DECISION MEMORANDUM

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FROM:BRAD PURDY

DATE:May 2, 1997

RE:CASE NO.  IPC-E-97-1; 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 AND METALLIC CONDUCTOR CABLES.

On February 20, 1997, the Idaho Power Company (Idaho Power; Company) petitioned the Commission, pursuant to Rule 101 of the Commission’s Rules of Procedure, IDAPA 31.01.01, for a Declaratory Order determining that the leasing of “dark” optical fibers and/or “dead” metallic (copper) conductors in cable owned by Idaho Power does not constitute the providing of telecommunication services subject to the provisions of the Telecommunications Act of 1988 contained in Title 62, Chapter 6 of the Idaho Code.  The Petition states that the proposed service (for customers CSHQA and Trus Joist McMillan) would not include the electronic equipment which would be required to send or receive data over the communication conductors; hence the terms “dark” fiber and “dead” conductors.

In its Petition, Idaho Power notes that in December 1993, it filed a Petition seeking a declaratory ruling “whether the leasing to the state of Idaho of one or more dark optical fibers in a cable owned by Idaho Power is the providing of telecommunication services” under the Idaho Telecommunications Act.  After reviewing the Petition and the Comments in that case (Case No. IPC-E-93-31), the Commission issued Order No. 25425 ruling that it did not.  Idaho Power contends that Order No. 25425 limited its application to only “dark fiber” cable service in the state of Idaho and not “dead” (copper) cable.

On May 22, 1996, Idaho Power filed a second Petition seeking a declaratory ruling as to the providing of dark fiber cable to various locations in the state of Idaho.  After reviewing the Petition, the Commission issued Order No. 26514 reaching the same conclusion as in the earlier case.  Again, Idaho Power contends, the Commission limited the application of its Order to dark fiber cable service to Albertsons and the City of Boise.

Idaho Power states that it continues to receive inquiries from interested customers, including CSHQA and Trus Joist McMillan, as to whether the Company is interested in providing dark fiber and/or dead copper communications cable service on a point-to-point basis between various locations within the state.  According to the Company, these entities would provide the electronic equipment by which they could send or receive data over the communications cable.  CSHQA purportedly desires that dark fiber and/or dead copper communications cable service be provided from its main office located at 200 North 6th Street in Boise to its satellite office located at 106 North 6th Street also in Boise.  Trus Joist McMillan purportedly desires that dark fiber and/or dead copper communications cable service be provided from its main office at 200 East Mallard Drive in Boise to its satellite office at 380 Park Center Boulevard in Boise.

Idaho Power states that it would lease one or more of the dark or dead communications conductors and cables to the lessees CSHQA and Trus Joist McMillan and would only be responsible for the installation of the communications cable.  In the case of fiber optic communication conductors, Idaho Power states, the Company would also install termination points, one for each fiber, on either wall mounted or rack mounted panels.  In either case, the Company states that it would not own, install, or maintain the communications equipment required to send or receive the lessees’ data.  The communications cable would be primarily installed in Idaho Power’s existing underground ducts and/or attached to existing Idaho Power poles.

Idaho Power refers to Title 62, Chapter 6 of the Idaho Code, referred to as the “Telecommunications Act of 1988" under which § 62-604, the Company contends, provides that a telephone corporation which does not provide basic local exchange service shall be exempt from the provisions of Title 61 of the Idaho Code.  Furthermore, Idaho Power asserts, § 62-605(3) of the Idaho Code permits competition as to those services which have been excluded from regulation under Title 61 of the Code.

The Company seeks a declaration from the Commission as to whether the leasing to Trus Joist and CSHQA of one or more dark optical fibers and cable owned by Idaho Power constitutes the providing of telecommunication services under Title 62, Chapter 6 of the Idaho Code and, if so, what regulatory requirements must be met by the Company.

On April 3, 1997, the Commission issued a Notice of Modified Procedure soliciting comments in response to Idaho Power’s Application.  Comments were filed by U S WEST Communications, Inc.  (U S WEST), the Ada County Highway District and the Commission Staff.

U S WEST

U S WEST contends that there is little doubt that Idaho Power is providing a service which competes directly with “private line” services provided by U S WEST and others regulated by the Commission under Title 62.  U S WEST notes that private line services do no technically meet the statutory definition of “telecommunication services” in that they do not involve the transmission of two-way, interactive, switched signals.

U S WEST believes that Idaho Power’s inclusion in the current filing of the “dead” metallic conductors, however, brings new questions of a technical nature to the analysis.  U S WEST notes that it is unclear from Idaho Power’s filing whether the cable facilities in question will be provided only where Idaho Power has “spare capacity” in existing facilities constructed by the Company for its own purposes or whether Idaho Power will construct new facilities upon the request of communications cable customers.  U S WEST states that although Idaho Power originally used fiber cable in its electric operations, there has been no previous discussion of the use of copper cable to meet the needs of customers for point-to-point communications.  U S WEST poses the following four questions:(1) Is the copper cable in question in the nature of “twisted pair” telephone cable or is it some kind of other facility?  (2) Who will provide the electrical power necessary to enable copper facilities to act as a transmission medium?  (3) Who will buy, install and maintain the power plant?  (4) Will the provision of power be part of the dead communications cable service offered by Idaho Power?  (5) How will the electrical power used in connection with the customer’s use of the cable facilities be billed and paid for?

