regulations not later than 30 days in advance of the projected service cut-over date, and the rates will become effective upon Direct providing service in the Eagle Mountain area.

15. Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah this 9th day of August 2004.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#39873

-ATTACHMENT-

-BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

IN THE MATTER OF THE APPLICATION OF DIRECT COMMUNICATIONS ROCKLAND, INC., and DIRECT COMMUNICATIONS CEDAR VALLEY, LLC, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ALLOWING OPERATION AS AN INDEPENDENT LOCAL EXCHANGE CARRIER.	DOCKET NO. 04-2419-01 STIPULATION

The undersigned parties in the above-entitled Docket, by and through their counsel of record, hereby stipulate and represent to the Commission as follows:

1. The parties have had an opportunity to fully participate in this docket, including three technical conferences conducted for the purpose of evaluating all aspects of the certification petition filed by Direct Communications Rockland, Inc. and its subsidiary, Direct Communications Cedar Valley, LLC (jointly "Direct"). Direct has filed prefiled testimony and exhibits in support of its petition, as well as supplemental direct testimony and updated financial data pertaining to its proposed purchase of the Eagle Mountain City ("the City") municipal telephone system.

2. Direct has worked through a series of issues and questions with the Division of Public Utilities ("the Division"), the Committee of Consumer Services

("the Committee"), the Utah Rural Telecom Association ("URTA"), Beehive Telephone Company, and Qwest Communications ("Qwest"), some of whom have entered into this Stipulation, which resolves their respective issues and concerns if adopted by the Commission.

3. Based upon the Commission's incorporation of the following elements to be incorporated in an Order, the undersigned parties hereby express their approval and assent to issuance by the Commission of the Certificate of Public Convenience and Necessity sought by Direct, pursuant to Utah Code Ann. § 54-4-25, and the undersigned parties hereby stipulate and agree that issuance of such a Certificate to Direct is in the public interest.

4. Based upon the fact of this Stipulation, the parties have not prefiled rebuttal testimony, but some will provide testimony at the hearing scheduled for July 8, 2004. The parties further stipulate and agree that the prefiled direct testimony, supplemental testimony and exhibits submitted by Direct may be received into evidence by the Commission without objection.

5. The parties agree that the Commission should require that any modifications to the sale and purchase agreement be submitted to the Commission prior to the closing. If no objection is raised by any party within 5 business days from the date of such submission, the Commission and the parties will be deemed to have assented, and no further action shall be required of Direct. If any changes to the sale and purchase agreement have been made after closing, the entire sale

and purchase agreement shall be filed with the Commission, along with an explanation, within 10 business days of closing.

6. The parties agree that there are three elements of the contract that should be addressed in the Commission's order: (1) Direct has agreed to the general principle that any amount in the purchase price which is above the Commission determined original cost be booked as an acquisition adjustment and will not be included in the calculations for development of rates and USF support; (2) the contract makes the sale conditional upon Direct Communications Cedar Valley receiving approval to participate in federal and state universal service support funds; and (3) in the event Direct or the City terminate the contract according to its terms, the certification for which Direct has petitioned should be vacated. The Certificate of Public Convenience and Necessity to be granted is contingent upon the closing of the contract by Direct and the City and Direct Communications Cedar Valley obtaining membership in NECA and the receipt of Federal USF support. Direct will notify the Commission of the decision of the FCC prior to closure of the sale.

7. The parties agree that Direct Communications Rockland has the financial, managerial, and technical experience and resources necessary to operate the system in Eagle Mountain and provide for its growth and modernization consistent with the best practices of the industry throughout the rest of Utah. Direct Communications Rockland has proposed to operate the Eagle Mountain system

through its subsidiary. Direct Communications Rockland, as the corporate parent of the subsidiary, agrees to assume ultimate responsibility for the financial stability and sound management of its subsidiary, and that it will assure the subsidiary's compliance with the rules and regulations of the Commission and the Division's statutory enforcement role. To the extent that external financing is required for funding principal or interest, for additional capital investment necessary for plant upgrades, new facilities and the successful operation of the system Direct is purchasing, Direct Communications Rockland shall bear that responsibility.

