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May 11, 2007

VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Docket No. ARB 789

Enclosed for filing, in the above-referenced proceeding, please find an original and 6 copies of Beaver Creek Cooperative Telephone Company's Opening Brief. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa F. Rackner", with a long horizontal flourish extending to the right.

Lisa F. Rackner

cc: Service List

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

ARB 789

In the Matter of the Petition of CLEAR
CREEK MUTUAL TELEPHONE COMPANY
for Arbitration of an Interconnection
Agreement with BEAVER CREEK
COPPERATIVE TELEPHONE COMPANY,
Pursuant to 47 U.S.C. §§ 251, 252

BEAVER CREEK COOPERATIVE
TELEPHONE COMPANY'S
OPENING BRIEF

8 Beaver Creek Cooperative Telephone Company ("BCT") respectfully submits this
9 Opening Brief pursuant to the schedule in this proceeding.

10 I. INTRODUCTION AND SUMMARY

11 BCT is a small rural cooperative telephone company, certified by the Oregon Public
12 Utility Commission ("OPUC" or the "Commission") as a competitive provider outside of its
13 service territory, throughout the State of Oregon. *In re Application of Beaver Creek*
14 *Cooperative Telephone Co.*, CP 1242, Order 06-155 (OPUC Apr. 3, 2006). BCT is a
15 competitive local exchange carrier ("CLEC") within the meaning of the Telecommunications
16 Act of 1996 (the "Act").¹

17 BCT's CLEC division currently serves customers in the Clackamas wire center in
18 Qwest territory, and in the Redland exchange located in the territory of Clear Creek Mutual
19 Telephone ("CCMT"). BCT provides advanced services entirely over its own broadband
20 facilities to its approximately 50 customers in CCMT's territory.

21 BCT interconnects to CCMT's network indirectly, via a third-party transit service, and
22 seeks to formalize this arrangement through an interconnection agreement. As a full
23 facilities-based provider, BCT has no plans to purchase unbundled network elements,
24 finished services for resale, or collocation from CCMT.

25 _____
26 ¹ Codified at 47 USC § 251 *et seq.*

1 Despite the small scale of BCT's operations in CCMT's service territory, CCMT
2 proposes to require BCT to invest substantial capital to build out local interconnection trunks
3 between the Parties' networks to establish a direct physical interconnection. The Act
4 specifically recognizes that such a requirement would pose an insurmountable and
5 unacceptable barrier to competition where, as here, the carriers exchange a small volume of
6 traffic. To prevent this, the Act imposes an express duty on ILECs to interconnect indirectly
7 with CLECs when the CLECs elect indirect interconnection. In light of this express duty,
8 CCMT cannot refuse to interconnect indirectly with BCT.

9 A related dispute arises out of CCMT's proposed separate trunking requirement,
10 which both conflicts with and is made unnecessary by BCT's indirect interconnection.
11 CCMT seeks to require BCT to incur substantial cost to establish separate trunking for
12 different types of non-toll traffic (e.g., local, EAS, E911 and operator services). Because
13 BCT is interconnecting with CCMT indirectly and as a full facilities-based provider, however,
14 the only BCT calls that will touch CCMT's network pursuant to this interconnection
15 agreement are local and EAS calls. Further, even if BCT were to interconnect directly with
16 CCMT's network, there is no justification for requiring BCT to establish more than one trunk
17 group to transit different types of non-toll calls. Simply put, the context of this agreement
18 makes separate trunking irrelevant and, in any event, no basis exists in the law for requiring
19 separate trunking.

20 Finally, CCMT and BCT disagree over reciprocal compensation rates. CCMT
21 proposes to pay the .0007 per-minutes-of-use capped rate for ISP-bound calls and receive a
22 higher state-arbitrated rate for other section 251(b)(5) traffic. This proposal, which picks and
23 chooses between the federal rate cap and state arbitrated rates, is discriminatory and an
24 unlawful violation of the "Mirroring Rule" established by the Federal Communications
25 Commission ("FCC") in the ISP Remand Order and affirmed in the FCC's Core Forbearance
26 Order.

