DECISION MEMORANDUM

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COMMISSIONER SMITH

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FROM:CHERI C. COPSEY

DATE:FEBRUARY 4, 1998

RE:APPLICATION OF LDM SYSTEMS, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.  CASE NO. LDM-T-97-1.

On March 5, 1997, the Commission received an Application from LDM Systems, Inc. for a Certificate of Public Convenience and Necessity to provide resold local exchange service as a competitive local carrier throughout the entire state of Idaho.

In Order No. 27295 issued December 31, 1997, the Commission found that this matter could be processed under Modified Procedure and requested interested persons file written comments regarding this Application by January 28,1998.  Only Staff, U S WEST Communications, Inc. and the Idaho Telephone Association filed comments on January 28, 1998.  LDM has not responded to those comments.  No other party filed comments.

BACKGROUND

LDM Systems, Inc. is a New York corporation qualified to do business in Idaho and is a non-facilities based reseller of telecommunications services.  It originally filed a price list for long distance services with this Commission in September 1994.

On March 5, 1997, LDM filed an Application with the Commission for a Certificate of Public Convenience and Necessity to provide resold local exchange telecommunications services as a competitive local carrier within Idaho and also requested an exemption from the requirements of Idaho Code § 62-610 and “IDAPA 31.N Rule 3 [sic].”  LDM originally applied to provide service throughout Idaho.  However, on September 15, 1997, LDM filed supplemental information in further support of its Application and revised its Application to restrict its services to only those areas currently served by U S WEST Communications, Inc. (North and South) and GTE Northwest Incorporated, as reflected in U S WEST’s and GTE’s current Certificates.

On September 15, 1997, LDM filed its proposed initial tariff with the Commission for information purposes pursuant to Idaho Code § 62-606.  LDM stated service will be provided through resale of services provided by the incumbent local exchange carrier and LDM stated it intends to provide all forms of intrastate telecommunications services, including:

Basic residential exchange services (local exchange flat rate, measured flat rate, operator assistance)

Residential custom calling and class features (call waiting, caller ID, call forwarding, etc.)

Basic business exchange services

Business custom calling and class features

Adjunct provider services (voice message, etc.)

Business and residential ancillary services (911, directory listing, directory assistance, etc.)

LDM filed supplemental financial information on November 11, 1997.  LDM stated it had not initiated negotiations with incumbent local exchange carriers for interconnection agreements.

STAFF FINDINGS

The Commission’s Rule of Procedure 111, IDAPA 31.01.01.111, and Procedural Order No. 26665, issued November 7, 1996, establish the minimum information that must be included with an application for a Certificate of Public Convenience and Necessity.  Staff found that the information provided by LDM in its Application and the additional material provided in support of that Application meet these requirements.

The Application included an audited balance sheet for December 31, 1995, and an unaudited income statement for the first 10 months of 1996.  According to the 1995 audited balance sheet, assets exceeded liabilities.  The unaudited 10 month income statement showed net sales of more than $23 million and net income of nearly $2.5 million.  According to information in its Application, LDM currently provides resold long distance telecommunications services throughout the continental United States.  Staff concluded LDM’s background should provide sufficient technical expertise for a reseller of local telecommunications services.

LDM certified it will comply with all Commission rules.  Staff found that LDM’s illustrative tariff, filed September 15, 1997, exhibits an understanding of tariffing requirements and processes.

Because LDM presently provides interexchange service in Idaho, as part of its review of this Application, Staff also examined the Commission’s Consumer Assistance Staff complaint records to determine Idaho consumer experiences with LDM.  There were 24 informal complaints, comments and inquiries regarding LDM’s interexchange service for 1996 and 1997.  Staff does not know the total number of LDM interexchange customers.  Therefore, it cannot fully evaluate the total extent of consumer problems.  However, Staff stated that in its experience, the total number of complaints received by the Commission normally do not accurately reflect the total magnitude of consumer problems.

