DECISION MEMORANDUM

TO:COMMISSIONER NELSON

COMMISSIONER SMITH

COMMISSIONER HANSEN

MYRNA WALTERS

TONYA CLARK

DON HOWELL

STEPHANIE MILLER

DAVE SCHUNKE

EILEEN BENNER

JOE CUSICK

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GARY RICHARDSON

WORKING FILE

FROM:WELDON STUTZMAN

DATE:JULY 3, 1996

RE:CASE NO. IPC-E-96-9, WRITTEN COMMENTS--IDAHO POWER’S REQUEST FOR A DECLARATORY ORDER REGARDING THE LEASING OF DARK FIBER

On May 22, 1996, Idaho Power Company (IPCo) filed a Petition seeking a declaratory ruling from the Commission that the leasing of “dark” optical  fibers in cable owned by IPCo is not providing telecommunication service subject to Idaho Code, Title 62.  On June 10, 1996, the Commission issued a Notice of Modified Procedure establishing a comment period that expired on 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.  Although some comments identified issues for the Commission’s consideration, none of the comments recommended denial of IPCo’s Application.

The comments of Telephony Services, a subsidiary of TCI Communications, Inc., focused on the definition of “telecommunications services” in Idaho Code § 62-603(9).  Noting that 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 IPCo 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 telecommunication service subject to the Commission’s jurisdiction.

GTE also noted that because no transmission of two-way interacted switched signals is involved, IPCo’s provision of fiber cable is not within the statutory definition of telecommunications service.  GTE cautioned, however, that if IPCo’s customers engage in the resale of its 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 IPCo.  Alberton’s ask that IPCo 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 IPCo’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 also speculates that IPCo may be contemplating making the service available to the public for compensation.  Also according to US WEST, IPCo may install, although it  will not own, the optical equipment which will 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 IPCo 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 IPCo’s provision of dark fiber competes with traditional exchange services and may reduce the level of telecommunications revenues available to support the universal service fund and ITAP.  U S WEST urges 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 IPCo.  U S WEST also discussed issues presented by the federal Telecommunications Act of 1996, such as IPCo’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 IPCo’s Application.  Staff noted that because IPCo is not providing photonics or other equipment to energize the dark fiber,  IPCo’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 the provision of dark fiber appears to not make IPCo a telecommunications provider under Title 62.  However, Staff urged the Commission to consider issues potentially raised by IPCo’s Application and the passage of the federal Telecommunications Act.  For example, the federal Act requires non-discriminatory access to public rights-of-way.  If IPCo attempts to reserve rights-of-way for its own use, it could be construed by the FCC as a barrier to entry to new telecommunications carriers.  Staff also recommended that any additional revenue generated by the leasing of dark fiber should be accounted as a contribution to regulated electric revenue.  Staff also noted that, although IPCo’s providing of dark fiber in this case is not a large economic issue, similar service to large customers throughout the state could be of interest to competitors in the new competitive telecommunications arena.

Commission Decision

Should Idaho Power’s request for a declaratory Order, stating that the providing of dark fiber is not a telecommunications service, be granted?

Weldon Stutzman

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