1 II. ARGUMENT

2 A. The Act Imposes an Express Duty on ILECs to Interconnect Indirectly with
3 CLECs when the CLECs Elect Indirect Interconnection.

4 CCMT objects to BCT's proposal to interconnect indirectly with CCMT's network
5 through a third party transit service and instead insists that BCT establish direct trunking
6 between the BCT and CCMT networks. CCMT's position is contrary to law and policy.

7 First, the plain language the Act states that the ILEC has the duty "to interconnect
8 directly *or indirectly* with the facilities and equipment of other telecommunications carriers."
9 47 USC § 251(a)(1) (emphasis added); *In re Deployment of Wireline Services*, Order on
10 Reconsideration and Further Notice of Proposed Rulemaking, CC Docket 98-147, 15 FCC
11 Rcd 17806, 17845 n.198, 2000 WL 1128623 (FCC Aug. 10, 2000) (defining "indirect"
12 interconnection as attachment through the facilities or equipment of third party carriers). This
13 straightforward interpretation of the Act's language has been recognized by both the FCC
14 and the courts. See *In Re Developing a Unified Inter-carrier Compensation Regime*, Further
15 Notice of Proposed Rulemaking, CC Docket 01-92, 20 FCC Rcd 4685, 4740, para. 125,
16 2005 WL 495087 (FCC Mar. 03, 2005) (recognizing indirect interconnection through transit
17 service is "a form of interconnection explicitly recognized and supported by the Act"); *WWC*
18 *License v. Boyle*, 459 F.3d 880, 893 (8th Cir. 2006); *Atlas Telephone Co. v. Oklahoma Corp.*
19 *Comm'n*, 400 F.3d 1256, 1268 (10th Cir. 2005); *Mountain Communications, Inc. v. FCC*, 355
20 F.3d 644 (DC Cir. 2004) (indirect connection sufficient to trigger reciprocal compensation
21 duties; ILEC cannot charge competitor fees for cost of delivering local traffic to distant points
22 of indirect interconnection).²

23 _____
24 ² BCT is not aware of any Commission orders addressing indirect interconnection.
25 However, the Commission has rejected an ILEC's argument that a CLEC's access to the
26 ILEC's unbundled network elements, under section 252(a)(1), is dependent upon physical
interconnection with the ILEC's network. *In re Petition of Metro One Telecommunications
for Enforcement of an Interconnection Agreement*, IC 1, Order 00-213 at 5-6 (OPUC Apr.
(continued...))

1 Moreover, as pointed out by the FCC, the obligation to interconnect indirectly is
2 supported not only by the plain language of the Act but its overriding policy goals as well. In
3 its Local Competition First Report and Order, the FCC observed that “the duty to
4 interconnect directly or indirectly is central to the 1996 Act and achieves important policy
5 objectives.” First Report and Order, *In re Implementation of the Local Competition*
6 *Provisions in the Telecommunications Act of 1996*, CC Docket 95-185, 11 FCC Rcd 15499,
7 15991, para. 997 (FCC Aug. 1, 1996). Later, the FCC observed further that the Act’s
8 provision for indirect interconnection removes barriers to competition by allowing many
9 CLECs, including rural LECs, to compete where they otherwise could not. Further Notice of
10 Proposed Rulemaking, 20 FCC Rcd at 4740, paras. 125-26. There, in discussing the
11 Commission’s legal authority to impose transiting obligations, the FCC observed:

12 It is evident that competitive LECs, CMRS carriers, and rural
13 LECs often rely upon transit service from the incumbent LECs
14 to facilitate indirect interconnection with each other. . . .
15 Moreover, it appears that indirect interconnection via a transit
16 service provider is an efficient way to interconnect when
17 carriers do not exchange significant amounts of traffic.
18 Competitive LECs and CMRS carriers claim that indirect
19 interconnection via the incumbent LEC is an efficient form of
interconnection where traffic levels do not justify establishing
costly direct connections. As AT&T explains, “transiting lowers
barriers to entry because two carriers avoid having to incur the
costs of constructing the dedicated facilities necessary to link
their networks directly.” This conclusion appears to be
supported by the widespread use of transiting arrangements.