8. The specific elements to which the parties further stipulate are as follows:

a. Qwest agrees to file a request for an amended certificate and request for a modification to the Lehi Exchange boundary, which will exclude the area now served by the City's municipal telephone system from Qwest's current Lehi Exchange boundaries. This modification is conditioned upon the closing of the sale of the City's system to Direct.

b. Qwest and Direct agree that it will be necessary for both companies to file a request for a Study Area Waiver with the FCC, which will remove the area served by Direct Communications Cedar Valley from Qwest's Study Area and create a separate Study Area for Direct Communications Cedar Valley. The parties agree that the Commission should find that such a waiver and modification of Study Area boundaries is in the public interest and that this Commission encourages

favorable action thereon by the FCC.

c. Direct agrees that Direct Communication Cedar Valley's rate for terminating switched access will not exceed 5 cents per minute for 3 years following the date of closing. In the event that the Commission or any party other than Direct seeks an increase in Direct Communications Cedar Valley's terminating access rate within those 3 years, Qwest shall be given notice of the requested increase and an opportunity to be heard.

d. The parties agree that the Certificate issued by the Commission to Direct Communication Cedar Valley contemplates that it will obtain federal USF support and NECA pool eligibility as quickly as possible. The parties request that the Commission re-open this docket and consider vacating the Certificate in the event the FCC does not approve NECA pool participation or federal USF support as requested.

e. The parties stipulate that Direct Communications Cedar Valley qualifies for "eligible telecommunications carrier" status, pursuant to all of the requirements of state and federal law, specifically, 47 U.S.C. § 214(e)(2), and request that the Commission so find. Direct Communications Cedar Valley will be the only ETC in the area it will serve, and it will be the carrier of last resort in a high cost rural area of the state. Direct Communications Cedar Valley will not be in competition with any other incumbent local exchange carrier ("ILEC") within the area of its Certificate.

f. The parties stipulate that Direct Communications Cedar Valley meets the requirements of Utah Code Ann. § 54-8b-15 and Commission Rule 746-360-6 for eligibility to participate in the Utah USF.

g. The parties agree that the area currently served by Eagle Mountain's telephone system, prior to inauguration of the City's telephone system, was an area in which no other carrier had existing facilities, leaving it, essentially, unserved. Exhibit 1, which is attached hereto and is incorporated herein by reference, contains a factual narrative providing greater detail regarding the history of telephone service in this area.

Direct represents the accuracy of this narrative, and the parties do not object to it for purposes of this Stipulation.

h. The parties stipulate and agree that this Commission should make certain findings and conclusions with respect to Direct Communications Cedar Valley's status which are consistent with facts common to recent FCC decisions approving early federal USF participation and NECA pool participation from applicants which have not met the technical definitions of ILEC status and propose to serve previously unserved areas. Such findings and conclusions should include the following sub-elements:

i. ETC status pursuant to 47 U.S.C. § 214(e)(2);

ii. Rural carrier status pursuant to 47 U.S.C. § 153(47);

iii. Direct Communications Cedar Valley meets the requirements of Utah

Code Ann. § 54-8b-15 and Commission Rule 746-360-6 to be eligible to participate in the Utah USF;

iv. The necessity for USF support, without which Direct Communications Cedar Valley would have to raise rates to recover amounts which would otherwise come from USF;

v. Direct Communications Rockland is an ILEC and an ETC in Idaho, and Direct Communications Cedar Valley should be regulated in Utah as an ILEC, inasmuch as its operations will be consistent in every practical and legal sense with the operations of the other Utah ILECs;

vi. Like the other rural Utah ILECs, Direct Communications Cedar Valley should be subject to all the statutes, rules and provisions which apply to rural ILECs.

vii. The City's municipal service has, and Direct Communication Cedar Valley 's service will, function as the carrier of last resort in the area served;

viii. Direct Communication Cedar Valley is not a CLEC, and is not in competition with any other ILEC in the area that it will serve;

ix. Direct Communications Cedar Valley is not a reseller, but is a facilities based carrier as that term is defined in Commission Rule 746-360-2(E);

I. The parties stipulate that Direct Communications Cedar Valley is a "telephone corporation" as defined in Utah Code Ann. § 54-2-1(23), and that it is a "local exchange carrier" as defined in Commission Rule 746-240-2(c), and that it

be providing "local exchange service" in the area served by the City's municipal telephone utility, as defined in Utah Code Ann. § 54-8b-2(8).

j. The parties stipulate that Direct Communication Cedar Valley's initial basic local rates shall be the rates currently in effect, as of the date hereof for the City's system, adjusted to recognize appropriate EAS and SLC charges.

