

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Channel Islands Telephone Company	)	
For Order Declaring It an Incumbent Local	)	WC Docket No. 08-123
Exchange Carrier in the Channel Islands, CA	)	
Pursuant to Section 251(h)(2) of the	)	
Communications Act of 1934, as Amended and	)	
Section 51.223(b) of the Commission's Rules	)	

**ORDER**

**Adopted: December 27, 2011**

**Released: December 27, 2011**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this Order, we deny Channel Islands Telephone Company's (CIT's) petition requesting that the Commission adopt an Order and rule "declaring that CIT shall be treated as the incumbent local exchange carrier ("LEC") in the Channel Islands, California telephone exchange" pursuant to section 251(h)(2) of the Communications Act of 1934, as amended, (the Act).<sup>1</sup> In light of the fact that CIT has deployed only limited facilities to date and appears to serve only one customer, we find that CIT does not meet the requirements for incumbent LEC status under section 251(h)(2).

**II. BACKGROUND**

**A. CIT Petition**

2. On June 25, 2008, CIT filed a petition asking that it be treated as an incumbent LEC in the Channel Islands, California telephone exchange pursuant to section 251(h)(2) of the Act and section 51.223(b) of the Commission's rules.<sup>2</sup> The Channel Islands are comprised of eight separate islands, extending for 160 miles along the coast of California.<sup>3</sup> The islands are divided into two groups, the Northern Channel Islands and the Southern Channel Islands. Together, the islands' land area totals approximately 346 square miles.<sup>4</sup> CIT has proposed to provide local exchange and interexchange service,

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<sup>1</sup> See Channel Islands Telephone Company, Petition for Order Declaring Channel Islands Telephone Company an Incumbent Local Exchange Carrier In the Channel Islands, CA Pursuant to Section 251(h)(2) of the Communications Act of 1934, as Amended and Section 51.223 (b) of the Commission's Rules, WC Docket No. 08-123 at 1 (filed June 25, 2008) (CIT Petition); see also 47 U.S.C. § 251(h)(2) (referring to Commission action "by rule" to treat a local exchange carrier (LEC) as an incumbent LEC for purposes of section 251).

<sup>2</sup> See CIT Petition at 1.; see also *Pleading Cycle Established For Comments on Petition for Order Declaring Channel Islands Telephone Company An Incumbent Local Exchange Carrier Pursuant to Section 251(h)(2) of the Communications Act*, WC Docket No. 08-123, Public Notice, 23 FCC Rcd 10338 (released July 1, 2008) (CIT Public Notice).

<sup>3</sup> See CIT Petition at 1.

<sup>4</sup> See *id.*

as well as certain other services, to and within five of the Channel Islands; specifically, San Miguel, Santa Rosa, Santa Barbara, Anacapa, and Santa Cruz Islands.<sup>5</sup> Four of the five Channel Islands that CIT seeks to serve, and a portion of the fifth, Santa Cruz Island, comprise the Channel Islands National Park.<sup>6</sup> The remainder of Santa Cruz Island is owned by the Nature Conservancy.<sup>7</sup>

3. In its application, CIT states that “the California Public Utilities Commission (CPUC) granted [it] a Certificate of Public Convenience and Necessity (CPCN) on May 16, 2008[,]” authorizing it to provide facilities-based local exchange and interexchange service on these islands.<sup>8</sup> CIT states that “San Miguel, Santa Rosa, Santa Barbara, Anacapa, and Santa Cruz Islands are not served by a local exchange or interexchange carrier and do not have any phone service.”<sup>9</sup> CIT states that the system it plans to install “will be located 100 percent outside the franchise area of any existing local service provider.”<sup>10</sup> CIT adds that “[a]lthough some analog cellular service is [provided] to a small part of Santa Cruz Island by Verizon Wireless, Verizon is currently in the process of decommissioning this service.”<sup>11</sup> According to CIT, “Verizon Wireless is not an ILEC on the Channel Islands, and thus, does not have ‘carrier of last resort’ obligations there.”<sup>12</sup>