20 *Id.* (footnotes omitted).

21 This interpretation has been uniformly supported by the courts. For instance, in
22 *WWC License*, the court relied on the plain language of the Act as well as the underlying
23 policy of eliminating monopolies and fostering competition to support its holding that the
24 _____
25 20, 2000) (“while many requesting carriers seek interconnection when requesting network
26 elements, nothing in the Act requires both”).

1 ILEC could not lawfully shift costs to the CLEC simply because the CLEC's election to
2 interconnect indirectly may impose costs on the ILEC. 459 F.3d at 890-93. There, the
3 CLEC elected to indirectly connect with the rural ILEC's network through third party tandem
4 switches rather than by placing physical points of interconnection in the rural ILEC's local
5 exchanges. *Id.* at 886. The ILEC argued that the duty to provide local dialing parity, per
6 47 USC § 251(b)(3), was dependent on the existence of a direct point of interconnection,
7 because providing local dialing parity through tandem routing would impose costs on the
8 ILEC and would be technically infeasible. *Id.* Rejecting the ILEC's arguments, the court
9 explained that the duties under sections 251(a) and (b) are "not limited with reference to
10 technical feasibility or expense." *Id.* at 893. The court observed that "[i]t is undisputed that
11 Congress passed the Act with the intention of eliminating monopolies and fostering
12 competition." *Id.* at 891. The court concluded:

13 "[T]his general intent should guide our consideration of
14 competing interpretations of the Act. . . . ***[W]e should be***
15 ***wary of interpretations that simultaneously expand costs***
16 ***for competitors (such as a requirement for direct***
17 ***connections)*** and limit burdens on incumbents (such as a
18 limitation of dialing parity to local exchange boundaries). If a
19 cost is imposed on a competitor, it becomes a barrier to entry
20 and rewards the company who previously benefited from
21 monopoly protection. Because Congress passed the Act with
22 a clear intent to foster competition, we are more inclined to
23 interpret a vague provision in a manner that reduces barriers
24 to entry."

20 *Id.* (emphasis added).

21 Similarly, in *Atlas Telephone Co.*, a number of rural ILECs appealed district court
22 orders affirming orders of the Oklahoma Corporation Commission ("OCC") in which the OCC
23 had established interconnection obligations between the rural ILECs and competitive
24 wireless carriers. Under the terms of the interconnection agreements, the competitive
25 wireless carriers were not required to establish physical connections with the rural ILECs'
26 networks. 400 F.3d at 1260. On appeal, the rural ILECs argued that section 251(c)(2)

1 requires CLECs to establish a physical connection within the ILECs' network for the
2 exchange of local traffic. *Id.* at 1268. In response, the court observed that "the [rural
3 ILECs'] interpretation of § 251(c)(2) would operate to thwart the pro-competitive principles
4 underlying the Act." *Id.* at 1266; *see also id.* at 1265 n.10 (observing that request for direct
5 interconnection is typically made when volume of traffic passing between carriers makes
6 physical interconnection economically feasible). Thus, the court held that "[t]he physical
7 interconnection contemplated by § 251(c) in no way undermines telecommunications
8 carriers' obligation under § 251(a) to interconnect "directly or indirectly." *Id.*³

9 As these decisions demonstrate, a Commission cannot require a CLEC to
10 interconnect directly with an ILEC's network. To do so would ignore the plain language of
11 the Act and contravene the policy of eliminating monopolies and fostering competition that
12 lies at its heart. Accordingly, as a matter of law, BCT must be allowed to interconnect
13 indirectly with CCMT's network through a third party transit service provider.

14 **B. The Parties' Interconnection Agreement Should Not Contain a Separate**
15 **Trunking Requirement.**

16 CCMT seeks to require BCT to establish separate trunk groups between the Parties
17 for different types of non-toll traffic. Specifically, CCMT proposes the following:

18 1.3 BCT shall be responsible for establishing separate trunk
19 groups for:

20 1.3.1 Local Interconnection Traffic including ISP Bound
21 Traffic and locally-dialed Enhanced Services traffic
that terminates directly on Clear Creek's switch.

