge will be \$215 per lot/living unit within the development and is payable in full by the developer prior to the start of any required construction by the Company.
3. The Company will not incur expenses prior to receiving payment from the developer equal to the total amount due for the development. (M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)**

**104.4 UNUSUAL INSTALLATIONS (T)**

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)**

**A. Facility Charges for New Areas of Residential Land Development (Cont'd)**

4. The Company and the developer will enter into a written land development agreement for provision of all additional facilities necessary to provide service to the development. The agreement will include the following:
  - a. A description of the development.
  - b. A description of the telephone facilities to be provided.
  - c. The amount of the facility charge.
  - d. A provision for the refund of the facility charges at \$430 per working access line, but not to exceed the amount paid by the developer, if at any time within 5 years of the date of the execution of the land development agreement, 50% of the access lines specified in the written agreement are in service.
  - e. A provision for the developer to notify the Company in writing when, in their judgment, fifty percent fill has been attained. Final evaluation will be made by the Company.
  - f. A date beyond which this refund provision will no longer apply. (M)

(M) Material moved from Section 4.

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104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)

104.4 UNUSUAL INSTALLATIONS (T)

104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)

A. Facility Charges for New Areas of Residential Land Development (Cont'd)

- 5. Residential developments with multi-family dwellings will be assessed \$215 per living unit.
- 6. If the development does not reach a 50% in-service rate within 5 years, the developer will not be entitled to any refund.
- 7. If a new community dial office or feeder facilities must be provided specifically to serve the development, additional charges will apply to the developer based on the nonrecoverable, nonreusable costs involved. These facilities and associated charges will be included in the agreement.
- 8. The Company will use its best efforts to assure the availability of CO facilities consistent with its obligations to provide exchange service.
- 9. Applicants for service within a new area of land development located outside of the base rate area will be required to pay a zone connection charge for each exchange access line requested.
- 10. Where, in the Company's judgment, a development involves considerable risk and there is reason to believe that the cost of the requested facilities cannot be recovered, the Company reserves the right to extend facilities to the development as required by specific requests for customer service. (M)

(M) Material moved from Section 4.

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**U S WEST COMMUNICATIONS**  
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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)**

**104.4 UNUSUAL INSTALLATIONS (T)**

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)**

**A. Facility Charges for New Areas of Residential Land Development (Cont'd)**

11. For requests for telephone service within land development areas for which there is no written land development agreement, the construction charges for each applicant will be \$215 per lot or living unit. This charge to individual applicants is not refundable.
12. If the Company determines that requests for service described in paragraph 11 preceding, should be filled by providing temporary facilities and if temporary construction charges would be less than the per lot charge, the applicant will be charged the temporary construction charge.

**B. Facility Charges for New Areas of Commercial Land Development**

1. A facility charge applies to the developer when the Company undertakes the provision of feeder and/or distribution facilities for exchange or other services to industrial parks; business, professional or institutional complexes; and apartment complexes. Developments where multi-family structures are to be rented or leased are included in this Tariff.
2. The facility charge will apply both inside and outside the base rate area.
3. A non-refundable charge applies for entrance facilities placed on private property, be it a parcel of land or a lot within a subdivision.
4. A refundable charge applies for back-bone feeder and/or distribution facilities placed or committed to serve commercial land developments.
5. The Company and the developer will enter into a written land development agreement for the provision of the requested facilities. (M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES** (T)(M)

**104.4 UNUSUAL INSTALLATIONS** (T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS** (T)

**B. Facility Charges for New Areas of Commercial Land Development (Cont'd)**

6. The facility charge will equal the estimated cost of the facilities requested and is payable in full by the developer prior to the start of any required construction or commitment of facilities by the Company.
7. Where facilities are to be placed in a commercial development, the developer must provide conduit, trenching and backfill, unless negotiated otherwise.
8. In lieu of a non-refundable charge, as outlined in 3. above, the developer may provide the entrance facilities from the utility easement to the protector or network interface on the following conditions:
  - a. Facilities must be installed in accordance with rules adopted by the Federal Communications Commission as amended and the most recent edition of the National Electrical Code.
  - b. Facilities must be sized by joint agreement between the Company and the developer.
  - c. All inspections, splicing and acceptance testing will be performed by the Company and the cost will be non-refundable.
  - d. Maintenance of the entrance cable will be provided by the Company. (M)

(M) Material moved from Section 4.

