DECISION MEMORANDUM

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COMMISSIONER HANSEN

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FROM:DON HOWELL

DATE:MARCH 28, 1997

RE:SILVER STAR’S APPLICATION FOR APPROVAL OF A SPECIAL SERVICES CONTRACT, CASE NO. SIL-T-97-1

On February 27, 1997, Silver Star Telephone Company requested that the Commission approved a “special services contract” so that Silver Star may provide telecommunications services to J.R. Simplot’s Smokey Canyon Mine.  The Smokey Canyon Mine is located in the Idaho portion of U S WEST Communications’ Afton exchange. On March 6, 1997, the Commission issued a Notice of Application and a Notice of Modified Procedure.  The Commission solicited comments concerning Silver Star’s request and directed that such comments be filed no later than March 20, 1997. Timely comments were filed by Silver Star, Union Telephone Company, the Commission Staff, and AT&T Communications.  On March 27, 1997, Silver Star filed a response to those previously filed comments.  On March 28, 1997, Union Telephone filed reply comments to Silver Star’s response.  The comments are attached.

THE APPLICATION

Silver Star proposed to construct and offer high-speed digital communication services to the Smoky Canyon Mine.  Silver Star asserted that the services encompassed in the special contract are beyond the scope of the Company’s normal tariff services.  Consequently, Silver Star

requested that the Commission approve the provision of service via the special contract.  Silver Star stated that the services to the Mine would be provided entirely by Silver Star facilities without requiring interconnection with U S WEST.  Silver Star asserted that all portions of the special contract are confidential, proprietary and trade secrets pursuant to Idaho Code §§ 48-801 et seq. and 9-340.

THE COMMENTS

1. Silver Star Comments.  In its comments, Silver Star notes that it has entered into a contract with  Simplot to provide the Smokey Canyon Mine with “dedicated, high-volume data and voice transmission and bundled services through more than five access lines.”  Silver Star asserts that Simplot will construct, own and maintain its own telecommunications facilities which will interconnect with Silver Star’s network in its Wayan exchange.  Silver Star states that under Idaho law and the recently enacted revisions to Idaho and federal law,

Silver Star is entitled to provide, and Smokey Canyon is entitled to obtain, the services contemplated by the Contract regardless of the fact that the Smokey Canyon Mine is located within an area presently certificated to U S WEST Communications, Inc.

Silver Star Comments at 2.

a.  The Idaho Telecommunications Act of 1988.  Silver Star insists that when U S WEST elected to remove its non-basic local exchange services from the Commission’s Title 61 regulation, that U S WEST consented to competition for Title 62 services.  Silver Star also notes that Idaho Code § 62-605(3) provides that neither Title 61 nor Title 62 prevents “any person or entity from providing telecommunications services in competition with a telephone corporation as to those services which have been excluded from regulation under title 61. . . .”  Silver Star argues that the exclusive franchise provisions contained in Idaho Code § 62-615(1) only apply to services which remain subject to the Commission’s Title 61 authority. Because  Silver Star will provide the Mine with more than five access lines, Silver Star states that it is providing Title 62 services.

b.  The Federal Telecommunications Act.  Silver Star observes that Section 253 of the federal Telecommunications Act provides that no state statute or regulation “may prohibit or have the affect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a).  The Company notes that the purpose of the federal Act was to provide a “policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications market to competition. . . .”  H.R. Conf. Rpt. No. 104-458 (1996); Silver Star Comments at 4.

c.  House Bill 313.  Finally, Silver Star states that Governor Batt has signed into law House Bill 313.  The Company insists that a major purpose of the Bill was to remove all entry barriers to competition.  Silver Star asserts that the exclusive franchise provision contained in 62-615(1) was specifically eliminated.  “Thus, if there were any lingering questions regarding Silver Star’s right to provide services, and Smokey Canyon’s right to chose its provider under the Contract, or regarding the public policies behind those rights, H.B. 313 eliminates them.”  Id. at 5.

Silver Star also maintains that the pending sale of the Afton exchange to Union Telephone does not affect the above analysis.  The Company asserts that the sale has

not been consummated, and may never be consummated.  As a “successor” to U S WEST in the certificate or service area, Union acquires no greater protection from facilities-based competition for Title 62 services than U S WEST had.  Any exemption or suspension that Union might obtain from the requirements of the 1996 Act if it acquires the exchange from U S WEST would apply only to resale or interconnection.  Neither resale nor interconnection are contemplated by the Contract.