22 ³ In relevant part, section 251(c) provides:

23 "In addition to the duties contained in subsection (b) of this
24 section, each incumbent local exchange carrier has the
25 following duties The duty to provide, for the facilities and
equipment of any requesting telecommunications carrier,
interconnection with the local exchange carrier's network . . . at
any technically feasible point within the carrier's network . . ."

26 47 USC § 251(c)(2)(B).

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Local Interconnection trunks shall be used solely for exchange of traffic between BCT's CLEC customers and Clear Creek's customers. A separate trunk group shall be provided for any traffic other than Local Traffic between Clear Creek and BCT. The following types of traffic are specifically excluded from the Local Interconnection trunk group(s), and shall be provided for using separate trunks groups:

1.3.1.1 EAS traffic in both directions between Clear Creek and any other company except BCT's own directly originated or directly terminated CLEC traffic. This exclusion includes all third party traffic, including ILEC traffic or BCT traffic, traffic of affiliates of BCT, and all toll and/or access traffic.

1.3.1.2 State and Interstate Access traffic regardless of origination point and destination.

1.3.1.3 Ancillary and tandem traffic per Paragraphs 1.3.2 – 1.3.4.

1.3.1.4 Connection to Wireless Carriers on either a Wireline-Wireless or Wireless-Wireline basis.

1.3.2 Connecting BCT's switch to the applicable 911/E911 routers or PSAPs. Clear Creek does not provide tandem or transit service for 911/E911 traffic. BCT shall not route any 911/E911 traffic over any trunk group connecting Clear Creek and BCT. BCT agrees to hold Clear Creek harmless for any problems with completing any 911/E911 traffic that BCT may attempt to route over Clear Creek's network. For all 911/E911 traffic originating from BCT, it is the sole responsibility of BCT and the appropriate state or local public safety answering agency to negotiate the manner in which 911/E911 traffic from BCT will be processed.

1.3.3 Connecting BCT's switch directly to the applicable Operator and Directory Assistance services for all 0+ or 0- or Directory Assistance, Intercept and/or Verification services. Clear Creek does not provide tandem or transit service for Operator Directory Assistance, Intercept or Verification traffic. BCT shall not route any Operator traffic over any trunk group connecting Clear Creek and BCT. BCT agrees to hold Clear Creek harmless for any

1 problems with completing any Operator traffic either
2 to or from BCT.

3 Pet. Ex. C ¶ 1.3. Thus, CCMT seeks to require BCT to establish separate trunk groups for
4 local interconnection, EAS, E911, connections to wireless carriers, and connections to
5 operator services.

6 CCMT's separate trunking proposal is not only unreasonable and unlawful, it is
7 unnecessary. BCT has requested and is entitled to interconnect indirectly with CCMT's
8 network through a third party transit service. Therefore, BCT should not be required to
9 establish any trunking at all—much less separate trunk groups for different types of non-toll
10 traffic as proposed by CCMT.

11 Moreover, even if BCT could be required to interconnect directly with CCMT's
12 network—which as a matter of law it is not required to do⁴—there would be no reason to
13 require BCT to establish more than one trunk group. It is undisputed in this proceeding that
14 BCT's customers in CCMT territory are being served entirely on BCT's network. Thus, the
15 only traffic arising as a result of BCT's CLEC operations in CCMT territory that will use
16 CCMT's network will be calls between CCMT and BCT customers originating and
17 terminating in the same wire center. These are all local calls. Additionally, BCT has no
18 CLEC operations outside the Portland Metro EAS territory. Therefore, any calls made by a
19 BCT customer from outside CCMT territory to a CCMT customer would be an EAS call.⁵
20 Consequently, the only BCT calls that will ever touch CCMT's network are local and EAS
21 calls. No practical or legal reason exists for requiring BCT to construct separate trunk
22 groups for these non-toll calls.

23 ⁴ See *infra*.

24 ⁵ It is true that BCT's ILEC operations may send traffic to CCMT's network.
25 However, this traffic is already handled through a third party transit provider and would not
26 be impacted by a hypothetical decision by this Commission to require BCT to route CLEC
traffic over direct interconnection trunks to CCMT.