k. The parties agree that there shall be a presumption that Direct's acquisition costs related to the purchase of the City's system should not be included in the calculation of Direct Communication Cedar Valley's revenue requirement nor reimbursed from the Utah USF; however, Direct Communication Cedar Valley shall not be precluded from requesting recovery of such acquisition costs in a future rate proceeding. Any amount in sales price above book value will be booked as an acquisition adjustment and will not be included in the revenue requirement calculation for development of rates. Any draw by Direct Communication Cedar Valley on the Utah USF shall be conditioned upon a satisfactory Commission review of Direct Communication Cedar Valley's revenue requirement and rate structure in accordance with Commission Rule 746-360-2(b). In order to ensure accuracy and an understanding of operations, Direct Communication Cedar Valley shall collect 18 months of actual data before filing a rate proceeding with the Commission. The parties anticipate the rate proceeding will be completed within 6 months after it is filed. However, Direct Communication Cedar Valley may draw USF support immediately for a Lifeline service when such service is established in

accordance with the Commission's rules.

l. In the event any of the plant to be purchased by Direct does not meet industry standards, USF support or customer rates shall not be used to pay for the costs of replacement, including the cost of unrecovered depreciation, without Commission approval.

m. The parties stipulate that in calculating Direct Communications Cedar Valley's revenues, all sources of revenue shall be considered. For purposes of Direct Communication Cedar Valley's first rate case, toll and DSL revenues will be included. In rate proceedings, Direct Communications Cedar Valley agrees that its actual capital structure can be included in the calculation of revenue requirements.

n. Direct Communications Cedar Valley will inform customers that they have the right to choose both an intra- and interstate carrier other than Direct Communications Cedar Valley for their long distance service.

o. Direct Communications Cedar Valley will file with the Commission semi-annual financial reports of operations and be subject to audit as the Division may determine necessary for the first 24 months of its operations. Direct Communications Cedar Valley shall also provide an informational copy to the Commission of all filings made by Direct Communications Cedar Valley with the FCC and NECA prior to the closing of its contract with the City. Direct Communications Cedar Valley will promptly advise the Commission of any pre-closing rulings by the FCC and NECA.

p. Direct will advise the Commission and the Division of a projected contract closing date and effective date of its tariffs not later than 10 days in advance of any such projection. Direct Communications Cedar Valley shall file its operating tariffs and rules and regulations not later than 30 days in advance of the service cut-over. Direct Communications Cedar Valley's initial basic local rates shall be the rates currently in effect for the City's system as of July 1, 2004, adjusted to recognize appropriate EAS and SLC charges. Adjustments to the current rates will be considered in Direct Communications Cedar Valley's first rate proceeding. Within one month after Direct Communications Cedar Valley commences those operations, it will begin to collect traffic and cost data separately for business and residential lines to and from each other Utah County exchange, for each successive period of three months to enable the calculation of EAS rates and traffic stimulation factors. Direct Communications Cedar Valley will report this data to the Division and to the Committee of Consumer Services within one month of the end of each three-month period. Until these studies enable cost-based EAS rates to be set by the Commission in Direct Communications Cedar Valley's first rate proceeding, proxy EAS rates will be set for the Eagle Mountain exchange at the current Qwest rate for the Lehi Exchange. If new facilities are required in order to continue EAS services, a cost study will be conducted to determine whether EAS rates need to be further adjusted to cover the total cost of the service.

q. As a condition of the order, Direct Communications Cedar Valley shall

ensure that no Eagle Mountain subscriber will be in a worse customer position as a result of Direct's purchase of the City's system than they were under the City's service with respect to rates, services offered, and service quality. If the Commission should determine at a future time that the subscribers are in a worse position in any of those specific respects, Direct, consistent with its guarantee, will be responsible for implementing a satisfactory remedy, consistent with state law.

9. The parties agree that their obligations under this Stipulation are subject to the Commission's approval of this Stipulation in accordance with its terms and conditions.

10. The parties recommend that the Commission adopt this Stipulation in its entirety. No party shall appeal any portion of this Stipulation and no party shall oppose the adoption of this Stipulation pursuant to any appeal filed by any person not a party to the Stipulation. Direct and the Division shall make witnesses available to provide testimony in support of this Stipulation, including testimony to explain the basis of their support for this Stipulation, and other parties may make such witnesses available. In the event other parties introduce witnesses opposing approval of the Stipulation, the parties agree to cooperate in cross-examination and in providing testimony as necessary to rebut the testimony of opposing witnesses.