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104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)

104.4 UNUSUAL INSTALLATIONS (T)

104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)

B. Facility Charges for New Areas of Commercial Land Development (Cont'd)

9. Refunds, where applicable, will be based on a five-year agreement and will be determined as follows:

- a. A declining refund factor of 100% the first year, 90% the second year, 80% the third year, 70% the fourth year and 60% the fifth year, will be applied to the refund formula in e. below based on lines in service subject to the facility agreement. Refunds will not be applicable to facilities placed in service beyond 5 years from the date of the facility agreement.
- b. The cost per line will be determined by dividing the total refundable facility charge by the number of lines negotiated.
- c. A minimum of 40% of the lines negotiated must be in service before a refund is applicable.
- d. Determination of refunds will be limited to once per year and must be initiated by the developer in writing.
- e. The following formula will determine the amount of refund:

$$\begin{array}{ccccccc} \text{INCREASED} & & & & & & \\ \text{LINES IN} & & \text{COST/} & & \text{REFUND} & & \\ \text{SERVICE} & \times & \text{LINE} & \times & \text{FACTOR} & = & \text{REFUND} \end{array}$$

10. Applicants for service within a new area of land development located outside of the base rate area will be required to pay a zone connection charge for each exchange access line requested. (M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

(T)(M)

**104.4 UNUSUAL INSTALLATIONS**

(T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (Cont'd)**

(T)

**C. Temporary Development Charge**

1. A temporary development charge will apply when, in the opinion of the Company, substantial evidence exists indicating that exchange telephone facilities will not be required beyond a ten (10) year (or less) time period within the specific development.
2. Normally the temporary development charge shall be collected in advance from the developer and shall be in the amount of the present worth of the undepreciated portion of the nonrecoverable, nonreusable investment required to provide exchange services to the development assuming a depreciation period equal to the estimated economic life of the facilities provided.
3. The Company and the developer will enter into a written agreement covering a time period not to exceed 10 years. Contract considerations include the following:
  - a. Whenever possible the above agreement shall be incorporated with the land development agreement governing facility charges in new areas of land development and all terms of that contract as described in 4.4.1.A.4., preceding, shall apply except that the facility charge refund per exchange access line shall be reduced by an amount equal to the temporary development charge divided by the estimated number of exchange access lines within the development.

(M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

(T)(M)

**104.4 UNUSUAL INSTALLATIONS**

(T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS**

(T)

**C. Temporary Development Charge (Cont'd)**

4. The development shall be reclassified permanent under the following conditions:
  - a. On the fifth anniversary date of the contract the Company determines that conditions area such that temporary status no longer applies to the specific development.
  - b. On the sixth and subsequent anniversary dates prior to the tenth anniversary date of the contract the developer petitions the Company in writing for a review of the development's temporary status and the Company determines that temporary status no longer applies to the specific development.
  - c. On the tenth anniversary of the contract, if exchange access lines remain in service within the development, the development shall be classified permanent.
5. Refunds of all or a portion of the temporary development charge shall be made to the developer upon reclassification of the development to permanent based on primary exchange access lines in service as follows:
  - a. Determine the ratio of exchange access line in service to the estimated net primary exchange access lines as specified in the agreement.
  - b. The refund shall be an amount equal to the total temporary development charge times the ratio in 5.a., preceding.
  - c. If a facility charge has been collected under a land development contract, the exchange access line ratio in 5.a., preceding, shall not exceed the exchange access line ratio calculated using exchange access lines in service as of the fifth anniversary of the contract.
  - d. There shall be only one refund made of the temporary development charge, or portion thereof, during the term of the contract.

(M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)**

**104.4 UNUSUAL INSTALLATIONS (T)**

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)**

**C. Temporary Development Charge (Cont'd)**

6. In those instances when it is necessary to collect the temporary development charge from individual customers residing within the development, the temporary development charge shall be converted to a monthly increment per exchange access line which shall be added to each customer's monthly billing.
  - a. Collection of the monthly increment shall terminate, if in the opinion of the Company, conditions indicate that the development has attained permanent status or on the tenth anniversary date of initial exchange access line installation within the development whichever occurs first.
  - b. Individual customers residing within a temporary development may form an association for the purposes of negotiating a temporary development contract with the Company. Such association will be accorded the same rights, privileges and obligations as a developer under the terms of the written agreement.
  - c. No refunds of the temporary development charge will be made to individual customers.
7. The temporary development charge applies in addition to any monthly, construction, zone connection or service charges applicable under existing tariffs. (M)

(M) Material moved from Section 4.

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**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** )  
 )

CC Docket No. 98-221

RECEIVED

JAN 26 1999

FCC MAIL ROOM

**AFFIDAVIT OF JOSEPH CUSICK**

JOSEPH CUSICK, being first duly sworn and upon oath, deposes and states as follows:

1. I am chief of the Telecommunications Section with the Staff of the Idaho Public Utilities Commission and was requested to review the CTC/Hidden Springs Community Development Agreement, Idaho Public Utilities Commission records, and U S WEST's tariff. I also applied commonly accepted regulatory concepts.