1 Accordingly, if the Parties' Interconnection Agreement must address trunking at all, it
2 should provide that, in the event BCT establishes a direct connection with CCMT, BCT is
3 allowed to combine local, EAS, E911, operator services, and connections to wireless
4 carriers on one trunk group. BCT's proposed language accomplishes this:

5 1.3 If BCT determines in its sole discretion that the amount of
6 traffic exchanged between the Parties warrants the
7 expense of constructing a direct interconnection, BCT
8 shall be responsible for establishing separate trunk
9 groups for:

10 1.3.1 Local Interconnection Traffic including ISP Bound
11 Traffic, locally-dialed Enhanced Services traffic that
12 terminates directly on Clear Creek's switch, and
13 EAS traffic; Local Interconnection trunks shall be
14 used solely for exchange of traffic between BCT's
15 CLEC customers and Clear Creek's customers;
16 and

17 1.3.2 Intrastate and Interstate Access traffic regardless of
18 origination point and destination.

19 Resp. Ex. A ¶ 1.3.

20 Consistent with the context of this agreement and with CCMT's obligations under
21 sections 251(a)(1) and 251(c)(2), the Commission should conclude that the Parties'
22 Interconnection Agreement should not contain a separate trunking requirement, because:
23 (1) separate trunking is not relevant to this Interconnection Agreement because BCT will not
24 be using CCMT's facilities for any non-local calls; (2) even if BCT were to interconnect
25 directly with CCMT's network, BCT has a right to use the direct interconnection trunks to
26 carry EAS traffic to its customers located in CCMT's ILEC territory; and (3) as a matter of
law, BCT may combine all of its non-toll traffic destined for customers in CCMT's ILEC
territory onto a single trunk group.

1 C. The Mirroring Rule Requires Adoption of the Same Rate for ISP-Bound Traffic
2 as for all Other Section 251(b)(5) Traffic.

3 CCMT wishes to elect to pay the federally-recognized capped rate for ISP-bound
4 traffic (.0007 per minute of use⁶) and receive a higher state-arbitrated rate for local traffic
5 (.0171 per minute of use). (See Ex. A (revised Pet., Ex. C (CCMT's proposed
6 Interconnection Agreement), Attach. 4 (pricing)).) Such "picking and choosing" is precisely
7 the kind of discriminatory the FCC sought to prohibit in the ISP Remand Order.

8 In the ISP Remand Order, the FCC considered the appropriate compensation rate
9 for ISP-bound traffic. Out of concern for regulatory arbitrage, the FCC adopted caps for
10 reciprocal compensation rates for ISP-bound traffic as well as other limitations related to
11 such traffic. At the same time, the FCC adopted a rule known as the "Mirroring Rule," which
12 provides that the ILEC must offer the same rate for both ISP-bound and other section
13 251(b)(5) traffic, whether that rate is the FCC-approved capped rate or a different state-
14 arbitrated rate:

15 It would be unwise as a policy matter, and patently
16 unfair, to allow incumbent LECs to benefit from reduced
17 intercarrier compensation rates for ISP-bound traffic, with
18 respect to which they are net payors, while permitting them to
19 exchange traffic at state reciprocal compensation rates, which
20 are much higher than the caps we adopt here, when the traffic
21 imbalance is reversed. Because we are concerned about the
22 superior bargaining power of incumbent LECs, **we will not
allow them to "pick and choose" intercarrier
compensation regimes**, depending on the nature of the traffic
exchanged with another carrier. **The rate caps for ISP-bound
traffic that we adopt here apply, therefore, only if an
incumbent LEC offers to exchange all traffic subject to
section 251(b)(5) at the same rate. Thus, if the applicable**

23 ⁶ In the ISP Remand Order, the FCC adopted a cap on intercarrier compensation for
24 ISP-bound traffic of \$.0007 per minute of use. *Implementation of the Local Competition
25 Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound
26 Traffic, Order on Remand and Report and Order*, 16 FCC Rcd 9151, 9187, para. 78 (2001)
("ISP Remand Order"), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert.
den.* 538 U.S. 1012 (2003).