4. CIT proposes to use wireless technology, specifically Code Division Multiple Access (CDMA), which it states will allow for the best propagation of signal on the islands as well as enable the delivery of 3G data capabilities.<sup>13</sup> According to CIT, “this technology also supports fixed wireless telephones, allowing CIT to provide plain old telephone service (POTS) lines and paystations.”<sup>14</sup> CIT explains that “[s]atellite links [will be] utilized to backhaul signals from each of the islands to a switch on the mainland” in Ventura, California, and “[a]ll of the islands will utilize wireless loops to link the base stations and POTS telephones.”<sup>15</sup> CIT states that the system it plans to install “will serve 100 percent of all the access lines and will be capable of providing high-quality, voice-grade telephone service, and will

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<sup>5</sup> See *id.* at 2. The largest island, Santa Catalina Island, is served by AT&T, and two additional islands, San Nicholas and San Clemente Islands, are controlled by the United States Navy. See *id.* at 2.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> CIT Petition at 2. The CPUC granted CIT “authority to provide limited facilities-based local exchange and interexchange service . . . .” See CIT Petition, Exh. 1 (CPUC Order) at 1. The CPUC denied CIT’s request to provide “full facilities-based services and to construct facilities because of the need for environmental review under the California Environmental Quality Act (CEQA).” See *id.* The CPUC stated that “a limited facilities-based CPCN would not authorize [CIT] to engage in construction, except for very minor activities such as the placement of switches in or on existing structures,” but noted that CIT could reapply for a full facilities-based CPCN and authorization to construct facilities after concluding CEQA review. See *id.*, Exh. 1 at 3-4.

<sup>9</sup> See CIT Petition at 2.

<sup>10</sup> See CIT Petition at 2. But see Verizon and Verizon Wireless (Verizon) Opposition at 2 (stating that Verizon serves the populated portion of Santa Cruz and is licensed to serve Anacapa and Santa Rosa Islands).

<sup>11</sup> See CIT Petition at 2. However, in its Opposition, Verizon refutes this claim, indicating that, in early 2008, it upgraded its wireless service from analog to digital on the populated portion of Santa Cruz Island and has not abandoned service. See Verizon Opposition at 1-2.

<sup>12</sup> See CIT Petition at 2.

<sup>13</sup> See *id.* at 3.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

offer all standard features including, but not limited to, voice mail and call forwarding.”<sup>16</sup> CIT adds that the access lines will also have broadband data capability for use by Park Service employees and the public to access the Internet, communicate via e-mail, and utilize other broadband applications.<sup>17</sup> CIT states that it will also deploy solar-powered paystations for the use of park visitors and to provide public access to 911 services.<sup>18</sup> CIT asserts that the availability of these services “will vastly improve public safety, bring 911 service [to the National Park], allow the Park Service to enjoy greater efficiencies in its operations, encourage greater use of the park and, generally, enhance the experience of Park Service personnel and visitors while on the islands.”<sup>19</sup> CIT notes that this project is part of a \$2.5 million grant provided by the State of California to deploy telecommunications services to rural and unserved areas in California.<sup>20</sup>

5. The Commission released a Public Notice requesting comments on the petition on July 1, 2008.<sup>21</sup> Verizon filed an opposition in response to the Public Notice, stating, among other things, that Verizon Wireless was not discontinuing service to the populated portion of Santa Cruz Island as CIT claimed, and in fact had recently upgraded its wireless service to that area.<sup>22</sup> Verizon also argued that the Commission “should not act on CIT’s request until the [CPUC] designates CIT as an incumbent LEC,” and CIT provides more information on the potential costs and benefits of the proposed service demonstrating that grant of the application is in the public interest.<sup>23</sup> CIT filed a reply arguing that the CPUC has effectively recognized that it will regulate CIT as a small incumbent” and that the proposed service would serve the public interest.<sup>24</sup>

## B. Statutory Provisions

6. Section 251(h)(1) defines an incumbent LEC<sup>25</sup> as a local exchange carrier that, on the date of enactment of the Telecommunications Act of 1996, provided local exchange service in an area and was either a member of the National Exchange Carrier Association (NECA),<sup>26</sup> or became a successor or

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<sup>16</sup> See CIT Petition at 3.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> Letter from Michael B. Hazzard, Counsel to Channel Islands Telephone Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 08-123, at 1 (filed Jul. 10, 2009); see <http://www.cpuc.ca.gov/Environment/info/mha/channelislands/channelislands.htm> (including link to maps).