11. In the event the Commission rejects any or all of this Stipulation, or imposes any additional material conditions on approval of this Stipulation, or in the event the Commission's approval of this Stipulation is rejected or conditioned in

whole or in part by an appellate court, each party reserves the right, upon written notice to the Commission and the other parties to this proceeding delivered no later than 5 business days after the issuance date of the applicable Commission or court order, to withdraw from this Stipulation. In such case, no party shall be bound or prejudiced by the terms of this Stipulation, and each party shall be entitled to undertake any steps it deems appropriate.

12. The parties agree that this Stipulation is in the public interest and that all of its terms and conditions are fair, just and reasonable.

13. No party is bound by any position asserted in the negotiation of this Stipulation, except to the extent expressly stated herein, nor shall this Stipulation be construed as a waiver of the rights of any party unless such rights are expressly waived herein. Execution of this Stipulation shall not be deemed to constitute an acknowledgement by any party of the validity or invalidity of any particular method, theory or principle of regulation, cost recovery, cost of service or rate design, and no party shall be deemed to have agreed that any method, theory or principle of regulation, cost recovery, cost of service or rate design employed in arriving at this Stipulation is appropriate for resolving any issues in any other proceeding in the future except as specified herein. No findings of fact or conclusions of law other than those stated herein shall be deemed to be implicit in this Stipulation. .

14. This Stipulation may be executed in counterparts and each signed counterpart shall constitute an original document.

DATED this 8th day of July, 2004.

/s/ David R. Irvine
Attorney for Direct Communications

/s/ Michael Ginsberg
Assistant Attorney General
Division of Public Utilities

/s/ Stephen F. Mecham
Attorney for the Utah Rural Telecom Association

/s/ Gregory S. Monson
Attorney for Qwest Communications

/s/ Paul Proctor
Assistant Attorney General
Counsel to the Utah Committee
Of Consumer Services

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

In the Matter of	)	
	)	
Direct Communications Rockland, Inc., and Direct Communications Cedar Valley, LLC	)	**AAD 04- _____**
	)	
Petition for Waiver of Sections 69.2(hh) and 69.605(c) of the Commission's Rules, Approval of Related Actions, and an Expedited Decision	)	**CC Docket No. 96-45**

To: Chief, Wireline Competition Bureau

Petition for Waiver of Sections 69.2(hh) and 69.605(c)
of the Commission's Rules; Request for Average Schedule Treatment;
and Request for Expedited Decision

David R. Irvine
Attorney for Petitioners
350 South 400 East, Suite 201
Salt Lake City, UT 84111
(801) 363-4011

October 27, 2004

Petition for Waiver of Sections 69.2(hh) and 69.605(c) of the Commission's Rules, Approval of Immediate Federal USF Support As an Average Schedule Company Under Section 69.605(c), and an Expedited Decision

Petitioners have executed a contract to purchase the Eagle Mountain City municipal telephone system, which sale has been approved by the Utah Public Service Commission ("UPSC"). Petitioners request that the Commission approve two actions sought by Direct Communications Rockland, Inc. ("DCRI") and Direct Communications Cedar Valley, LLC ("DCCV"). Exhibit 1, which is attached hereto and incorporated herein by reference, is a copy of a Joint Petition by Qwest Corporation ("Qwest") and DCCV to waive the study area boundary freeze and modify Qwest's Study Area boundary by excluding from that Study Area the territory certificated to DCCV, and designating DCCV's certificated territory as a separate Study Area for purposes of Part 36 of the Commission's rules. That application has been filed contemporaneously with this Petition.

Second, pursuant to section 1.3 of the Commission's Rules, DCRI and DCCV ask that section 69.2(hh) of the Commission's Rules be waived in order to allow DCCV to become a member of NECA and receive immediate federal Universal Service Fund ("USF") support. Petitioners further request that the Commission allow DCCV to receive such federal USF support as an average schedule company pursuant to 47 C.F.R. 69.605(c), and Petitioners request a waiver of section 69.605(c), if necessary, to permit such treatment. Petitioners also request an expedited decision in order to preserve the viability of economical telephone service at Eagle Mountain, Utah.

