



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

February 12, 1999

RECEIVED

FEB 16 1999

VIA FED EX

FCC MAIL ROOM

Federal Communications Commission
Office of the Secretary
Portals
445 Twelfth Street SW
Washington DC 20554

RE: Petition for Declaratory Ruling Concerning Section 251(h)(2)
CC Docket No. 98-221
Or in the alternative *Ex Parte* Communication

Dear Secretary:

Enclosed for filing is an original and 12 copies of the Idaho Public Utilities Commission's Supplemental Reply Comments in CC Docket No. 98-221. Please acknowledge receipt of this document by date stamping the duplicate copy of this letter and returning it in the enclosed self-addressed, stamped envelope. Because the deadline for filing Reply Comments was January 26, 1999, and these Supplemental Reply Comments were made necessary by events that occurred after the deadline, if there is a problem in filing these in CC Docket No. 98-221 as comments, please accept them as an *ex parte* communication filed pursuant to 47 C.F.R. §1.1206(b) and place them in the public record. All parties to the docket have been served as indicated in the Certificate of Service.

Sincerely,

A handwritten signature in cursive script that reads "Cheri C. Copsey".

Cheri C. Copsey
Deputy Attorney General

Enclosure

L:fcc.cc3

No. of Copies rec'd
List A B C D E

04/2

Before the
FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

FEB 16 1999

FCC MAIL ROOM

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)
Situating Carriers as Incumbent Local Exchange)
Carriers under Section 251(h)(2) of the)
Communications Act)
_____)

CC Docket No. 98-221

IDAHO PUBLIC UTILITIES
COMMISSION
SUPPLEMENTAL COMMENTS

These Supplemental Comments are necessary to briefly address three issues material to the Commission's consideration of this Petition that developed after the deadline for reply comments. On January 25, 1999, the United States Supreme Court issued its decision in *AT&T Corp. v. Iowa Utilities Board*¹ and these Supplemental Comments discuss its effect on this Petition and the IPUC's position. In addition, several commenters filed reply comments after the January 26, 1999, deadline that require response. Several commenters misstate the factual underpinnings for the Idaho Public Utilities Commission (IPUC) Petition and materially misrepresent Idaho law concerning utility tariffs.

I. *AT&T v. IOWA UTILITIES BOARD.*

On January 25, 1999, the United States Supreme Court decided *AT&T Corp. v. Iowa Utilities Board* and vacated, in part, the Eighth Circuit decisions. The Supreme Court ruled that Congress had explicitly given the Commission jurisdiction to make rules governing matters to which the 1996 Telecommunications Act applies. *AT&T* slip opinion at 12. It ruled therefore that the Commission

had not exceeded its jurisdictional authority by promulgating rules to implement certain pricing and non-pricing provisions of the Telecommunications Act of 1996. More specifically, the Supreme Court reinstated a number of Commission rules stricken by the Eighth Circuit. It also held that the Commission rules governing unbundled access and “pick and choose” negotiations were consistent with the Act.

A. AT&T v. Iowa does not affect this Petition.

Nothing in the Supreme Court decision affects the appropriateness of this Petition or any of the IPUC’s arguments. The Supreme Court recognized that Section 251(c) obligates incumbent local exchange carriers (ILECs) to share their network with competitors because this will facilitate market entry and promote the introduction of competition into telecommunications markets. *AT&T* slip opinion at 3. Granting this Petition will facilitate market entry and promote the introduction of competition into the local exchange market.

This Petition was filed pursuant to the explicit authority granted to the Commission in Section 251(h)(2) to impose the Section 251(c) obligations on local exchange carriers (LECs) that possess the same anti-competitive potential that traditional incumbents possess. Congress empowered the Commission to impose those same Section 251(c) obligations on LECs that control the bottleneck essential network facilities but do not fall within the statutory definition. Congress and the Commission clearly recognized there was a potential for new entrants to control the bottleneck essential network facilities in manner similar to ILECs. The Commission recognized that if a LEC looked like an ILEC, acted like an ILEC and had the power of an ILEC to control those essential facilities, it was an ILEC for competitive purposes. The issue before the Commission in this Petition is whether CTC or similarly situated LECs are ILECs for the purposes of Section 251(c) obligations. Nothing in the Supreme Court decision changes that essential question.