The Consumer Assistance Staff records contain electronically documented conversations with LDM’s long distance customers, various telecommunications companies’ representatives, correspondence, bills, and other written materials.  According to those records, Idaho consumer complaints against LDM primarily involve rates, billing, marketing practices, and carrier selection, including “slamming,” the unauthorized switching of interexchange carriers.  The majority of the complaints (22 out of 24) involved either clear allegations of slamming or the consumer alleged that LDM’s sales representatives misrepresented themselves as being agents for Sprint or the local exchange company that serves the consumer.  LDM denied intentionally misleading or slamming customers.  However, it acknowledged that it had reliability problems associated with soliciting orders through independent sales agents, especially through telemarketing.  Since LDM offered no solution to its admitted slamming problem, the Staff stated it had no basis for believing that similar slamming problems will not occur in the local exchange marketplace.

Attached to the Staff Comments was a copy of Appendix B to the Federal Communications Commission Common Carrier Scorecard Report dated December 1997.  According to that document, LDM has a significantly high level of consumer complaints filed against it with the Federal Communications Commission regarding allegations of slamming.  LDM had the third highest number of slamming complaints among resellers filed with the FCC.

LDM also requested the Commission grant it an “exemption” from the Universal Service Fund requirements, because it argues it will operate solely as a re-seller and its contributions to the Universal Service Fund (USF) will be made by its underlying carriers, U S WEST and GTE.  LDM did not provide any documentation that it is currently a customer of GTE or U S WEST or that either GTE or U S WEST will collect or remit all of LDM’s contributions to the fund.  In fact, in its comments opposing granting such an exemption to LDM, U S WEST stated it had no interconnection or resale agreement with LDM for Idaho and would not be collecting a USF surcharge from end users or remitting that surcharge to the USF administrator.

Under existing Commission rules, local exchange carriers that request an exemption may be granted exemptions only “upon the grounds that the LEC provides such a small number of local service lines in Idaho and generates such a small monthly surcharge that neither the practical administration of the USF nor the public interest requires monthly remittances.”  IDAPA 31.46.01.401.01.  However, even under this rule, the LEC is still required to collect the surcharge and remit it at least yearly.  It is not exempted from collection or remittance.

No LEC will be excused from making remittances less often than annually nor from annual reporting under Rules 202 and 203.

U S WEST COMMENTS

In its comments, U S WEST took no position regarding the propriety of granting LDM’s Application for a Certificate of Public Convenience and Necessity.  However, U S WEST objected to LDM’s request for an exemption from the requirements of Idaho Code § 62-610 which requires LECs to collect and remit a surcharge to the Idaho USF.  U S WEST stated that, at this time, LDM does not have an interconnection or resale agreement with U S WEST for the state of Idaho.

U S WEST asserted that LDM incorrectly stated the law in its Application.  LDM’s Application states:

Applicant respectfully request exemption from the requirements of I.C. § 610 [sic] and IDAPA 31.N Rule 3.  Applicant, as a resale carrier, submits that granting an exemption from the Commission’s Universal Service Fund (“USF”) requirements is warranted because the facilities-based carriers from which Applicant will purchase underlying transmission services for its Idaho operations will cover Applicant’s contribution.  Applicant’s contribution to the USF will be met through payments made by local exchange carriers (e.g., U.S. west and GTE) from which Applicant will lease transmission capacity; therefore, Applicant should be granted an exemption from direct payment into the USF.

Application at p. 4.  U S WEST argued that because contribution to the Idaho USF is a statutory requirement, the Commission does not have the authority to grant the requested relief should it be inclined to do so and, moreover, to grant the requested exemption would be contrary to the public’s interest.

Idaho Code § 62-610(2) provides that “the USF shall be funded by imposing a statewide end user surcharge on local exchange service and MTS and WATS type services.”  The code further provides that “providers of local exchange service shall remit the local exchange surcharge revenues to the fund administrator. . . .”  U S WEST argued that by requesting an exemption from collection or remittance, LDM seeks to avoid the explicit statutory requirement that end users (LDM retail customers) be surcharged and that their local exchange provider (LDM) collect and remit the surcharge to the fund administrator.