I. Background

This Petition has been filed to facilitate a sale of the only municipal telephone system in Utah to a private local exchange carrier, DCCV, which is well-qualified to

operate the system and provide high-quality, state-of-the-art telephone service, but the private buyer cannot maintain the system's operation without state and federal USF support.

A. Municipal Telephone Service in Eagle Mountain, Utah

Eagle Mountain City ("EMC") was incorporated as a town in 1996, and it created its municipal telephone system by ordinance in 1997. The fifth-class city is the only significant residential area in Utah County west of Cedar Mountain, and that part of Utah County has historically been rural and agricultural. Prior to the town's incorporation, the entire area was primarily desert rangeland and farms, and there were no telephone facilities whatsoever in the center area of the town; Qwest served a small number of customers scattered along State Highway 73, which runs approximately 5 miles north of the town's center. There are no services of any nature within the City, other than municipal services, and there is very little commercial activity. This isolated community, which has now grown to 6,093 persons depends on other cities in Utah County for nearly all life supporting services; the nearest community where some of these services are available is 8 miles to the East.

EMC is an area where young families can find affordable entry-level homes. Approximately 40% of the population is under age 12; the average age of the population is 21 years. The municipal telephone system serves approximately 2,223 telephone subscribers. Landline telephone service is critical for the community's access to emergency health care and public safety services; the nearest medical clinical facilities are in Lehi, Utah (about 15 miles east of Eagle Mountain) and the nearest fully-equipped hospital facilities are at least 30 miles to the northeast or southeast. Life-threatening emergencies require evacuation by air ambulance.

The center of the City, where its growth has been concentrated, is approximately 5 miles south of the nearest State road, Highway 73. The municipal system subscribers are all located in that center part of the City. Without the City's municipal system, there would be no landline service whatsoever available for those subscribers, for there was no telephone service of any kind in the area prior to the City's creation of the municipal system. Currently, and at the time of the initial development, the entire area within the City's incorporated limits is and was within the service territory certificated to Qwest and its corporate predecessor, US West. [1] However, neither company has ever had telephone facilities south of Highway 73. Qwest serves fewer than 100 subscribers located adjacent to Highway 73, some of whom live within the corporate limits of the City.

The EMC municipal telephone system was established to serve an area in which no other telephone carrier had facilities of any nature. It functions as the carrier of last resort for the customers it serves. The EMC municipal telephone system subscribers solely bear the full cost of the EMC system's operating expenses. The EMC system is prohibited by state law from participating in the Utah Universal Service Support Fund ("USSF") because it is a municipal system, and EMC has not attempted to qualify for federal USF support, even though it likely is eligible. Consequently, the basic rates paid by EMC subscribers are the highest in Utah at $27.00 per month, which is $4.05 higher than the state's maximum USSF-supported basic service rate.

[1] On September 16, 2004, Qwest filed a petition with the Utah Public Service Commission asking that its Lehi Exchange boundary be modified to exclude the City of Eagle Mountain from Qwest's certificated territory. This boundary modification was filed pursuant to a Stipulation between Qwest and Direct Communications and other parties interested in DCCV's UPSC petition for a certificate of public convenience and necessity. The conditional modification, to which the parties stipulated, was approved by the UPSC in its Order in Docket No. 04-049-136, dated October 8, 2004.

The EMC system provides most, but not all, central office services and features common to other local exchange carriers in Utah. The City's decision to sell the system was prompted, in part, by the realization that capitalization of its growth and maintenance requirements would require further borrowing at interest rates far less favorable than are available to private carriers.

In November 2002, the City conducted a referendum in which the City's residents were asked to vote on whether to sell the telephone system to DCRI. In that election, 94% of the voters approved the sale to DCRI in order to obtain the additional service features DCRI committed to provide. Following a two-year negotiation process, DCRI entered into a contract with EMC in December, 2003 to purchase the City's municipal telephone system.

B. Direct Communications Rockland, Inc., the Proposed Purchaser of the Eagle Mountain Municipal Telephone System

DRCI is an Idaho-certificated incumbent local exchange carrier ("ILEC") and eligible telecommunications carrier ("ETC") serving approximately 1,500 rural subscribers in Rockland, Arbon, and the southern half of Bear Lake County, Idaho. DCRI elected to provide service to EMC through a subsidiary, DCCV, organized and formed specifically for that purpose.