Id. at 5.  Silver Star concludes that it is willing and able to provide the requested services to Simplot.  The Company declared that the special contract was negotiated in arms length bargaining and that the Mine has chosen to obtain services from Silver Star.

2.  The Staff Comments.  The Staff begins by reciting the background of the Afton sales case.  The Staff suggests that the Commission answer three questions before ruling on Silver Star’s Application.

1.Who is the real party in interest?  In other words, which party “owns” the Afton exchange  at this point in time?

2.What is the status of the sale of the Afton exchange?  Does Silver Star’s challenge of the section 214 application stay the sale or FCC proceedings?

3.May Silver Star provide telecommunications service outside its certificated service area and within the service area of another telephone corporation without amending its own Certificate?

Staff Comments at 3.  The Staff professed that it did not possess sufficient information to answer the first two questions but briefly addressed the third point.

The Staff acknowledges that Idaho Code § 62-605(3) entitles any person or entity to provide Title 62 telecommunications services in competition with a Title 62 telephone corporation.  The Staff also notes that Idaho Code § 61-526 provides that no telephone corporation shall begin construction of any line “without having first obtained from the commission a certificate that the present or future public convenience and necessity require or  will require such construction . . . .”  In other words, the Staff questioned whether Silver Star must seek an amendment to its Certificate to expand service beyond its existing service area.

Given the lack of sufficient information and the complexity of the three questions, the Staff suggests the Commission seek additional information before ruling on Silver Star’s request.  Consequently, the Staff recommended that the Commission convene a prehearing conference “so interested parties may supply the necessary information and advise the Commission of their respective positions.”  Staff Comments at 5.

3.  Union Telephone Comments.  Union Telephone also recites the factual background to the Afton sale case.  In particular, Union observes that the Commission in Order No. 26687 approved the sale of the Afton exchange to Union Telephone and dismissed Silver Star’s Application to amend its certificated service area.  Union asserts that it should be treated as the equitable owner of the Afton exchange.  Union argues that but for Silver Star’s conduct in attacking the sale of the Afton exchange to Union, the sale would have been consummated by now.  Union characterized Silver Star’s conduct as asking the Commission “to sanction [Silver Star’s] conduct and allow it to raid the exchange under the guise of deregulation, pirating away profitable customers which help maintain lower rates for less profitable residential rural customers.”  Union Comments at 4.  Union insists that Silver Star is attempting to take advantage of a “window of opportunity” attributable to the prolonged Idaho and Wyoming regulatory cases “which abuse has unjustly delayed consummation of the Afton exchange to Union Telephone.”  Id. at 5.  Union implies that if the sale had been consummated, that it would have sought to serve the Afton exchange on an exclusive basis pursuant to Idaho Code § 62-615(1).(footnote: 1)  Union Telephone also asserts that Silver Star may not begin construction of a line pursuant to Idaho Code § 61-526 until it has obtained a certificate from the Commission that the present and future public convenience and necessity requires such construction.  Union asserts that service to the Smokey Canyon Mine “is a direct interference with Union Telephone’s equitable ownership of the Afton exchange system.”  Union Comments at 6.

Union Telephone also insists it should have the right to review the special services contract.  Union maintains that its inability to inspect the Silver Star’s contract hampers its ability to comment upon Silver Star’s proposal.  Union argues that Idaho Code §§ 61-301, 302, 307, 315, 502, 503, 513, 526, 622A, and 623 “require that Union Telephone be able to review and comment upon Silver Star’s ‘special services contract.’”  Union Comments at 8.

Union requests the Commission schedule a full hearing in this matter.  Relying on comments similar to those filed by Silver Star in AT&T’s request for a Title 61 certificate to offer local service (Case No. ATT-T-96-1), Union states that it is inappropriate for the Commission to review a matter of this importance without a full public hearing.  Again quoting Silver Star in the AT&T case, Union asserts

It is difficult to conceive how these important issues, which go to the heart of the Commission’s role and authority, and the rights of certified local exchange carriers, could be resolved satisfactorily through the modified procedure proposed by the Commission.