<sup>21</sup> See CIT Public Notice.

<sup>22</sup> Verizon Opposition at 1.

<sup>23</sup> See *id.*

<sup>24</sup> CIT Reply at 2.

<sup>25</sup> Section 251 of the Act establishes different pro-competition requirements for different categories of carriers. Under section 251, incumbent LECs are subject to the most significant obligations, including non-discriminatory interconnection and unbundling obligations. See 47 U.S.C. § 251(a)-(c). All telecommunications carriers are subject to the requirements of section 251(a) of the Act. See 47 U.S.C. § 251(a). In addition to those requirements, local exchange carriers are also subject to the requirements of section 251(b). See 47 U.S.C. § 251(b). Incumbent local exchange carriers are subject to the requirements of section 251(c) in addition to all of the requirements applicable to telecommunications carriers and local exchange carriers. See 47 U.S.C. § 251(c).

<sup>26</sup> NECA is an association, established by the Commission, for all “telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by the association.” 47 C.F.R. § (continued....)

assign of such an incumbent LEC (legacy incumbent LEC). Section 251(h)(2) authorizes the Commission to treat a LEC as an incumbent LEC for purposes of section 251 “by rule” if the Commission determines that the LEC satisfies certain statutory criteria. In particular, the Commission must find that: (1) the LEC at issue “occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a [legacy incumbent LEC;]” (2) “such carrier has substantially replaced [a legacy incumbent LEC];” and (3) “such treatment is consistent with the public interest, convenience, and necessity and the purposes of . . . section [251].”<sup>27</sup>

### III. DISCUSSION

#### A. Overview

7. We find that CIT does not satisfy the requirements for treatment as an incumbent LEC pursuant to section 251(h)(2). We find that it does not presently occupy a position in the market for telephone exchange service comparable to that of a legacy incumbent LEC, and that it has not substantially replaced a legacy incumbent LEC as required by section 251(h)(2).<sup>28</sup> In light of our conclusion that CIT does not satisfy either of the two definitional requirements of section 251(h)(2), we do not reach the public interest analysis.

#### B. Section 251(h)(2)(A)

8. In order to treat CIT as an incumbent LEC under section 251(h)(2), the Commission must find that CIT “occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a [legacy incumbent LEC].”<sup>29</sup> For purposes of this discussion, we assume that the service territory proposed by CIT is an appropriate service area under section 251(h)(2)(A) for analyzing CIT’s market position. The Commission has found that “incumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c).”<sup>30</sup>

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69.601(b). The association was established “in order to prepare and file access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements.” 47 C.F.R. § 69.601(a).

<sup>27</sup> 47 U.S.C. § 251(h)(2); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16110, para. 1248 (1996) (*Local Competition Order*) (subsequent history omitted) (stating that a “clear and convincing” showing should be required to satisfy the requirements of section 251(h)(2)).

<sup>28</sup> 47 U.S.C. § 251(h)(2)(B).

<sup>29</sup> 47 U.S.C. § 251(h)(2)(A). Section 251(h)(1) defines an incumbent LEC. *See* 47 U.S.C. § 251(h)(1).

<sup>30</sup> *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act and Treatment of Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket No. 97-134, 12FCC Rcd 6925, 6941 at para. 26 (1997) (*Guam Declaratory Ruling and NPRM*) (citing *Local Competition Order*, 11 FCC Rcd at 15505-12, paras. 1-20); *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Report and Order, CC Docket No. 97-134., 13 FCC Rcd 13765, 13768-69 at para. 6 (1998) (*Guam Order*) (adopting in full the conclusions set forth in the *Guam Declaratory Ruling and NPRM*) *See also Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Report and Order, 21 FCC Rcd 11506, 11510-12, paras. 9-13 (2006) (*Mid-Rivers Order*).