1 **rate cap is \$.0010/mou, the ILEC must offer to exchange**
2 **section 251(b)(5) traffic at that same rate. Similarly, if an**
3 **ILEC wishes to continue to exchange ISP-bound traffic on**
4 **a bill and keep basis in a state that has ordered bill and**
5 **keep, it must offer to exchange all section 251(b)(5) traffic**
6 **on a bill and keep basis.** For those incumbent LECs that
7 choose not to offer to exchange section 251(b)(5) traffic
subject to the same rate caps we adopt for ISP-bound traffic,
we order them to exchange ISP-bound traffic at the state-
approved or state-arbitrated reciprocal compensation rates
reflected in their contracts. This “mirroring” rule ensures that
incumbent LECs will pay the same rates for ISP-bound traffic
that they receive for section 251(b)(5) traffic.

8 This is the correct policy result because we see no
9 reason to impose different rates for ISP-bound and voice
traffic.

10 ISP Remand Order, 16 FCC Rcd at 9193-94, paras. 89-90 (emphasis added).⁷ See also
11 Core Forbearance Order, 19 FCC Rcd at 20181-82, para. 8 (stating that “[t]he Commission
12 adopted this “mirroring” rule to ensure that incumbent LECs paid the same rates for ISP-
13 bound traffic that they received for section 251(b)(5) traffic”).

14 The FCC explained that the Mirroring Rule’s requirement that ISP-bound and all
15 other section 251(b)(5) traffic be exchanged at the same rate prevents the rate caps from
16 operating in discriminatory manner. See *id.* at 20187, para. 23 (“the potential for
17 discrimination under the rate caps is limited because the caps apply to ISP-bound traffic
18 only if an incumbent LEC offers to exchange all section 251(b)(5) traffic at the same rate”).
19 The Mirroring Rule accomplishes this by “prevent[ing] disparate treatment of the two types of
20 traffic.” *Id.*

21
22 ⁷ Note that the Mirroring Rule applies to new market entrants such as the parties in
23 this arbitration. Under the rules established in the ISP Remand Order, ILECs that had not
24 been receiving ISP-bound traffic as of April 21, 2001 were not required to compensate
25 competitors for ISP-bound traffic. The FCC lifted this so-called “New Market Exclusion” in its
26 October 2004 Core Forbearance Order. See *Petition of Core Communications, Inc., for
Forbearance Under 47 USC § 160(c) from Application of the ISP Remand Order*, WC
Docket 03-171, Order, 19 FCC Rcd 20179, 20186, para. 21 (Oct. 8, 2004) (“Core
Forbearance Order”).

1 Thus, according to the unambiguous terms of the ISP Remand and Core
2 Forbearance Orders, CCMT may opt for *either* the .0007 rate cap for both ISP-bound traffic
3 and local traffic *or* a state arbitrated rate for both types of traffic; CCMT cannot opt, as it
4 proposes, to pay the lower capped rate for ISP-bound traffic and receive a higher state-
5 arbitrated rate for other section 251(b)(5) traffic.

6 **III. CONCLUSION**

7 For the reasons stated here, BCT urges the Commission to issue an order
8 concluding that: (1) BCT may elect to interconnect indirectly with CCMT's network; (2) the
9 Parties' Interconnection Agreement should not contain a separate trunking requirement; and
10 (3) CCMT may opt for either the capped rate of .0007 per minutes of use for both ISP-bound
11 traffic and all other section 251(b)(5) traffic or a state-arbitrated rate for both ISP-bound
12 traffic and all other section 251(b)(5) traffic.

13 DATED: May 11, 2007.

14 McDOWELL & RACKNER PC

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16 Lisa F. Rackner
17 Sarah J. Adams

18 Attorneys for Beaver Creek Cooperative
19 Telephone Company

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket ARB 789 on the following named person(s) on the date indicated below by email at his or her last-known address(es) indicated below.

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DATED: May 11, 2007.



Lisa F. Rackner
Of Attorneys for Beaver Creek Cooperative Telephone Company