2. U S WEST Communications, Inc. is a rate regulated Bell operating company in Idaho and has a tariff on file with the IDAHO PUBLIC UTILITIES COMMISSION. My understanding of the Hidden Springs Community Development is that when fully developed it will include as many as 915 residences with as many as six (6) access lines per home and an undetermined number of small businesses. This means that when the Development is completed, CTC could be providing in excess of 3,000 access lines. I also reviewed the development agreement between Hidden Springs and CTC Telecom. According to the agreement, the developer paid CTC a non-refundable initial payment of \$60,000 and a refundable facilities charge of \$35,250. The refund of the \$35,250 facilities charge is directly tied to the number of customers using CTC.

3. Under the U S WEST tariff in effect at the time the Hidden Springs Community Development contract was being negotiated, U S WEST was required to have a development contract with the Developer/Builder of any development of more than four lots. The minimum terms

and conditions that must be contained in such agreement were set forth in Advice No. 97-15-S, section 4.4 and what is now section 104, attached to this Affidavit. Section 104 contains those tariff conditions that were in effect during the relevant period -- CTC's contract was signed April 7, 1998. (They were removed from the tariff effective July 7, 1998.) A sample development contract is included in the tariff. *See* attached. A comparison of CTC's development contract with U S WEST's tariffed facility charges (section 104.4.1) illustrates that any development agreement with U S WEST would have required the Hidden Springs Developer to match his payment to CTC (\$60,000) with a similar payment to U S WEST. The Developer did not contract with U S WEST.

4. U S WEST could not simply have demanded the Developer include its facilities at the time of construction without any agreement. U S WEST had a tariff in effect that precluded that. Without an agreement, the first question would be whether the Developer/Builder is required to provide trench and backfill for the facilities at no cost. In addition, there are more issues to be covered by an agreement than simply costs. The trench and backfill specifications, easements, surface grade requirements and how are inspections coordinated are just the minimum issues that need to be addressed in an agreement. Without an agreement, in my opinion, U S WEST could not build facilities at the time the development was under construction. There was no customer requesting service and this was still private property.

5. In addition, in the face of an agreement requiring the Hidden Springs Community Developer to pay CTC a non-refundable \$60,000, I do not believe that the developer would enter into another agreement with any other local exchange carrier, whether it is U S WEST or some other LEC, to over build CTC's facilities. There are several factors that lead me to that conclusion. First, any other LEC would have similarly required a non-refundable payment up front. In addition, the agreement requires the developer to exclusively market CTC's services for three (3) years. Finally, the developer receives a refund for every CTC customer up to the refundable \$35,250 facilities charge.

6. While it is true that once the Hidden Springs Community Development has residents, one of those residents could request telephone service from U S WEST, that customer would be required by the U S WEST tariff to pay all construction charges in excess of \$1600. *See* Section 4.2, attached. There is no way to definitively determine in advance what those charges might be. However, in my opinion it is likely that most customers in the Hidden Springs Community

Development would experience substantial construction charges in order to receive service from U S WEST over U S WEST's own facilities. The Idaho Public Utilities Commission Staff has some experience with the costs of constructing facilities to serve new customers in the same general area as the Hidden Springs Community Development. According to the Idaho Public Utilities Commission Staff files, one customer in 1997 located just one-half a mile north of the proposed Hidden Springs Community Development requested telephone service and the construction costs were quoted at over \$14,000. The customer also determined that wireless was not an option because of the mountainous terrain.

7. When the Staff reviewed the CTC Application for a Certificate of Public Convenience and Necessity, Staff also reviewed the area to determine whether Hidden Springs Community Development customers would realistically have access to wireless phones. Staff found that because of the geography, even wireless was problematic for this new community.

8. I reviewed the FCC Monitoring Report, CC Docket No. 98-202, dated December 1998, Table 3.22, indicating the number of loops by study area in Idaho. CTC's service area is the entirety of the Hidden Springs Community Development. According to that documents, when Hidden Springs Community Development is completed, CTC Telecom will be equal to or larger than the majority of the rural local exchange carriers in Idaho.

FURTHER YOUR AFFIANT SAITH NAUGHT.

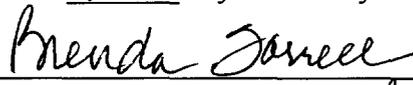
RESPECTFULLY submitted at Boise, Idaho this 21<sup>st</sup> day of January 1999.

  
\_\_\_\_\_  
JOSEPH CUSICK  
Chief Telecommunications Section  
Idaho Public Utilities Commission Staff

State of Idaho )  
                  ) ss  
County of Ada )

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of January 1999.



