(text box: 1)BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF THE PETITION OF IDAHO POWER COMPANY FOR A DECLAR­ATORY ORDER DETERMINING THE JURIS­DICTION OF THE COMMISSION OVER THE LEASING OF FIBER OPTIC CABLE. | )  )  )  )  )  ) | CASE NO.  IPC-E-96-9  ORDER NO.  26514 |

On May 22, 1996, Idaho Power Company (IPC) filed a Petition seeking a declaratory ruling from the Commission that the leasing of “dark” optical  fibers in cable owned by IPC is not providing telecommunications as defined by Idaho Code, Title 62, Chapter 6.  On June 10, 1996, the Commission issued a Notice of Modified Procedure establishing a comment period that ended July 1, 1996.  Written comments were filed by TCI Telephony Services, Inc., GTE Telephone Operations, Albertson’s, U S WEST Communications, Inc., and the Commission Staff.  After reviewing the Petition and the filed comments, we issue this Order determining, based on the specific facts in this case, that IPC’s leasing of dark fiber does not subject the Company to our jurisdiction under Idaho Code, Title 62, Chapter 6.

THE PETITION

The term “dark fiber” normally refers to installed fiber optic cable that is not electronically activated for the transmission of information.  Fiber optic cable contains bundled filaments of glass or other transparent materials used as the medium for transmitting coded light pulses that represent data, image and/or sound.  IPC would not be involved in the transmission of signals, but only proposes to lease optical fibers in cable owned by the Company.

According to the Petition, IPC was approached by Albertson’s and the City of Boise (collectively “Lessees”) inquiring whether IPC could provide dark fiber to those entities.  IPC would lease one or more optical fibers in cables to Lessees.  Albertson’s and the City each would provide and maintain electronic equipment by which they could send or receive data over the fibers.  The fiber cable would be primarily installed in IPC’s existing underground ducts or attached to existing Company poles.  The Petition is similar to one filed by IPC in December 1993 in Case No. IPC-E-93-31.  The Commission issued Order No. 25425 in that case determining on the facts presented that the providing of dark fiber by IPC to the state of Idaho did not fall within the Commission’s jurisdiction under Title 62.

THE WRITTEN COMMENTS

The comments of Telephony Services, a subsidiary of TCI Communications, Inc., focused on the definition of “telecommunications services” in Idaho Code § 62-603(9).  Because the definition includes the transmission of signals, Telephony Services concluded that the leasing of dark fiber does not fall within the definition of telecommunications service.  Telephony Services also noted that the definition requires that a service be provided to the public or some portion thereof and, because IPC is merely providing the service to select customers that are requesting the service, it is not provided to the public and thus is not a telecommunications service subject to the Commission’s jurisdiction.

GTE also stated that because no transmission of two-way interactive switched signals is involved, IPC’s provision of fiber cable is not within the statutory definition of telecommunications service.  GTE cautioned, however, that if IPC’s customers engage in the resale of their transmission capacity to others, the customer would be providing a telecommunications service.

The comments filed by Albertson’s explain the Company’s desire to lease the dark fiber from IPC.  Albertson’s asked that IPC be granted permission as quickly as possible to proceed with the installation of the fibers.

The comments filed by U S WEST noted some differences between IPC’s filing in this case and its previous filing in Case No. IPC-E-93-31.  First, U S WEST noted that this case involves two customers rather than a one-time, single customer as in the previous case. U S WEST speculated that IPC may be contemplating making the service available to the public for compensation and that IPC may install, although it will not own, the optical equipment to make the dark fiber operable.  U S WEST stated that the installation of such equipment “without providing further operation and maintenance services to the lessees may still fall short of the statutory requirement that the regulated provider actually ‘transmit’ signals.”  According to U S WEST, if IPC is responsible for the transmission over the dark fiber, then it should be regulated as a Title 62 telecommunications provider.  Finally, U S WEST suggested that IPC’s provision of dark fiber competes with traditional exchange services and may reduce the level of telecommunications revenues available to support the Idaho Universal Service Fund and ITAP.  U S WEST urged the Commission to adopt the approach it did in the earlier case and limit its declaratory Order to the particular facts of this case as represented by IPC.  U S WEST also discussed issues presented by the federal Telecommunications Act of 1996, such as IPC’s potential responsibility to provide access to conduits, poles and rights-of-way used for wire communications.

 The comments filed by Commission Staff also identified potential issues raised by the filing but did not recommend denial of IPC’s Application.  Staff noted that because IPC is not providing photonics or other equipment to energize the dark fiber,  IPC’s role is little more than that of a cable installer.  The fiber provided is not intended to be used for access to the public switched network, nor is it a type of service available generally to the public.  Thus, according to Staff, the provision of dark fiber appears not to make IPC a telecommunications provider under Title 62.  However, Staff urged the Commission to consider issues potentially raised by IPC’s Petition and the passage of the federal Telecommunications Act.  For example, the federal Act requires non-discriminatory access to public rights-of-way.  If IPC attempts to reserve rights-of-way for its own use, Staff suggested it could be construed by the FCC as a barrier to entry to new telecommunica­tions carriers.

FINDS OF FACT AND CONCLUSIONS OF LAW

“Telecommunications service” is defined at Idaho Code § 62-603(9) as “the transmission of two-way interactive switched signs, signals . . . messages, data . . . by wire, radio, lightwaves, or other electromagnetic means . . . and are offered to or for the public, or some portion thereof, for compensation.”  In IPC’s previous case, Case No. IPC-E-93-31, the Commission concluded that the leasing of dark fiber to a state agency was not a telecommunications service because IPC was not involved in the transmission of data, nor was it offering the service to the public.  In this case, as the Petition and comments make clear, IPC again is not involved in the transmission of signals or data over the leased fiber.  The question of whether the service is offered to the public, or a portion thereof, is a closer one in this case because the Company is proposing to provide dark fiber to two additional customers, thus broadening its availability to a larger segment of potential customers.  We need not decide this issue, however, because there is no dispute that IPC will not transmit signals over the optic fiber.  As stated by Staff in its comments, IPC in this case, is little more than a “cable installer” which does not fall within the statutory definition of telecommunications service.

The comments do identify potentially significant issues should IPC expand its availability of dark fiber.  These issues include the Company’s possible duty to make its public rights-of-way available to other potential providers, and issues relating to universal fund support provided by traditional telecommunications companies.  These and other issues may need to be addressed in the future in light of the federal Telecommunications Act, which was enacted February 8 of this year.

Based on our review of the Petition and written comments, we find that IPC’s leasing of dark fiber to Albertson’s and the City of Boise, so long as IPC is not involved in the actual transmission of signals or data over the fiber, does not subject IPC to our regulatory authority under Title 62.  Our determination is based upon the particular facts presented in this case.

O R D E R

IT IS HEREBY ORDERED that Idaho Power Company’s request for a declaratory Order is granted.  After reviewing the particular facts of this case, the Commission concludes that the leasing of “dark fiber” to Albertson’s and the City of Boise does not subject the Company to the provisions of Idaho Code, Title 62.  This decision is based strictly upon the particular facts presented in the Petition.

THIS IS A FINAL ORDER.  Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. IPC-E-96-9  may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. IPC-E-96-9 .  Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration.  See Idaho Code § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                  day of July 1996.

                                                                                                                                      RALPH NELSON, PRESIDENT

                                                                                           MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

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**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

July 12, 1996