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BEFORE  THE  IDAHO  PUBLIC  UTILITIES  COMMISSION

IN THE MATTER OF THE PETITION OF)

IDAHO POWER COMPANY FOR A DECLAR-)CASE  NO.  IPC-E-96-9

ATORY ORDER DETERMINING THE JURIS-)

DICTION OF THE COMMISSION OVER THE)COMMENTS OF THE

LEASING OF FIBER OPTIC CABLE)COMMISSION STAFF

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COMES  NOW  the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Weldon B. Stutzman, Deputy Attorney General, and submits the following comments for the Commission’s consideration in Case No. IPC-E-96-9.

Summary

Idaho Power Company (IPC) requests of the Commission a declaratory order that leasing of dark fiber in a cable owned by IPC is not providing a telecommunications service subject to Title 62 of the Idaho Code.  IPC’s proposal is a virtual carbon copy of a prior request made and granted by this Commission in IPC-E-93-31 for IPC’s provision of dark fiber to the State in the Capital Mall.

The requested dark fiber will be used for data transfer between separate locations by two entities, Albertson’s and the City of Boise.  The service contracted from IPC appears to be mere provision of a private line.  Because IPC is not providing photonics or other equipment to energize the dark fiber, IPC’s role seems little more than that of cable installer.  The fiber provided is not intended to be used for access to the public switched network, nor is this type of service available generally to the public.  For these reasons, the provision of dark fiber appears not to make IPC a telecommunications provider under Title 62 or a telecommunications carrier under the federal Telecommunications Act of 1996.  The discussion from IPC-E-93-31 about the applicability of Title 62 to dark fiber still seems appropriate.  The definitions of telecommunications and telecommunications service in the Telecommunications Act of 1996 at Section 3 (a)(2) emphasize common carrier responsibilities and offering of fee for service directly to the public.

However, given the passage of the Telecommunications Act of 1996 as evidence of a shift to a new competitive model for the entire national telecommunication system, a narrow focus on the provisions of the Idaho Code may be shortsighted.  In fact, the new Telecommunications Act may prompt change to Titles 61 and 62.  The 1997 Idaho Legislature may consider whether some changes are needed to assure compatibility of these sections of Idaho state law with the new federal Act.

General Background Information

1.   Idaho Power Company

Staff learned that the dark fiber to be provided is all new cable, that the installation will be partly aerial (on poles) and partly underground (in vaults), that it is point-to-point for both Albertson’s and Boise City with no commonality of use for the separate facilities proposed, and that IPC will make no use of the cable for its own purposes.  IPC line crews will do the installation themselves if they are not too busy at the time, in which case outside contractors would do the job.

IPC does not seek out customers for this service, but only responds to requests from outside.  Response to Staff questions about IPC policy toward dark fiber indicated that IPC sees the service as a market niche it can fill and profit from, but that it has been merely responding to requests and has not planned on formally marketing such services.  Staff understands that IPC has looked at the issue of use of electric rights-of-way for such purpose and decided that it was broad enough to allow them to provide cable attachments and installation and maintenance for others.

The 1993 lease to the State in the Capitol Mall was at least partly for idle capacity in existing cable, with additional new cable installed only for State use.  Staff understands that in the previous contract for dark fiber the costs were booked to Plant In Service (Account 397) and the lease payments to Other Electric Revenues (Account 454).

2.   Albertson’s

Albertson’s has already signed a contract with IPC for a five-year lease, with extensions possible for two additional five year periods.  Staff was provided a copy of the lease.  Albertson’s approached IPC, asking about the same type of installation IPC had done for the State two years ago.  Albertson’s approached TCI over a year ago, but TCI did not indicate interest in doing the job.  Albertson’s likes IPC’s construction experience as evidence of competence in this type of installation done.

Albertson’s dark fiber will extend from its headquarters in Parkcenter to leased space near the airport in the First Security Data Center.  The dark fiber will directly connect IBM mainframes, allowing automatic backup of data from all ten regional distribution centers now collected in Parkcenter with new computer installations in the airport area.  The energizing devices and photonics to drive the dark fiber are built into the IBM mainframes.

This connection can only be made with dark fiber, not with standard telephone cable.

U S WEST will be providing ordinary telephony services for the new data center installation to complement this data-only line.

3.   Boise City

Boise City’s dark fiber will travel from City Hall via existing conduit under Capital and Main to the West One building, where the City has additional personnel and computer workstations.  The fiber will provide bandwidth to hook about 60 more terminals into the City’s existing network.  Due to capacity constraints, the City decided it needed more than just a T-1 line.  It was noted that one fiber will be used for ordinary phone service, acting like an extension to the City’s existing PBX for the personnel in the West One building.

Boise City approached IPC about providing dark fiber.  It also approached TCI and

U S WEST with a request to provide dark fiber and was told by both that they were not interested in such an installation.  A contract for service has apparently been signed by the City and returned to IPC for final signature.

Issues

Given the recent passage of the Telecommunications Act, this request requires more thought and more context than the identical request received and approved in IPC-E-93-31.  Merely asking for declaration that this is not telecommunication service under Title 62 may be too narrow a focus within the newly emerging framework for competition in telecommunications.  Staff’s intent in this section is to raise several additional issues for consideration by the Commission.  While none of them seems to be a reason for denying IPC’s request for a declaratory order, Staff believes each of these issues is potentially important enough to warrant attention.

1.   Use of electric right-of-way for non-electric purposes

Even if IPC is not a telecommunications carrier under the Federal Act or a Title 62 provider under Idaho law, should IPC use its public rights-of-way for this non-electrical purpose?  GTE noted this as a possible legal issue, though saying it did not intend to pursue it, in its comments on provision of dark fiber to the State in IPC-E-93-31.