  
\_\_\_\_\_  
Notary Public for Idaho, residing at Boise Idaho  
My Commission expires: 5/6/2004

**U S WEST COMMUNICATIONS**  
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**4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

**4.1 GENERAL**

1. The provision of telephone service may require the payment of a Line Extension, special or temporary construction charge by the customer ordering telephone service. These charges are in addition to the regular rates and charges applicable for the exchange service provided. If facilities are requested by a developer/builder for single family residential dwellings, a Provisioning Agreement for Housing Developments is required. (C)  
(C)  
(C)  
(C)
2. Advance payments or deposits for exchange service, if required under the regulations contained in Section 2 of this Tariff, shall be paid at the time agreement is made between the applicant and the Company to provide such exchange service.
3. With approval of the Company, arrangements may be made for the payment of Line Extension charges in monthly installments spread over a reasonable period, not to exceed one year. All unpaid installments become due upon termination of service. (C)  
(T)
4. With approval of the Company, a customer may furnish material, transportation, labor, board or lodging as all or part payment of the charge in lieu of cash.
5. Except as specifically provided for service station lines, the ownership of any pole line, circuit or other facilities provided wholly or in part at the expense of an applicant under this Tariff shall at all times be vested exclusively in the Company or another company with which the Company has a joint agreement.
6. Except as otherwise provided herein, the regulations in this Tariff contemplate that the type of construction required to provide the quantity and grade of telephone service involved will be determined by the Company. The customer will be required to pay the added costs involved when a different type of construction than that proposed by the Company is desired.
7. Where applicants are so located that it is necessary or desirable to use private and/or government right-of-way to furnish service, such applicants may be required to provide or pay the cost of providing such right-of-way including survey costs, in addition to any applicable charges.

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*Theresa J. Hallen* SECRETARY

4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.1 GENERAL (Cont'd)

8. Applicants who request service at a location where facilities have never existed, and the Company must extend facilities in order to provide the requested service may be required to pay Line Extension charges in addition to the rates and charges applicable to establish service. Additional charges may apply as provided in paragraphs 6 and 7 preceding, and for special types of construction, new areas of land development and temporary construction. (C)
9. All necessary construction will be undertaken at the discretion of the Company consistent with budgetary responsibilities and consideration for the impact on the general body of subscribers. (C)
10. Service station customers who request local exchange service will be classed as new applicants for the application of Line Extension charges. New service station customers will be assessed the appropriate Line Extension charge applicable at the point of connection. (C)

4.2 LINE EXTENSION CHARGES

1. Applicants who request service at a location where facilities have never existed,, and the Company must extend facilities in order to provide the requested service, may be required to pay Line Extension charges in addition to the rates and charges applicable to establish service. (C-M)
2. The Company will grant a one - time credit allowance of \$1,600 for the premises. Charges for the Line Extension in excess of the credit allowance shall be based on the cost to the Company to place the facilities. The credit allowance will be applied towards the written quote to determine customer charges. (C-M)
3. The terms and conditions stated in 4.1 also apply to the provision of Line Extensions. (N)  
(N)  
(D)

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4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.4 PROVISIONING AGREEMENT FOR HOUSING DEVELOPMENTS

(D)  
(N)

A. Description

A Provisioning Agreement for Housing Developments (PAHD) is a contractual arrangement between the Company and the Developer/Builder for the provision of distribution facilities, including conduit for the service lateral trench within new areas of residential development.

B. Terms and Conditions

1. A PAHD is required where Developers/Builders plan to develop four or more lots. Less than four lots will be treated according to the terms set forth under Line Extension Charges.
2. The Developer/Builder will provide trench and backfill for the facilities and be responsible for those costs. In areas where the Company has trench and backfill agreements with other utilities, the Developer/Builder is responsible for the Company's trench and backfill cost.
3. To accommodate Developer/Builder coordination schedules, with the Company's approval, the Developer/Builder has the option of placing Company provided facilities in the trench.
4. The PAHD will include, but is not limited to: a description of the development; an addressed, recorded plat; trench and backfill specifications; easements; surface grade requirements; and coordination of inspection schedules.
5. If the Developer is not the Builder, the Builder or premises owner will be responsible for the provision of the trench including, at a minimum, one inch conduit with adequate pull string, for the service drop to the living unit.
6. The Company will provide the facilities at no charge to the Developer/Builder as long as the cost does not exceed the established cap, which shall equal the distribution and drop portion of the average exchange loop investment, times the number of lots in the development. The Company may require payment by the Developer/Builder of all costs in excess of the cap prior to the start of any required construction.

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**4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

- (M)
- 4.4 PROVISIONING AGREEMENT FOR HOUSING DEVELOPMENTS**
- B. Terms and Conditions (Cont'd)
7. Distribution facilities covered in the PAHD cannot be used for subsequent developments until they are covered by a new PAHD. (N)
8. The PAHD may vary terms and conditions as appropriate. (N)
- 4.5 SPECIAL SERVICE ARRANGEMENTS** (M1)  
(M2)
- 4.5.1 SPECIAL ASSEMBLIES, FACILITIES AND FINISHES OF EQUIPMENT**
- Rates and charges in connection with special assemblies, special facilities and special finishes of equipment will be based on the costs involved in each individual case. (M2)