B. *AT&T v. Iowa Utilities does not preclude modifying 47 C.F.R. §51.223(a).*

Likewise, nothing in the *AT&T* decision affects the IPUC's request, in the alternative, that the Commission modify 47 C.F.R. § 51.223 to allow state commissions to directly address LECs within their jurisdictions similarly situated to CTC Telecom without resorting to the costly, cumbersome and time consuming Petition process imposed by 47 C.F.R. § 51.223(b). The Commission's rule, 47 C.F.R. § 51.223, establishing a lengthy process by which state commissions can ultimately impose Section 251(c) type obligations, unnecessarily complicates the issue and is not statutorily required. Nothing in the *AT&T* decision changes that.

While the Commission has authority under Section 253(d) to preempt state utility commissions from creating barriers to competitive entry into a market, this rule (47 C.F.R. § 51.223) broadly preempts states from addressing intrastate situations similar to CTC's without establishing that imposing such obligations on LECs like CTC violates Section 253. There has been no Commission finding that such additional requirements violate Section 253 when imposed on LECs controlling the bottleneck network to essential facilities. State utility commissions should be allowed to impose legitimate conditions designed to promote competition and to protect the public interest in situations like the one facing the Commission in this Petition where the LEC in question stands in the same position as an incumbent LEC.

States routinely weigh whether rural ILECs should be exempted from the application of Section 251(c) obligations or whether Section 251 (b) or (c) obligations should be suspended or modified for LECs with fewer than 2 percent of the nation's subscriber lines. *See* 47 U.S.C. § 251(f). Congress clearly recognized that states were better situated to examine and weigh clearly local concerns. This is no different.

The IPUC followed the process outlined in the Commission's rule, 47 C.F.R. § 51.223. Contemporaneously with its Petition to the Commission, the IPUC promulgated flexible rules designed to protect the public safety and welfare, to ensure the continued quality of telecommunications services in Idaho and to safeguard customer rights. Unlike Section 251(c) obligations, however, the IPUC proposed rules are flexible and allow the IPUC to apply only those obligations to the LEC the IPUC finds are in the public interest. Moreover, when there is actual competition, the IPUC can exempt the LEC from those rules entirely.

Rather than facilitating competitive entry into markets like Hidden Springs Community Development, this Petition process, however, may have a chilling effect on entry. Competitors may be daunted by a process that requires state commissions to petition the Commission for authority to impose additional obligations on LECs like CTC in order to create an opportunity to compete. Therefore, the IPUC renews its request that the Commission modify 47 C.F.R. § 51.223.

II. CTC'S CONTRACT IS IRRELEVANT TO ITS MARKET POSITION

Contrary to the comments filed by ELI, CTC, Time Warner and Cox in opposition to the Petition, the IPUC does not rely on CTC's contract with the developer to support its Petition. As stated in the IPUC's Reply Comments at pages 12-13, it does not matter how CTC became the sole provider of telecommunications services in Hidden Springs Community Development. The critical facts are that CTC is the sole telecommunications provider in Hidden Springs, controlling the bottleneck to the local exchange network, and for any other entrant to compete with it, the new entrant must over build or duplicate CTC's facilities. It is the fact that there is now a barrier to entry for other potential competitors that makes CTC a monopoly with the anti-competitive advantages of an ILEC. How that barrier was created is not relevant.

In Southern Pacific Communications Co. v. AT&T, the D.C. Circuit stated:

The defendant's innocence or blameworthiness, however, has absolutely nothing to do with whether a condition constitutes a barrier to entry. Any market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be considered a barrier to entry, regardless of who is responsible for the existence of that condition.

Southern Pacific Communications Co. v. AT&T, 740 F.2d 980, 1002 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1005 (1985) (emphasis added). Courts have noted that monopoly power is created through barriers to entry, such as control to bottleneck local exchange network, the regulatory process, lengthy construction delays to enter the market or the large capital requirements for competitors. *United States v. AT&T*, 524 F.Supp. 1336, 1347-48 (D.D.C. 1981). It is not necessarily based on contractual relationships.

In analyzing this Petition, the Commission should focus on whether CTC enjoys the anti-competitive advantages of an ILEC and, thus, whether the Commission should exercise its statutory authority to treat CTC and similarly situated LECs as ILECs for the purposes of Section 251(c). Its contract is irrelevant to this consideration.