II. Basis for DCCV's Request for Expedited Decision

The purchase contract entered into between DCRI and EMC is contingent upon approval of USF support for DCCV by the UPSC and this Commission. DCRI's analysis of the EMC system shows that the high costs of serving this rural area make it uneconomical for a private carrier to provide service if the subscribers are the only source of system revenue. On August 9, 2004, the UPSC approved DCRI's and DCCV's

petition for a certificate of public convenience and necessity to operate the EMC telephone system. Specific findings by the UPSC are treated below, but the core finding of that Order is that although DCCV is a newly-organized company, it qualifies as an ETC pursuant to 47 U.S.C. § 214(e)(2), and should be regulated as though it were an ILEC even though, as a new company, it cannot meet the ILEC requirements of 47 CFR § 36.611, 36.612, and 69.2(hh) because it did not exist in 1996. The UPSC further found that DCCV meets the Utah USF requirements of UPSC Rule 746-360-6 for eligibility to participate in the Utah Universal Service Support Fund.

DCCV's loan guarantee application through the Rural Utilities Service ("RUS") is filed and pending. DCCV expects RUS approval to be issued by December 31, 2004; however, final approval of that financing is contingent upon the Commission's approval of federal USF support. The purchase contract between DCCV and EMC cannot be closed without the RUS financing.

The EMC city officers (the Mayor and City Council) who constitute the EMC telephone system's governing body have advised state regulators that the City's current operating deficit cannot be remedied without a telephone rate increase of approximately $11 per subscriber per month. This increase in local rates is a short-term fix to the long-term problem. DCCV is extremely concerned that a rate increase of that magnitude will cause subscribers to discontinue service, thereby burdening the system with decreased revenues before DCCV can even begin operating the system.

III. Precedent and Good Cause Exist for the Requested Relief

Generally, Commission rules may be waived for good cause shown.[2] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[3] The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[4]

DCCV is a new company, and it therefore does not meet the requirement of section 69.2(hh) of the Commission's Rules that it be an ILEC as defined by section 251(h)(1) of the 1934 Act. DCCV's parent company is an ILEC and an ETC for purposes of regulation in the State of Idaho, but not within the State of Utah. Nevertheless, the UPSC found that DCCV would be operating within the State of Utah: (1) as a "rural telephone company" pursuant to 47 U.S.C. § 153(47);[5] (2) as an ETC pursuant to 47 U.S.C. § 214(e)(2);[6] (3) that the system DCCV will purchase has functioned as though it were an ILEC in an area not previously served by any other carrier;[7] and (4) that DCCV should be regulated by the UPSC as an ILEC, inasmuch as its operations will be consistent in every practical and legal sense with the operations of the other Utah ILECs.[8]

The telephone service currently provided by the EMC municipal telephone system is the only telephone service which has ever been offered or provided in the area

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[2] 47 C.F.R. § 1.3.
[3] *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).
[4] *WAIT Radio v. FCC*, 418 F.2d 1153,1159 (D.C. Cir. 1969, *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*); *Northeast Cellular*, 897 F.2d at 1166.
[5] UPSC Order in Docket No. 04-2419-01 issued August 9, 2004, at Page 13, and attached hereto and incorporated herein by reference as Exhibit 2.
[6] *Id.* at Pages 14, 20, 28.
[7] *Id.* at Pages 12, 18, 28.
[8] *Id.* at Page 29.

served by that system. Prior to installation of the EMC municipal system, no other carrier had facilities in that service area. The EMC system was financed exclusively by the City, and no other carrier has ever competed to provide telephone service there, even though the area was within Qwest's certificated area. Thus, DCCV is purchasing a municipal system where no service had existed prior to that offered by EMC.

In this respect, DCCV comes before the Commission in a position nearly identical to that of other new companies organized after 1996 and organized for the purpose of serving areas where no other carrier had previously provided service. Because the definition of an ILEC pursuant to 47 U.S.C. § 251(h)(1) precludes such classification for any carrier created after 1996, DCCV cannot meet that definitional test or the ILEC requirement for NECA membership and USF participation. However, in several recent decisions, the Commission has recognized the practical difficulties inherent in rigid application of the ILEC definition irrespective of circumstances.