(M) Material moved to Page 2.  
(M1) Material moved to Section 104.  
(M2) Material moved from Page 12.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES** (T)(M)

**104.4 UNUSUAL INSTALLATIONS** (T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS** (T)

**A. Facility Charges for New Areas of Residential Land Development**

1. A facility charge (refundable) applies to the developer when the Company undertakes the provision of facilities for exchange service or other services to a residential development of 4 or more lots or living units before telephone demand is known within the development. Extensions into or additions of 4 or more lots or living units to new or existing Mobile Home, Trailer, and RV Parks requiring telephone facilities to individual spaces will be considered residential developments. This Tariff applies to projects both inside and outside the base rate area.
2. The facility charge will be \$215 per lot/living unit within the development and is payable in full by the developer prior to the start of any required construction by the Company.
3. The Company will not incur expenses prior to receiving payment from the developer equal to the total amount due for the development. (M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)**

**104.4 UNUSUAL INSTALLATIONS (T)**

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)**

**A. Facility Charges for New Areas of Residential Land Development (Cont'd)**

4. The Company and the developer will enter into a written land development agreement for provision of all additional facilities necessary to provide service to the development. The agreement will include the following:
  - a. A description of the development.
  - b. A description of the telephone facilities to be provided.
  - c. The amount of the facility charge.
  - d. A provision for the refund of the facility charges at \$430 per working access line, but not to exceed the amount paid by the developer, if at any time within 5 years of the date of the execution of the land development agreement, 50% of the access lines specified in the written agreement are in service.
  - e. A provision for the developer to notify the Company in writing when, in their judgment, fifty percent fill has been attained. Final evaluation will be made by the Company.
  - f. A date beyond which this refund provision will no longer apply. (M)

(M) Material moved from Section 4.

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*Regina J. Stalena* SECRETARY

**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

(T)(M)

**104.4 UNUSUAL INSTALLATIONS**

(T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS**

(T)

**A. Facility Charges for New Areas of Residential Land Development (Cont'd)**

5. Residential developments with multi-family dwellings will be assessed \$215 per living unit.
6. If the development does not reach a 50% in-service rate within 5 years, the developer will not be entitled to any refund.
7. If a new community dial office or feeder facilities must be provided specifically to serve the development, additional charges will apply to the developer based on the nonrecoverable, nonreusable costs involved. These facilities and associated charges will be included in the agreement.
8. The Company will use its best efforts to assure the availability of CO facilities consistent with its obligations to provide exchange service.
9. Applicants for service within a new area of land development located outside of the base rate area will be required to pay a zone connection charge for each exchange access line requested.
10. Where, in the Company's judgment, a development involves considerable risk and there is reason to believe that the cost of the requested facilities cannot be recovered, the Company reserves the right to extend facilities to the development as required by specific requests for customer service.

(M)

(M) Material moved from Section 4.

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**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)**

**104.4 UNUSUAL INSTALLATIONS (T)**

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)**

**A. Facility Charges for New Areas of Residential Land Development (Cont'd)**

11. For requests for telephone service within land development areas for which there is no written land development agreement, the construction charges for each applicant will be \$215 per lot or living unit. This charge to individual applicants is not refundable.
12. If the Company determines that requests for service described in paragraph 11 preceding, should be filled by providing temporary facilities and if temporary construction charges would be less than the per lot charge, the applicant will be charged the temporary construction charge.

**B. Facility Charges for New Areas of Commercial Land Development**

1. A facility charge applies to the developer when the Company undertakes the provision of feeder and/or distribution facilities for exchange or other services to industrial parks; business, professional or institutional complexes; and apartment complexes. Developments where multi-family structures are to be rented or leased are included in this Tariff.
2. The facility charge will apply both inside and outside the base rate area.
3. A non-refundable charge applies for entrance facilities placed on private property, be it a parcel of land or a lot within a subdivision.
4. A refundable charge applies for back-bone feeder and/or distribution facilities placed or committed to serve commercial land developments.
5. The Company and the developer will enter into a written land development agreement for the provision of the requested facilities. (M)

(M) Material moved from Section 4.

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104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)

104.4 UNUSUAL INSTALLATIONS (T)

104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (T)

B. Facility Charges for New Areas of Commercial Land Development (Cont'd)

6. The facility charge will equal the estimated cost of the facilities requested and is payable in full by the developer prior to the start of any required construction or commitment of facilities by the Company.
7. Where facilities are to be placed in a commercial development, the developer must provide conduit, trenching and backfill, unless negotiated otherwise.
8. In lieu of a non-refundable charge, as outlined in 3. above, the developer may provide the entrance facilities from the utility easement to the protector or network interface on the following conditions:
  - a. Facilities must be installed in accordance with rules adopted by the Federal Communications Commission as amended and the most recent edition of the National Electrical Code.
  - b. Facilities must be sized by joint agreement between the Company and the developer.
  - c. All inspections, splicing and acceptance testing will be performed by the Company and the cost will be non-refundable.
  - d. Maintenance of the entrance cable will be provided by the Company. (M)

(M) Material moved from Section 4.