U S WEST contends that depending on the answers to the foregoing questions about how the service is physically being provided, the bright line between the provision of finished telecommunications services and the mere construction of physical facilities becomes increasingly obscure.  U S WEST further notes that Idaho Power admits that the communications cable it will use will be primarily installed in the Company’s underground ducts and/or attached to existing power poles.  Further, in providing the subject facilities, Idaho Power will be using those rights-of-way secured pursuant to its public utility status.  U S WEST argues that in this respect, Idaho Power is in a unique position with an advantage over other competitors who might attempt to meet the needs of CSHQA, Trus Joist McMillan and other similar customers.  Any other cable construction or installation firm would lack access to a public right-of-way which Idaho Power, as a regulated electric utility, now has.  Moreover, any telephone corporation which could gain access such rights-of-way would be subject to the Commission’s regulation under Titles 61 and/or 62 of the Idaho Code.

U S WEST argues that Idaho Power has an additional advantage over its competitors in providing this service in that it has access to the use of existing facilities paid for by the Company in its capacity as a public utility.  This, U S WEST contends, plainly appears to lower the costs of Idaho Power’s telecommunications services and enhances its competitive position vis-à-vis other providers.

U S WEST believes that with the passage of House Bill No. 313, this Commission takes on “full power and authority” to implement the federal Telecommunications Act of 1996.  U S WEST argues that this expression of authority includes the enforcement of the provisions dealing with access to the rights-of-way and facilities of public utilities including, in some cases, energy utilities.

U S WEST also contends that the increasing use by large customers of alternative telecommunications arrangements, including those at issue in this case, will have an effect on universal service considerations.  U S WEST asserts that under House Bill No. 313, this Commission is also charged with the responsibility to identify necessary changes to the Idaho Universal Service Fund in light of the federal Act’s mandates.  Part of these deliberations, U S WEST contends, must include a consideration of the question of how universal service funding supports will be affected by the apparent trend of large users to rely upon arrangements which meet their specialized telecommunications needs but which may not constitute traditional telecommunication services.

In its conclusion, U S WEST does not ask the Commission to deny Idaho Power’s Application in this case.  Rather, based upon the foregoing concerns, it “urges this Commission to continue its cautious case-by-case approach in this docket.”  Comments at p. 6.

Ada County Highway District (ACHD)

The ACHD states that it has exclusive supervision over and is the property owner of the public rights-of-way in Ada County, excluding state highways.  As such, the ACHD has the authority to regulate access and establish use restriction over those rights-of-way.  More specifically, the ACHD contends that it has the authority to regulate the installation of facilities of telecommunications providers and to be reimbursed for costs pursuant to House Bill 367 which will be codified as Idaho Code § 62-701A.  The ACHD believes that the fiber optic cables proposed to be installed by Idaho Power will likely be installed in ACHD rights-of-way.

The ACHD believes that it has certain obligations pursuant to the federal Telecommunications Communications Act of 1996 including the obligation to allow access to the public rights-of-way  in a non-discriminatory manner.  The ACHD states that applying this requirement to different classes of regulated versus unregulated telecommunications companies has proven to be challenge.  Idaho Power’s proposed dark fiber services, the ACHD states, constitutes yet another category of telecommunications company.  The ACHD notes that Idaho Power has an advantage over other telecommunications providers because of its use of public rights-of-way for the transmission of electricity and, now, for the provision of dark fiber and dead cable services.

The ACHD challenges Idaho Power’s contention that it is nothing more than a cable installer on the basis that most cable installers have no statutory rights to utilize the public rights-of-way to place permanent facilities.  The ACHD’s concern is that Idaho Power will end up in direct competition with other telecommunications companies, both regulated and non-regulated, many of which will be obligated to spend millions of dollars on trenches, conduits and poles to create the infrastructure to carry the fiber optic cables.  Clearly, Idaho Power will have a significant competitive advantage over these companies because it already has those facilities in place.  Because the purpose of the state and federal telecommunications acts is to promote competition by encouraging a level playing field, such competition may be discouraged and the goals of the federal and state acts will not be achieved if Idaho Power is permitted to gain such a competitive advantage over other providers.

While the provision of dark fiber services to one or two entities may not be significant, the ACHD notes, Idaho Power’s trend of adding one customer at a time is troubling.  The ACHD states that it “may not be too long before Idaho Power has a significant share of the market.”  Comments at p.4.