9. In prior decisions, the Commission has deemed carriers to be incumbent LECs under section 251(h)(2) when the carrier has deployed facilities and is serving all, or the vast majority, of the customers in the relevant geographic area. CIT states that it “occupies 100% of the market share. . . .”<sup>31</sup> In fact, CIT has deployed only limited facilities and appears to serve a single customer.<sup>32</sup> Furthermore, the CPUC denied CIT’s request to construct the proposed facilities and provide full facilities-based service on the islands because of the need for an environmental review under the California Environmental Quality Act (CEQA).<sup>33</sup> Instead, the CPUC granted CIT a limited facilities-based CPCN that allows it to commence operations as a telecommunications provider and deploy limited facilities, such as placing equipment in or on existing structures.<sup>34</sup> CIT cannot deploy additional facilities until it receives the requisite environmental approvals, and requests and receives additional authority from the CPUC. We understand that these proceedings are pending. CIT’s circumstances stand in stark contrast to the situation in the *Mid-Rivers Order*, where the Commission found that Mid-Rivers occupied a position in the market for telephone exchange service within the Terry exchange comparable to that of a legacy incumbent LEC based on Mid-Rivers’ extensive facilities build-out and estimates of Mid-Rivers’ subscribership in the Terry exchange that ranged from 85 to 93 percent.<sup>35</sup>

10. Accordingly, we conclude that CIT does not occupy a position in the market for telephone exchange service within the Channel Islands exchange that is comparable to the position occupied by a legacy incumbent LEC as required by section 251(h)(2)(A).<sup>36</sup>

### C. Section 251(h)(2)(B)

11. Section 251(h)(2)(B) requires that CIT show that it has substantially replaced the legacy incumbent LEC in the service area at issue.<sup>37</sup> CIT cannot satisfy this requirement, on its face, because CIT is proposing to serve an area that has not been served by an incumbent LEC, as that term is defined in section 251(h)(1). We addressed an analogous situation, in the *Guam Telephone Authority Proceeding*.<sup>38</sup> In that proceeding, the Commission found that the Guam Telephone Authority (GTA) should be treated as an incumbent LEC under section 251(h)(2) even though it could not satisfy the literal requirement that it substantially replace the legacy incumbent LEC. This was due to the fact that GTA was the only LEC to serve Guam.<sup>39</sup> Under these circumstances, the Commission concluded that section 251(h)(2) is satisfied when “the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area

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<sup>31</sup> CIT Petition at 6-7.

<sup>32</sup> The record in this proceeding does not indicate that CIT is currently providing service to any customer. See Letter from Todd Lesser, President, Channel Islands Telephone Company, to William Dever, FCC, WC Docket No. 08-123 (filed Nov. 11, 2011). However, in a telephone conversation with Wireline Bureau staff on November 7, 2011, Mr. Lesser stated that the company was serving one customer.

<sup>33</sup> See CPUC Order at 1.

<sup>34</sup> See *id.* at 3.

<sup>35</sup> See *Mid-Rivers Order*, 21 FCC Rcd at 11510-12, paras. 9-13.

<sup>36</sup> 47 U.S.C. § 251(h)(2)(A).

<sup>37</sup> 47 U.S.C. § 251(h)(2)(B).

<sup>38</sup> *Guam Order*, 13 FCC Rcd at 13765; *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6925.