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JUL 6 - '98

JUL 20 '98

SOUTHERN IDAHO  
Issued: 5-14-98

*Theresa L. Stalton* SECRETARY

104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

(T)(M)

104.4 UNUSUAL INSTALLATIONS

(T)

104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS

(T)

B. Facility Charges for New Areas of Commercial Land Development (Cont'd)

9. Refunds, where applicable, will be based on a five-year agreement and will be determined as follows:

a. A declining refund factor of 100% the first year, 90% the second year, 80% the third year, 70% the fourth year and 60% the fifth year, will be applied to the refund formula in e. below based on lines in service subject to the facility agreement. Refunds will not be applicable to facilities placed in service beyond 5 years from the date of the facility agreement.

b. The cost per line will be determined by dividing the total refundable facility charge by the number of lines negotiated.

c. A minimum of 40% of the lines negotiated must be in service before a refund is applicable.

d. Determination of refunds will be limited to once per year and must be initiated by the developer in writing.

e. The following formula will determine the amount of refund:

$$\begin{matrix} \text{INCREASED} \\ \text{LINES IN} \\ \text{SERVICE} \end{matrix} \times \begin{matrix} \text{COST/} \\ \text{LINE} \end{matrix} \times \begin{matrix} \text{REFUND} \\ \text{FACTOR} \end{matrix} = \text{REFUND}$$

10. Applicants for service within a new area of land development located outside of the base rate area will be required to pay a zone connection charge for each exchange access line requested.

(M)

(M) Material moved from Section 4.

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*Theresa J. Sullivan* SECRETARY

104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES (T)(M)

104.4 UNUSUAL INSTALLATIONS (T)

104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS (Cont'd) (T)

C. Temporary Development Charge

1. A temporary development charge will apply when, in the opinion of the Company, substantial evidence exists indicating that exchange telephone facilities will not be required beyond a ten (10) year (or less) time period within the specific development.
2. Normally the temporary development charge shall be collected in advance from the developer and shall be in the amount of the present worth of the undepreciated portion of the nonrecoverable, nonreusable investment required to provide exchange services to the development assuming a depreciation period equal to the estimated economic life of the facilities provided.
3. The Company and the developer will enter into a written agreement covering a time period not to exceed 10 years. Contract considerations include the following:
  - a. Whenever possible the above agreement shall be incorporated with the land development agreement governing facility charges in new areas of land development and all terms of that contract as described in 4.4.1.A.4., preceding, shall apply except that the facility charge refund per exchange access line shall be reduced by an amount equal to the temporary development charge divided by the estimated number of exchange access lines within the development. (M)

(M) Material moved from Section 4.

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*Theresa J. Stalter* SECRETARY

**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

(T)(M)

**104.4 UNUSUAL INSTALLATIONS**

(T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS**

(T)

**C. Temporary Development Charge (Cont'd)**

4. The development shall be reclassified permanent under the following conditions:
  - a. On the fifth anniversary date of the contract the Company determines that conditions area such that temporary status no longer applies to the specific development.
  - b. On the sixth and subsequent anniversary dates prior to the tenth anniversary date of the contract the developer petitions the Company in writing for a review of the development's temporary status and the Company determines that temporary status no longer applies to the specific development.
  - c. On the tenth anniversary of the contract, if exchange access lines remain in service within the development, the development shall be classified permanent.
5. Refunds of all or a portion of the temporary development charge shall be made to the developer upon reclassification of the development to permanent based on primary exchange access lines in service as follows:
  - a. Determine the ratio of exchange access line in service to the estimated net primary exchange access lines as specified in the agreement.
  - b. The refund shall be an amount equal to the total temporary development charge times the ratio in 5.a., preceding.
  - c. If a facility charge has been collected under a land development contract, the exchange access line ratio in 5.a., preceding, shall not exceed the exchange access line ratio calculated using exchange access lines in service as of the fifth anniversary of the contract.
  - d. There shall be only one refund made of the temporary development charge, or portion thereof, during the term of the contract.

(M)

(M) Material moved from Section 4.

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*Regina L. Stalton* SECRETARY

**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES** (T)(M)

**104.4 UNUSUAL INSTALLATIONS** (T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS** (T)

C. Temporary Development Charge (Cont'd)

6. In those instances when it is necessary to collect the temporary development charge from individual customers residing within the development, the temporary development charge shall be converted to a monthly increment per exchange access line which shall be added to each customer's monthly billing.
  - a. Collection of the monthly increment shall terminate, if in the opinion of the Company, conditions indicate that the development has attained permanent status or on the tenth anniversary date of initial exchange access line installation within the development whichever occurs first.
  - b. Individual customers residing within a temporary development may form an association for the purposes of negotiating a temporary development contract with the Company. Such association will be accorded the same rights, privileges and obligations as a developer under the terms of the written agreement.
  - c. No refunds of the temporary development charge will be made to individual customers.
7. The temporary development charge applies in addition to any monthly, construction, zone connection or service charges applicable under existing tariffs. (M)

(M) Material moved from Section 4.