III. CTC MATERIALLY MISREPRESENTS IDAHO LAW AND OVERLOOKS ANTITRUST IMPLICATIONS

Contrary to CTC's assertion, Idaho law does not permit a rate-regulated ILEC to charge less than its costs for extending service to a customer or to discriminate against a class of customers. In an attempt to overcome the fact that customers in Hidden Springs will have no economical or practical choice in telecommunications providers, CTC stated:

Under Section 62-622(1)(e) of the Idaho Code, an incumbent carrier such as U S WEST has the unfettered, unilateral ability to immediately lower its line extension charges and maximum basic local exchange rates at any time.

CTC Reply Comments at p. 7. CTC's characterization of Idaho law is simply wrong. It ignores both the state and federal law and the fact that any company requested to serve a customer in Hidden

Springs must duplicate CTC's network. Clearly, it will be the customer who bears the costs of that duplicate facility and, as the IPUC demonstrated in its Reply Comments, customers will face a high cost, indeed, for obtaining that service.

A. *Idaho law does not permit a rate-regulated ILEC to price its services below its costs or to discriminate against a class of customers.*

Idaho law specifically prohibits an ILEC from charging rates that do not permit it to recover its costs or that discriminate against a class of customers. *Idaho Code* §§ 61-301,² 61-307,³ 61-315⁴ and 62-222(1);⁵ *Building Contractors Ass'n. v. Idaho Public Utilities Commission*, 916 P.2d 1259 (Idaho 1996). It is frankly difficult to understand why CTC places such importance on *Idaho Code* § 62-622 and whether U S WEST can unilaterally change its tariff applying to line extensions. First, as discussed below, this statute does not presently govern U S WEST's line extension fees; it is currently governed by *Idaho Code* §§ 61-307 and 61-622 and not *Idaho Code* § 62-622(1). *Idaho Code* §§ 61-307 and 61-622 prohibit an ILEC from unilaterally changing its tariff. However, the ability to change a tariff unilaterally is irrelevant to whether customers will have a viable choice in providers.

Regardless of whether an ILEC's tariff is governed by *Idaho Code* §§ 61-307 and 61-622 or *Idaho Code* § 62-622(1)(a), a rate-regulated ILEC is simply not permitted under Idaho law to price its services below its costs or to discriminate against one class of customers. *Building Contractors*, 916 P.2d at 1263; *Idaho Code* §§ 61-301, 61-307, 61-315 and 62-222(1).

Idaho Code § 62-622 was part of a statutory package added by the Idaho Legislature in 1997 which was designed to transition the regulated telecommunications industry to a competitive market. This legislation allows ILECs to request the IPUC to establish a "maximum" basic local exchange service rate to create pricing flexibility for quick responses to actual competition. It is designed to

ensure that rate-regulated companies are not placed at a competitive disadvantage. Until an ILEC requests the IPUC establish a “maximum” basic local exchange service rate pursuant to *Idaho Code* § 62-622(1)(a), *Idaho Code* § 62-622(1)(e) does not apply. There has been no such request and no “maximum” basic local exchange rates have been established. However, the more relevant consideration for this Commission is that even in those instances that *Idaho Code* § 62-622 will apply, the “maximum” basic local exchange rate must be sufficient allow the recovery of the costs incurred to provide the services.

. . . . Maximum basic local exchange rates shall be sufficient to recover the costs incurred to provide the services. Costs shall include authorized depreciation, a reasonable portion of shared and common costs, and a reasonable profit. . . .

Idaho Code § 62-622(1)(a) (emphasis added). Moreover, while under *Idaho Code* § 62-622(1)(d) an ILEC may charge rates lower than the “maximum” basic local exchange rate in response to competition,

upon the petition of a nonincumbent telephone corporation, the commission shall establish a minimum price for the incumbent telephone corporation's basic local exchange service if the commission finds, by a preponderance of the evidence, that the incumbent telephone corporation's prices for basic local exchange services in the local exchange area are below the incumbent telephone corporation's average variable cost of providing such services.

Idaho Code § 62-622(1)(d) (Emphasis added). Therefore, in Idaho, even under this statutory scheme any rate-regulated company would be required to price its line extensions to allow it to recover the costs incurred in providing the service.