Idaho Code Section 62-705 notes that public rights-of-way are to be used for electric services and a telephone line “to be used only in connection with the said electric energy and power line.”  Section 62-705 does not apply within incorporated cities, the places most likely to see emerging competition in the wake of the Telecommunications Act.  Boise City Ordinance 5650, enacted in August of 1995, granted IPC a franchise for electrical service that specifically includes a “nonexclusive right to locate and maintain telephone, cable, fiber optics, or other communications facilities of the Grantee or other parties.”  The terms of that Ordinance may need further amplification or specification, especially in so far as they relate to rights-of-way granted to other companies and by other possibly overlapping jurisdictions, in light of the general provisions of the Telecommunications Act calling for improved access for emerging competitors.

2.   Provision of right-of-way under the Telecommunications Act

Telecommunications companies wishing to become competitors in Idaho are beginning to seek rights-of-way necessary to provide their services.  In most cases these companies will likely be required to share the available public rights-of-way with companies already there, e.g. the incumbent local exchange company and the power company.  It would appear that the Telecommunications Act of 1996 will require non-discriminatory access at reasonable costs for all requesters, within the constraints of available space.  Staff would like to be assured that IPC will not use dark fiber installations to fill all available space and prevent firms wishing to be recognized as telecommunications providers from gaining access to public rights-of-way.

IPC uses its poles and vaults for its own cable, but does it or must it make its

right-of-way available to telecommunications carriers on the same terms?  Section 703 of the Telecommunications Act will lead to FCC regulations requiring just, reasonable, and

non-discriminatory rates for pole attachments used by telecommunications carriers, and it specifically includes electric, gas, and other public utilities that own or control poles, ducts, conduits, or rights-of-way used for any wire communications.  IPC actions attempting to reserve rights-of-way for its own use, even if based on local franchise or right-of-way agreements, might be construed by some as a barrier to entry of new telecommunications carriers and be subject to possible Federal preemption.

3.   Pricing of access to right-of-way

The Telecommunications Act calls for just and reasonable charges for rights-of-way for use of telecommunications services.  Must IPC begin to impute a rent, a market value it would charge to others, for use of available space?  Or should local agreements be adjusted to assure that the mere privilege of use of the public right-of-way should be free to all comers, as it has been in the past for some existing monopoly providers of public utility services?

Whether the charge for access is simply to cover the cost of installation, or whether it includes some payment (rent) for use of a scarce resource, it is vital that such common carrier services should be provided at the same cost to all telecommunication providers.

4.   Accounting treatment of revenues and expenses associated with installation and lease of dark fiber.

The earlier case IPC-E-93-31 made no specific mention of the accounting treatment of any revenues and expenses associated with leasing dark fiber to the State.  More recent contact with IPC indicates that the installation was treated as an asset of the regulated side of the business and booked to Plant In Service (Account 397) and the revenue to Other Electric Revenue (Account 454).

The poles and rights-of-way used for the purpose of providing dark fiber are assets included in rate base for electric use.  Even if no expenses associated with providing the dark fiber are claimed as part of rate base and charged against the regulated business, any additional revenue (net lease payments) attributable to the use of these electric rate-based assets for telecom purposes must be counted as a contribution to regulated electric revenue.

5.   Consequences of narrow definition of telecommunication services

Does the Commission, as a matter of policy, wish to allow electric companies (or more generically, non-telecommunications companies), to provide narrowly delimited services that may have the effect of bypassing telecommunications companies?  Comments of the Idaho Telephone Association in IPC-E-93-31 expressed concern over this issue but  reserved further objection because the client was the State and the installation was for only a narrow area.  In response to such concern, the Commission in Order No. 25425 pointed out that its decision was based only on the facts of the case and had no precedential value.

Had these dark fiber services been provided by a telecommunication service company, revenues associated with such service would likely be included in the overall revenue base against which assessments for universal service obligations are made.  If these services remain limited, any such revenue impacts would likely be very small in a statewide accounting.  Nonetheless, much larger contracts of a similar nature could be of major significance to some of Idaho’s smaller telecommunications providers.

6.   A foreshadowing of the kind of competition to come?

A June 11 press release from U S WEST points out that this request is evidence that new competitors are entering local markets to provide telecommunications facilities and services to business customers.  While not specifically agreeing with U S WEST’s implication that the IPC proposal represents telecommunications services in the narrow sense of the word,  Staff wishes to highlight potential concern over provision of such services to large business customers.  To the extent that such customers are served by non-telecommunications companies, both incumbent and emergent telecommunications service providers may have less customers, and thus less revenue potential, to help share the cost burdens associated with providing local exchange services to basic residential and small business customers.

If IPC intends to develop this line of business further, so that its providing of dark fiber is not “incidental” and narrowly limited, should it dispense with asking for a declaratory order that it is not a telecommunications provider under Idaho Code?  IPC could, as Entergy and a couple of other electric utilities have already done, apply to the FCC for status as an “exempt telecommunications company” under Section 703 of the Telecommunications Act.  Such a step might allow them to fully develop the telecommunications potential associated with their electric utility business without subjecting them to further scrutiny under the Public Utilities Holding Company Act.

Staff Recommendation

Without recommending the request be denied, Staff wishes to point out the existence of some of these issues and note that substantial broadening of the scope of telecommunications services under the Telecommunications Act could subject IPC to some liability for universal service contributions, regardless of whether or not it falls under Title 62 in Idaho Code.  Granting of IPC’s request for a declaratory ruling should be taken with full recognition of some of the uncertainties indicated above.

DATED  at Boise, Idaho, this            day of July 1996.

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Weldon B. Stutzman

Deputy Attorney General

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