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*Theresa L. Staller* SECRETARY

**104. OBSOLETE CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES**

(T)(M)

**104.4 UNUSUAL INSTALLATIONS**

(T)

**104.4.1 EXTENSIONS FOR NEW REAL ESTATE ADDITIONS**

(T)

**A. Facility Charges for New Areas of Residential Land Development**

1. A facility charge (refundable) applies to the developer when the Company undertakes the provision of facilities for exchange service or other services to a residential development of 4 or more lots or living units before telephone demand is known within the development. Extensions into or additions of 4 or more lots or living units to new or existing Mobile Home, Trailer, and RV Parks requiring telephone facilities to individual spaces will be considered residential developments. This Tariff applies to projects both inside and outside the base rate area.
2. The facility charge will be \$215 per lot/living unit within the development and is payable in full by the developer prior to the start of any required construction by the Company.
3. The Company will not incur expenses prior to receiving payment from the developer equal to the total amount due for the development.

(M)

(M) Material moved from Section 4.

CONTROL NUMBER

Idaho  
3458-1  
(01-89)

Job Number  
Allocation Area

## LAND DEVELOPMENT AGREEMENT

### RESIDENTIAL

THIS AGREEMENT entered into this        day of        19        , by The Mountain States Telephone and Telegraph Company, a Colorado Corporation (hereinafter referred to as "The Company" and hereinafter referred to as "The Developer");

WITNESSETH:

#### RECITALS:

The Developer has planned to undertake construction of a development known as        which is more fully described as being located in the        , County,        . The Company has been requested by The Developer to provide telecommunication facilities, more specifically:        , (as shown on the attached Exhibit A) attached hereto and incorporated herein by this reference which facilities will be adequate to serve        access lines in the above mentioned area.

The proposed area is such that pursuant to the tariffs of The Company on file with the Idaho Public Utilities Commission (hereinafter referred to as "The Commission"), The Company is willing to undertake provision of such facilities only upon payment of the security deposit hereinafter specified.

#### COVENANTS:

In consideration of the mutual covenants and conditions here set forth, it is hereby agreed by and between The Company and The Developer as follows:

1. This Agreement is entered into subject to the tariffs of The Company presently in effect and on file with The Commission. In the event that these tariffs are changed, superseded or suspended prior to any performance by The Company, then this agreement shall become void and the parties may enter into such new agreements as will conform to such tariffs as may be in effect after the aforesaid change, suspension or supersedure.
2. The Developer shall pay to The Company a security deposit equal to sixty percent (60%) of the estimated cost for providing telecommunication facilities to said Development. A security deposit of  $.60 \times \text{Estimated Cost} (\$ \underline{\hspace{2cm}}) = (\$ \hspace{2cm})$  shall therefore be paid to The Company upon execution of this agreement.

3. Upon payment of the sums enumerated in paragraph 2, The Company shall undertake installation of the facilities as stated in the RECITALS and as shown on the attached Exhibit A.
4. The Company agrees to complete said work by . In no event shall The Company's failure to complete the work by the above-specified date be considered a breach of this agreement by The Company, nor shall it relieve The Developer of any of its obligations hereunder, if said delay is caused by acts of God, labor disputes, availability of equipment or material, delays in receiving equipment or material, delays in obtaining easements or rights-of-way, unusual working condition, unusual terrain, delay caused by The Developer or any other circumstances beyond the reasonable control of The Company. The parties shall, insofar as possible, coordinate their construction work.
5. Any easements, rights-of-way or property required by The Company in the above development shall be furnished by The Developer without cost or restriction to The Company and shall be cleared and within six inches of final grade by the construction start work date. All survey property stakes will be placed by The Developer as required to identify the physical location of said easements and rights-of-way within the development. The Developer shall be required to reimburse The Company for unusual private and government right-of-way costs pursuant to this agreement, that are not covered by the security deposit. In the event of replatting, rezoning, or change of use during the term of this agreement, The Developer or the permitted assignee shall bear the full expense of relocation or replacement of all affected telecommunication facilities. This amount is not refundable.
6. If at any time during the 5 year term of this agreement, The Development has fifty percent (50%) or more of the above stated access lines in service (with access line count not to exceed one access line per lot or, in the case of multifamily dwellings, one access line per living unit if previously agreed), The Developer is eligible to receive a refund of the above stated security deposit subject to the following:
  - a. In no case will the refund be greater than the total security deposit assessed by The Company.
  - b. In no case shall the refund exceed \$1,000 per subscriber actually receiving service from The Company at the time that The Developer requests verification of the access lines in service pursuant to Paragraph 7. below.
  - c. In the event that the estimated cost for providing telecommunications facilities exceeds \$833 per subscriber (i.e. when The Developer's portion of the estimated cost is more than \$500 per subscriber), The Developer recognizes that the percentage of access lines in service must be greater than 50% to achieve a full refund. When The Developer's portion of the estimated costs exceeds \$1,000 per subscriber he will not receive a refund of that amount of the deposit per subscriber which is greater than \$1,000 regardless of how many lines are brought into service.

d. No interest shall be payable to The Developer upon the amount subject to refund under this agreement.