This requirement to price a service based on the ILEC’s costs in providing the service is crucial to the Commission’s consideration of the IPUC’s Petition. It supports the IPUC’s position. U S WEST’s current charges for line extensions are its actual costs in excess of \$1,600 and, as the IPUC established in its Reply Comments, the IPUC’s experience demonstrates that line extension

costs for customers in Hidden Springs would be very high. Cusick Affidavit at 2-3, attached to the IPUC's Reply Comments. Therefore, whether an ILEC can unilaterally change its charges for line extensions is irrelevant. The ILEC is constrained by Idaho statutory law to recoup its costs and Hidden Springs customers desiring a competitor will still be required to pay those costs. Therefore, as argued by the IPUC, there is no effective competition in Hidden Springs.

Finally, the IPUC is constitutionally prohibited from ordering a rate regulated company to provide a service and not allow it to at least recover its costs for providing that service. *Hayden Pines Water Company v. Idaho Public Utilities Commission*, 834 P.2d 873, 877 (Idaho 1992). Therefore, no matter how CTC characterizes the issue, the fact is that customers in Hidden Springs will not have economically viable choices unless this Commission grants this Petition.

B. The 1996 Telecommunications Act does not immunize companies from antitrust laws.

CTC also ignores the antitrust implications of allowing an ILEC to underprice the charge for extending service to a customer in order to "compete" with another company. While the 1996 Telecommunications Act requires the Commission and state commissions to promote competition, it does not immunize utilities from claims of predatory pricing violative of the Clayton Act. 47 U.S.C. §601(b). Therefore, LECs that wish to compete with companies like CTC must be careful to not engage in anti-competitive practices like predatory pricing.

Predatory pricing is defined as pricing below an appropriate measure of costs for the purpose of eliminating competitors in the short run and reducing competition in the long run. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 U.S. 104, 117 (1986). Predatory pricing has been termed "inimical to the purposes of [antitrust] laws." *Id.* As the Supreme Court noted in *Cargill*, the term is usually reserved for pricing below some measure of cost. Many courts have ruled that pricing below marginal or average variable cost is presumptively illegal. *Id.* at footnote 12.

Therefore, companies wanting to compete with CTC who are required to duplicate its network need to be careful in how they price line extensions for customers in Hidden Springs. For a company to offer to duplicate CTC's network facilities at less than costs in order to fill a customer request for service runs the risk of violating the Clayton Act which clearly prohibits

any person . . . , either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . , or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

45 U.S.C. §12.

CONCLUSION

While all parties agree that the 1996 Telecommunications Act was designed to promote competition by removing certain barriers, there is considerable disagreement between those who support the Petition and those who oppose it over whether competition is measured from the customers' perspectives. Competition is a

Contest between two rivals. The effort of two or more parties, acting independently, to secure the business of a third party by the offer of the most favorable terms

BLACK'S LAW DICTIONARY 284 (6th ed. 1990) *quoting Ingram Corp. v. Circle, Inc.*, 188 So.2d 96, 98 (1966). Without competition for customers, there is no competition.

Therefore, as the Commission evaluates this Petition, it should determine whether CTC's customers, or customers of similarly situated LECs, will practicably or economically have the realistic opportunity for future choices in local exchange service if the Commission does not grant the Petition, or, in the alternative, modify 47 C.F.R. § 51.223(a) to recognize state authority to address these issues. In the Hidden Springs situation, CTC clearly controls the bottleneck network facilities. It is

a monopoly. Therefore, without Commission action, not only will CTC customers in Hidden Springs fail to enjoy the benefits of the 1996 Telecommunications Act and competition but other customers in similarly situated areas will also become the captive of one LEC. The Commission should grant the IPUC's Petition.

Respectively submitted this 12th day of February 1999.