The Commission granted an exception to Skyline Telephone and waived the restrictions of section 69.2(hh) of the Commission's Rules in an order released April 12, 2004.[9] Skyline was a newly created company which proposed to serve a previously unserved rural, high-cost area. In its order approving Skyline's waiver of ILEC status as a condition of NECA membership and participation, the Commission wrote:

> When the Commission revised its rules to require that telephone companies be incumbent LECs to participate in NECA tariffs and pools, . . the Commission did not specifically provide for companies, such as Skyline Telephone, that come into existence after the enactment of the 1966 Act. The purpose of the incumbent LEC restrictions in Parts 36, 54, and 69 is to distinguish competitive LECs from incumbent LECs for purposes of calculating access charges and universal service support, not to impose interconnection requirements. Skyline Telephone is the sole provider of services in the area it

[9] *Petition of M&L Enterprises, Inc., d/b/a Skyline Telephone Company for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules* (filed May 25, 2001), Order, CC Docket No. 96-45, 19 FCC Rcd 6761 (*Skyline*).

> serves; thus, it is not a competitive LEC. As a rural telephone company, Skyline Telephone is exempt from the interconnection requirements in section 251(c) until the company receives a bona fide request for interconnection, services, or network elements, and the Washington Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the Act.[10]

Similar rulings in similar cases have been issued by the Commission in the *Sandwich Isles, South Park,* and *Border to Border* cases.[11] As with these companies, DCCV is newly formed (and therefore ineligible to be classified as an ILEC under the statutory definition). DCCV will provide service to a high-cost, rural area which, prior to 1996 was unserved by any existing carrier. Like these other companies, the service to be provided by DCCV cannot be sustained without federal and state USF support.

IV. The Waivers Sought by DCCV Are in the Public Interest

The comparative isolation of Eagle Mountain and the public safety aspects of reliable telephone service have been discussed above. The urgency of expeditiously completing the sale of the EMC municipal system to DCCV is reflected in the immediate pressure on the City raise its telephone rates in order to keep the system breaking even. DCCV has determined that operation of the system is not economically feasible without both state and federal USF support, and the purchase contract and RUS financing are all contingent upon approval of such support.[12]

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[10] *Id.* at ¶ 27.

[11] *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification,* Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles*), *application for review pending, Verizon Hawaii Inc. (formerly GTE Hawaiian Telephone Company) Application for Review of an Order Granting in Part a Petition for Waiver by Sandwich Isles Communications, Inc.*, filed Mar. 8, 1998, updated Sept. 4, 2001 (*Verizon Hawaii Application for Review*); *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules,* Order, AAD 97-41, 13 FCC Rcd 198 (Acct. Aud. Div. 1997) (*South Park*); *Border to Border Communications, Inc. Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules,* Memorandum Opinion and Order, AAD 96-61, 10 FCC Rcd 5055 (Com. Car. Bur. 1995) (*Border to Border*).

[12] Exhibit 2, Pages 7, 9, 25.

The UPSC found that the EMC municipal telephone system operates in a high-cost rural area, and that its rate structure, the highest in Utah, is a consequence of the municipality's statutory inability to participate in the Utah Universal Service Support Fund and the fact that EMC has not been a participant in federal USF support. These cost pressures will be remedied as a consequence of the sale of the system to DCCV, which the UPSC found is eligible for state USF participation and support.[13] Without such state and federal support, which the UPSC found to be necessary as a means of assuring affordable service at Eagle Mountain, the subscribers will continue to bear the full and increasing costs of the operation of the system.

DCCV has requested that it be allowed to participate in federal USF as an average schedule company under section 69.605(c) of the Commission's Rules for two reasons: (1) DCCV hopes that such a classification will expedite a favorable decision and allow immediate USF participation upon approval; and (2) DCCV does not have adequate historical cost data at the present time which would allow immediate USF participation on any other basis. The system of accounting followed by EMC has been structured to comport with municipal accounting policies and practices rather than anything similar to the Uniform System of Accounts. Until DCCV becomes the system owner and operator, the collection of actual cost data cannot be reliably undertaken. At such time as historical data is available, DCCV wishes to reserve the right to apply for historical cost treatment.

The primary goal of the USF program is to promote the nationwide availability of reasonably-priced telephone service by providing "direct assistance to the areas where it is most needed to ensure that telephone rates remain affordable for the average

[13] Exhibit 2 at Pages 7, 8, 16.