7. The Developer shall give notice to The Company representative stated below in writing when fifty percent (50%) or more of the above stated access lines are in service and The Company representative shall then verify the access lines in service to determine whether a refund is in fact due under this agreement. Notice as stipulated above may be given one time without payment of an administrative fee. Any subsequent notice will require payment by the Developer of an administrative fee for verification of the access lines in service.

If The Developer has achieved fifty percent (50%) or more of the access lines in service, already received a refund, and is still eligible for additional refunds consistent with paragraphs 6.a., b. and c. above, The Developer may seek an additional refund by giving written notice of the number of net additional access lines which have gone into service since the initial refund (and subsequent refunds if applicable) was calculated. Applications for additional refunds shall be limited to one per year and shall be filed no earlier than 1 year from the date of receipt by The Developer of his refund.

8. If by \_\_\_\_\_, the fifth anniversary of the execution of this agreement The Company has not received notice from The Developer that fifty percent (50%) or more of the above stated access lines are in service, The Developer shall not receive any refund under this contract.
9. It is understood and agreed that the consideration paid by The Developer is a charge for the cost of providing telecommunication facilities in this type of area and is not a deposit for security for individual subscribers, nor are such payments applicable to installation charges or the regular monthly charges for such service as provided in the filed tariffs of The Company, and the charge does not vest ownership of the facilities in The Developer or subscriber nor does the charge reserve .
10. The security deposit and refund procedure provided for pursuant to this agreement does not satisfy the zone connection and construction charges which may be payable by the individual customers as required by tariff. The Developer shall not represent that the payment of the security deposit by The Developer alleviates the individual customer's responsibility to pay other appropriate charges when required by tariff.
11. Any type of construction requested by The Developer other than normal construction proposed by The Company shall be subject to additional charges as provided in The Company's tariffs, and such charges shall not be subject to refund.
12. In the event access line development does not reach the above stated number of access lines within five years from the date of this agreement, The Company shall have no obligation to continue to provide the facilities not in use which were placed or reserved pursuant to this agreement. In the event of a lack of access line development, The Company may utilize any facilities which are in

excess of the amount in service on the fifth anniversary date, and The Company shall have no obligation to serve subsequent customers in the development other than pursuant to applicable tariffs then on file and in effect, with The Commission.

13. This agreement may not be assigned by The Developer without the prior written consent of The Company, which consent shall not be unreasonably withheld.
14. This agreement shall inure to the benefit of and be binding upon the successors in interest and permitted assignees of the parties hereto.
15. The Company 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 The Developer 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, The Company shall charge to such subsequent applicants, those fees and construction charges applicable under the tariffs then on file and in effect with The Commission. The Developer shall not be entitled to any refund or reduction in charges by reason of the provision of such service to such additional applicants.
16. 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 suit, including reasonable attorney's fees.
17. Any notice between the parties and payment of security deposit and refund, pursuant to this agreement, shall be given in writing, certified United States mail return receipt requested, postage prepaid, addressed, if to The Company to:

The Mountain States Telephone and Telegraph Company  
Manager - FEDC  
P.O. Box 7888  
Boise, ID 83723  
999 Main Street, Room 501

And if to The Developer to:

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

DEFINITIONS:

18. The following definitions are applicable to this agreement:

Access Line: The telecommunication circuit that extends from the customer's termination point to a central office.

Central Office: A switching unit in a telephone system, providing service to the general public, having the necessary equipment and operating arrangements for terminating and interconnecting access lines.

Distribution Facilities: All telephone plant between the feeder facilities and the customer's termination point.

Feeder Facilities: The telephone plant between the central office and distribution facilities.

Tariff: A document filed by The Company with the Public Utilities Commission which lists the communication services and products offered by The Company and gives a schedule of rates for those services and products.

IN WITNESS WHEREOF, the parties have executed this agreement the day and year appearing on the first page of this agreement.

THE MOUNTAIN STATES TELEPHONE AND  
TELEGRAPH COMPANY, a Colorado Corporation

By \_\_\_\_\_

Title Manager Design

By \_\_\_\_\_

Title \_\_\_\_\_

ATTEST/WITNESS

\_\_\_\_\_