Moreover, the ACHD states that Idaho Power’s dark fiber lines will carry public communications.  For example, a telephone call may come from the public to a business headquarters.  That call will then be routed to a branch office via the dark fiber provided by Idaho Power.  The ACHD questions why this should be treated differently than a call which comes over a fiber optic line directly to the branch office.  If and to the extent that Idaho Power’s dark fiber is carrying communications from the public, the ACHD believes that Idaho Power meets the definition of a telecommunications provider thereby subjecting itself to regulation by the PUC.

The ACHD illustrates its concern with the following hypothesis.  If Idaho Power’s next request is to provide dark fibers to connect the Micron operations in east Boise to the Micron operations elsewhere in Boise and in Nampa, there would no doubt be a substantial volume of communications which the telecommunications companies would desire to serve.  Is this an intra- company communication that does not involve public communications?  What if public phone calls are transferred from one site to another using Idaho Power’s dark fiber?  What if the Micron branch offices are spun off into separate corporations such as Micron Technology, Micron Electronics and Micron Custom Manufacturing?  Does it become public communications at this point because it is the employees of different corporations communicating with each other?  What if stock of one of the subsidiaries is sold to a totally unrelated corporation?  Surely, at that point, Idaho Power’s dark fiber line would carry public communications the ACHD argues.  Nonetheless, no action would occur automatically by Idaho Power which would bring this to the attention of the Idaho Public Utilities Commission or subject Idaho Power’s provision of services to regulation.

In conclusion, the ACHD recommends that the Commission issue a finding that Idaho Power is a telecommunications provider subject to regulation.  Alternatively, the ACHD contends that the Commission should carefully limit its ruling to the facts of the CHSQA and Trus Joist situations and that any ruling should point out that the Commission is not authorizing Idaho Power to use the public rights-of-way to install dark fiber.  This authorization, the ACHD contends, must come from the local highway jurisdiction based upon state and federal law and local ordinances and policies.  The ACHD urges the Commission to proceed cautiously and to ensure that a level playing field is provided for the various competitors.

Commission Staff

Staff does not believe that there is a need for further declaratory Orders regarding the same subject matter presented in Idaho Power’s Application in this case. Staff notes that previous filings point out that the Company believes that each previous Order was limited to the case at hand.  Clearly, Idaho Power has put itself in the business of providing dark fiber.  Staff believes that the Commission should issue a generic ruling that covers future cases obviating the need to process any more of these cases.

Staff’s conclusion is that the provision of dark fiber does not subject the Company to regulation as a Title 62 telecommunication service provider.  On that singular issue, Staff recommends that the Commission issue a one-time declaration that the provision of dark fiber does not and will not subject the Company to treatment as a telecommunications provider under Idaho law.

In spite of the foregoing, Staff has concerns including whether the provision of dark fiber is appropriately accounted for by Idaho Power.  In the present case, Idaho Power has indicated that the Company will rate base its dark fiber investment and include associated revenues and expenses.  Based upon an onsite audit it conducted, Staff is satisfied that, currently, the rent revenue from the provision of dark fiber more than covers the return on investment and the yearly depreciation expenses associated with the plant-in-service investment.  Staff is satisfied, therefore, that the Company’s electric ratepayers are not currently subsidizing the dark fiber operations.  Staff notes that the cable is purchased, owned and maintained by the Company and is simply leased to third parties.  Staff understands that the work is being subcontracted to outside parties subject to Company inspection.  Staff further understands that any excess capacity is not used by the Company in connection with the provision of electric service.  Given this information, Staff is concerned about the Company-owned cable itself and wonders whether treatment as an electric rate base is fully appropriate regardless of the specific accounting treatment.  Staff has doubts that the provision of dark fiber should be treated as part of the rate base of an electric utility and has heard from the Company no specific reason that any of this deserves to be treated as plant-in-service.  Staff recommends, therefore, that the final Order issued in this case state that it is a declaratory Order regarding the Title 62 issue only and makes no judgment concerning the propriety of including this dark fiber service in electric rate base.  Final judgment on that issue should be left to the next general rate case, Staff believes.

Finally, Staff is concerned about the effect of Idaho Power’s operations on competitors.  Staff notes that Idaho Power treats right-of-way requests from telecommunication businesses the same as other such requests from other utilities as required in Idaho Code § 61-514.  That section requires a complaint from another utility or a Commission initiated inquiry before the issuance of a directive that utilities must share facilities.  In light of the federal Telecommunications Act of 1996, Staff believes that Idaho Code § 61-514 does little to ensure that Idaho Power will provide non-discriminatory access to its rights-of-way.

In summary, Staff recommends the issuance of a declaratory Order as requested with two accompanying notes.  First, that the Order is generic and should obviate the need to create a new case for each additional provision of dark fiber by the Company.  Second, that the Order is limited to the applicability of Title 62 and does not constitute formal approval of rate base treatment for dark fiber services by the Company.

Commission Decision

Does the Commission wish to approve Idaho Power’s Application?  Should it be subject to the conditions proposed by Staff?

Brad Purdy

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