In addition, U S WEST stated that, as a wholesaler, U S WEST will not pay the end user surcharge associated with the resale of local exchange services.  In the typical resale arrangement, the wholesaler is not the provider of local exchange services and has no retail customer from whom to collect the surcharge.  Comments of U S WEST at p. 3.  Consequently, U S WEST asserted it will not collect any funds to remit to the USF administrator.  U S WEST suggested that requiring it to pay the surcharge is, in effect, requiring it to make a contribution to the USF out of revenues reduced by the sale of local service at a discount to a competitor LEC.

Finally, U S WEST claimed that LDM’s interpretation violates the legislative intent for creating the USF.  It argued that the Idaho Legislature intended local exchange customers, and not facilities-based providers, share the responsibility for funding the Idaho USF.  It also suggested that reducing the number of customers in the pool providing USF funding would increase the surcharge remaining customers would need to  pay.  It argued that LDM’s interpretation would give resellers, like LDM, an unintended competitive advantage.

IDAHO TELEPHONE ASSOCIATION COMMENTS

Like U S WEST, Idaho Telephone Association took no position regarding the propriety of granting LDM’s Application for a Certificate of Public Convenience and Necessity.  However, like U S WEST, Idaho Telephone also opposed LDM’s request for exemption from USF requirements.  Idaho Telephone observed that if LDM resells local exchange service, as proposed in its Application, it is a “provider of local exchange” and, therefore, subject to Idaho Code § 62-610.  It argued that LDM, as a LEC, cannot be exempted from the statute’s requirements.  Idaho Telephone urged the Commission to deny LDM’s request for exemption absent an enforceable agreement specifically providing that the whole seller, U S WEST or GTE, will collect and remit the USF surcharge for each end user.  No such agreement exists now.

STAFF RECOMMENDATION

Based upon Staff’s experience with LDM’s practices in obtaining long distance customers through slamming, Staff recommended LDM Systems, Inc. be denied a Certificate of Public Convenience and Necessity to provide local exchange telecommunications services within the U S WEST’s and GTE’s service territories.

Alternatively, Staff recommended that if LDM was granted a Certificate, the Certificate be conditioned on the following two conditions:

1.That prior to switching the consumer’s local exchange service, LDM obtain written authorization from the consumer for the switch, and

2.That LDM submit a quarterly report to the Commission that reports the number of consumer complaints made to LDM and states the general subject matter of those complaints.

Staff further recommended the Commission grant LDM no exemption for USF contributions (as well as TRS fund contributions) because LDM has not established that it “provides such a small number of local service lines in Idaho and generates such a small monthly surcharge that neither the practical administration of the USF nor the public interest requires monthly remittances.”  IDAPA 31.46.01.401.01.  Furthermore, LDM has not established that the USF surcharge will be collected from end users by any carrier and remitted to the USF administrator as required by Idaho Code § 62-610.

COMMISSION DECISION

Does the Commission want to grant LDM Systems, Inc. a Certificate of Public Convenience and Necessity for those areas currently served by U S WEST Communications, Inc. (North and South) and GTE Northwest Inc., as reflected in U S WEST’s and GTE’s current Certificates?

If the Commission decides to grant LDM Systems, Inc. a Certificate of Public Convenience and Necessity, does it want to condition issuance of that Certificate as follows:

1.Prior to switching the consumer’s local exchange service, LDM Systems, Inc. must obtain written authorization from the consumer to switch to LDM, and

2.LDM Systems, Inc. must submit a quarterly report to the Commission that reports the number of consumer complaints made to LDM and states the general subject matter of those complaints.

If the Commission decides to grant LDM Systems, Inc. a Certificate of Public Convenience and Necessity, does it want to exempt LDM Systems, Inc. from collecting the USF surcharge from all end users it serves, from remitting those surcharges to the USF administrator, or from otherwise fulfilling all the requirements Idaho Code § 62-610 places on LECs?

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Cheri C. Copsey

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