ALAN G. LANCE
Attorney General


Cheri C. Copsey
Deputy Attorney General
for the Idaho Public Utilities Commission

N:fcc-ctc.sup

ENDNOTES

1. 1999 WL 24568 (January 25, 1999), *vacating in part, Iowa Utilities Board v. F.C.C.*, 135 F.3d 535 (8th Cir. 1998) and *People of California v. F.C.C.*, 124 F. 3d 934 (8th Cir. 1997). (Publication page references are not available.)
2. *Idaho Code* § 61-301 Charges just and reasonable. All charges made, demanded or received by any public utility, or by any two (2) or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.
3. *Idaho Code* §61-307 Schedules -- Change in rate and service. Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility except after thirty (30) days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the thirty (30) days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission by some character to be designated by the commission, immediately preceding or following the item.
4. *Idaho Code* § 61-315 Discrimination and preference prohibited. No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section.
5. *Idaho Code* §62-622(1) The commission shall regulate the prices for basic local exchange services for incumbent telephone corporations in accordance with the following provisions:
 - (a) At the request of the incumbent telephone corporation, the commission shall establish maximum just and reasonable rates for basic local exchange service. Maximum basic local exchange rates shall be sufficient to recover the costs incurred to provide the services. Costs shall include authorized depreciation, a reasonable portion of shared and common costs, and a reasonable profit. Authorized depreciation lives shall use forward-looking competitive market lives. Authorized depreciation lives shall be applied

prospectively and to undepreciated balances.

(b) At the request of the telephone corporation, the commission may find that existing rates for local services constitute the maximum rates.

(c) The commission shall issue its order establishing maximum rates no later than one hundred eighty (180) days after the filing of the request unless the telephone corporation consents to a longer period.

(d) An incumbent telephone corporation may charge prices lower than the maximum basic local exchange rates established by the commission. Provided however, upon the petition of a nonincumbent telephone corporation, the commission shall establish a minimum price for the incumbent telephone corporation's basic local exchange service if the commission finds, by a preponderance of the evidence, that the incumbent telephone corporation's prices for basic local exchange services in the local exchange area are below the incumbent telephone corporation's average variable cost of providing such services.

(e) After the commission has established maximum basic local exchange rates, an incumbent telephone corporation may change its tariffs or price lists reflecting the availability, price, terms and conditions for local exchange service effective not less than ten (10) days after filing with the commission and giving notice to affected customers. Changes to tariffs or price lists that are for nonrecurring services and that are quoted directly to the customer when an order for service is placed, or changes that result in price reductions or new service offerings, shall be effective immediately upon filing with the commission and no other notice shall be required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS ^{12th} DAY OF FEBRUARY 1999, SERVED THE FOREGOING IPUC SUPPLEMENTAL COMMENTS, IN DOCKET NO. 98-1221, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

MAGALIE ROMAN SALES
SECRETARY
FEDERAL COMMUNICATIONS COMM
PORTALS
445 12TH STREET SW
WASHINGTON DC 20554

JANICE M MYLES
FEDERAL COMMUNICATIONS COMM
COMMON CARRIER BUREAU
ROOM 544
1919 M STREET NW
WASHINGTON DC 20554

INTERNATIONAL TRANSCRIPTION SERVICES
1231 20TH STREET NW
WASHINGTON DC 20036

CONLEY E WARD
KENNETH R McCLURE
CYNTHIA A MELILLO
GIVENS PURSLEY LLP
277 NORTH 6TH STREET SUITE 200
PO BOX 2720
BOISE ID 83701-2720

BENJAMIN H DICKENS JR
GERARD J DUFFY
MICHAEL B ADAMS JR
BLOOSTON MORDKOFKY
JACKSON & DICKENS
2120 L STREET NW
WASHINGTON DC 20037

KECIA BONEY
MCI WORLDCOM INC
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

ROY E HOFFINGER
MARK C ROSENBLUM
AT&T CORP
ROOM 3249J1
295 NORTH MAPLE AVE.
BASKING RIDGE NJ 07920

CHARLES C HUNTER
CATHERINE M HANNAN
HUNTER COMMUNICATIONS LAW
GROUP
1620 I ST NW STE 701
WASHINGTON DC 20006

JOHN H HARWOOD II
LYNN R CHARYTAN
TODD ZUBLER
WILMER CUTLER & PICKERING
2445 M STREET NW
WASHINGTON DC 20037-1420

ROBERT B McKENNA
JOHN L TRAYLOR
1020 19TH STREET NW
WASHINGTON DC 20036

WILLKIE FARR & GALLAGHER
THREE LAFAYETTE CENTRE
1155 21ST STREET NW
WASHINGTON DC 20036

ROBERT S TANNER
MARK TRINCHERO
MOLLY O'LEARY
DAVIS WRIGHT TREMAINE LLP
SUITE 700
1155 CONNECTICUT AVE NW
WASHINGTON DC 20036

Claudia C. Copsey