<sup>39</sup> The Commission found that GTA did not qualify as an incumbent LEC under section 251(h)(1) because it was not a member of NECA when the 1996 Telecommunications Act was enacted, although GTA provided exchange telephone service and exchange access throughout Guam at the time that GTA requested incumbent LEC status under section 251(h)(2). See *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6927, para. 2; see also *Guam Order*, 13 FCC Rcd at 13766, para. 2.

that did not receive telephone service from a NECA member as of the date of enactment of the 1996 Act.”<sup>40</sup> Applying that same standard here, we find that CIT falls far short. In contrast to the situation in Guam, CIT’s proposed service area on the Channel Islands is largely unserved at present. CIT has deployed limited facilities on the Channel Islands and does not serve all or virtually all of the customers in the service area. Moreover, to the extent that portions of CIT’s proposed service area is already served by Verizon, CIT would not *replace* that service but would rather be offering complementary service. Accordingly, we conclude that CIT has not satisfied section 251(h)(2)(B).

#### D. Section 251(h)(2)(C)

12. The last requirement to qualify as an incumbent LEC under section 251(h)(2) is that such treatment must be consistent with the public interest, convenience, and necessity and the purposes of section 251. CIT contends that granting its petition would serve the public interest. The public interest requirement is in addition to, not in lieu of, the definitional requirements in sections 251(h)(2)(A) and (B).<sup>41</sup> Because we find that CIT has not satisfied either of those requirements, we do not evaluate whether declaring CIT to be an incumbent LEC would be consistent with the public interest.

#### E. Other Issues

13. We note that our decision is limited to finding that CIT does not satisfy the statutory requirements to be deemed an incumbent LEC pursuant to section 251(h)(2). The decision does not prevent CIT from serving the proposed service territory as a non-incumbent. In addition, our order does not preclude CIT from seeking incumbent LEC status in the future, if it subsequently meets the standards set forth in section 251(h)(2).

14. We also note that incumbent LEC status under section 251(h)(2) would not, by itself, authorize CIT to obtain Universal Service Fund (USF) support and/or participate in the NECA pools. Section 251(h)(2) addresses whether a carrier should be treated as an incumbent LEC “for purposes of section 251.”<sup>42</sup> In the *Mid-Rivers Order*, the Commission specified that it was granting incumbent LEC status to Mid-Rivers only for purposes of section 251, and that any questions concerning the status of Mid-Rivers as an incumbent LEC for other purposes, such as USF funding and NECA pool participation would be addressed in separate proceedings.<sup>43</sup> In addition, the fact that CIT is not an incumbent LEC does not foreclose the possibility of receiving universal service support. Under the Connect America Fund, non-incumbent LECs may be eligible to receive support through mechanisms including the remote access fund and the mobility fund.<sup>44</sup>

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<sup>40</sup> See *Guam Declaratory Ruling and NPRM*, 12 FCC Red at 6943, para. 31.

<sup>41</sup> 47 U.S.C. § 251(h)(2) (the requirements of this section are stated as conjunctive, not in the alternative).

<sup>42</sup> See 47 U.S.C. § 251(h)(2); see also *Guam Order*, 13 FCC Red at 13765, 13769, paras. 1, 6.

<sup>43</sup> See *Mid Rivers Order*, 21 FCC Red at 11514, para. 17. We recognize that this limitation was not placed on the treatment of the Guam Telephone Company as an incumbent under section 251(h)(2). As discussed above, however, the circumstances in that case were considerably different from those in this proceeding.

<sup>44</sup> *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109; *Universal Service Reform-Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, at paras. 28, 30 (rel. Nov. 18, 2011).

**IV. CONCLUSION**

15. In light of our conclusions discussed above, we deny CIT's petition and decline to initiate a rulemaking proceeding to consider treatment of CIT as an incumbent LEC on the Channel Islands. This decision is without prejudice to re-filing by CIT if it subsequently meets the requirements of section 251(h)(2).

**V. ORDERING CLAUSES**

16. Accordingly, IT IS ORDERED that, pursuant to the authority in Sections 1, 2, 4(i), 4(j) and 251(h) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j) and 251(h), the above petition for treatment as an incumbent LEC filed by Channel Islands Telephone Company on June 25, 2008, IS DENIED without prejudice to re-filing.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett  
Chief, Wireline Competition Bureau