Union Comments at 7.

4.  AT&T Comments.  AT&T supported several Union points and also called for a full hearing on the issues relating to Silver Star’s request.  In particular, AT&T concurred with Union Telephone’s comments that:  (1) Silver Star has not applied to amend its certificated service area; and (2) interested parties should have the right to inspect a proposed contract and to file further comments.  AT&T Comments at 2.  In addition, AT&T expresses concern that Silver Star may, or has the potential to, subsidize its Title 61 services with funds from Title 62 non-regulated services.

SILVER STAR’S RESPONSE

In its response, Silver Star maintains that Union Telephone and the Commission Staff place undue emphasis on the history of the Afton sale.  Silver Star maintains that “[n]one of this is relevant to the present application, and the Staff’s account of recent FCC actions is inaccurate in any event.”  Silver Star Response at 1.  Silver Star insists the Staff is mistaken in its belief  that Silver Star is attacking the sale of the Afton exchange.  Silver Star is merely challenging the Wyoming PSC’s decision denying Silver Star’s right to provide competitive services in the Afton exchange.

Silver Star claims that the status of the sale of the Afton exchange to Union is a moot point.  Silver Star argues that existing Idaho law allows it to compete with U S WEST as to those services which U S WEST has elected to exclude from Title 61 regulations.  The Company states that “U S WEST apparently concedes as much since it has not opposed the Contract.  Further, the Federal 1996 Act removes barriers to facilities-based competition at the local exchange regardless of who ‘owns’ the Afton exchange.  Rural exemptions or suspensions do not affect the right of a customer to install its own communications facilities or of a competitor to provide facilities-based competition regardless of ownership of the exchange.”  Silver Star Response at 2.

Silver Star claims that the only real question for the Commission’s consideration is whether the quality of services in the terms and conditions under which they are offered by Silver Star under the contract are reasonable.  The Company maintains that the Commission is capable of confirming these facts without a hearing.  “Silver Star cannot conceive of how Union or AT&T could bring anything to the table in that analysis, or how they would gain anything other than a competitive advantage from access to the Contract.”  Id. at 3.  Silver Star also dismisses AT&T’s concern about cross-subsidization.  To the extent that Silver Star may earn a profit under the contract, “it may work to reduce [Silver Star’s] revenue requirement for all services and the need for an explicit Idaho USF subsidy.”

Silver Star renews its request that the Commission review its special contract under modified procedure without undue delay.  It urges the Commission to approve the contract and to maintain the contract as confidential, proprietary information.

UNION’S REPLY COMMENTS

Union asserts that it is not surprising that Silver Star urges the Commission to ignore the relevant history behind this Application to approve a special contract.  Union insists that “[i]t is ironic that Silver Star argues for the right compete after doing everything within its power to prevent competition.  Because of Silver Star’s actions, the sale of the [Afton] exchange which should have occurred in 1994, has been continually delayed.”  Union Reply Comments at 1-2.  Without reviewing the Silver Star contract, Union maintains it is uncertain whether the Mine is getting the most reasonable deal if Union were able to negotiate directly with the Mine.  Union declares that it has no ability to enter a contract with Simplot until the Afton sales transaction closes.

Union reiterates that Silver Star’s position in this case is opposite to its position in prior cases.  Union declares that nowhere “in the 1996 Telecommunications Act is there a statement that competition should automatically be allowed where the equitable owner of the exchange is a rural carrier.”  Id. at 2.  Union concludes that the Commission should require Silver Star to disclose the proposed contract and asks the Commission to reject Silver Star’s Application.

COMMISSION DECISION

1. What is the Commission’s desire? Does the Commission desire to schedule a pre-hearing conference, schedule a full hearing, or decide the case based upon written comments under Modified Procedure?

2. Should interested parties has access to the special contract that has been claimed to be  a trade secret and confidential?

3. Is Silver Star proposing to build facilities outside its certificated service area?

4. Is there a sufficient record to decide the request?

5. Anything else?

                                                                         Donald L. Howell, II

Deputy Attorney General

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**FOOTNOTES**

1:

As previously mentioned, the exclusive franchise provision formerly contained in Section 62-615(1) is effectively repealed on July 1, 1997.