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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF THE APPLICATION OF SILVER STAR TELEPHONE COMPANY’S REQUEST TO APPROVE A SPECIAL SERVICES CONTRACT.  | ))))))) | CASE NO. SIL-T-97-1STAFF COMMENTS |

COMES NOW the Staff of the Idaho Public Utilities Commission by and through its counsel of record and hereby submits these comments in the above referenced case.  On February 24, 1997, Silver Star Telephone Company requested that the Commission approve “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 requesting comments concerning Silver Star’s request.

BACKGROUND

In August 1993, U S WEST and Union Telephone Company(footnote: 1) filed a joint Application (Case No.  USW-S-93-5) requesting approval for U S WEST to sell the Afton exchange to Union.  The Afton exchange straddles the Idaho-Wyoming border.  The Idaho portion consists of an area known as Tygee Valley and includes approximately 40 customers.  An application to transfer U S WEST’s Wyoming certificate was also filed with the Wyoming Public Service Commission (WPSC).

In October 1993, Silver Star filed a competing Application with this Commission to expand its service territory to include the Idaho portion of the Afton exchange.  Silver Star opposed the sale of the Afton exchange to Union and argued that Silver Star could better serve the Afton exchange.  Silver Star also filed a competing Application with the Wyoming PSC for the Wyoming portion of the Afton exchange.  Silver Star suggested that the Idaho Commission “await the decision of the Wyoming Commission before conducting hearings” on its competing Idaho Application.  U S WEST and Union agreed to postponement of the Idaho proceedings.

In February 1994, the Wyoming Commission issued an Order denying the sale of the Afton exchange to Union and, instead, directed that U S WEST sell the exchange to Silver Star.  Union Telephone appealed the Wyoming PSC’s decision to the Wyoming Supreme Court.  In February 1996 the PSC’s decision was reversed and the case was remanded back to the Wyoming Commission.  Union Telephone Co. v. Wyoming PSC, 910 P.2d 1362 (Wy. 1996)

Silver Star then filed a request with the Wyoming PSC that it be issued a Certificate of Public Convenience and Necessity to provide local telecommunications services in the Wyoming portion of the Afton exchange.  Silver Star maintained that enactment of the federal Telecommunica­tions Act of 1996 allowed it to offer local telephone service in competition with U S WEST in the Afton exchange because U S WEST still “owned” the exchange.  The WPSC denied Silver Star’s application and appeal of that decision is pending before the Wyoming Supreme Court.(footnote: 2)

On September 20, 1996, this Commission issued Order No.  26619 requesting written comments concerning the proposed sale of U S WEST’S Afton exchange to Union Telephone.  On October 18, 1996, U S WEST, Union Telephone, and Silver Star filed a stipulation in the Idaho case.  The stipulation provided that Silver Star did not oppose the Commission’s approval of the U S WEST-Union sale and transfer of assets and authority to serve the Idaho portion of the Afton exchange.  However, Silver Star desired to preserve its Certificate Application to offer telecommunication services in the Idaho portion of the Afton exchange.  In other words, Silver Star did not object to approval of the sale but reserved the right to seek this Commission’s permission to provide telecommunication services in competition with either U S WEST or Union Telephone.

In Order No. 26687 issued  November 15, 1996, the Commission conditionally approved the sale of the Afton exchange to Union Telephone, provided that existing rates for Idaho customers located in the Afton exchange remain at their existing rates for a period of two years from the date of the Order.  Silver Star’s application to expand its certificated service area on an exclusive basis was dismissed without prejudice.

Staff believes that the Federal Communications Commission (FCC) has approved U S WEST’s and Union Telephone’s Section 214 Application for the sale of the Afton exchange. We further understand that Silver Star is currently challenging this sale before the FCC in Docket No.  CCBPOL 97-1.

DISCUSSION

Silver Star has requested that the Commission approve a special services contract. After reviewing the request, the Staff suggests that the Commission answer three questions before ruling on the request.

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?

The Staff does not possess sufficient information to answer the first two questions.  The third question is briefly addressed below.

Two statutory provisions touch on the third question.  First, 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 addition, Idaho Code § 62-615(1) states  that no telephone corporation shall “provide telecommunication services to customers or end-users located within another telephone corporation’s certificated service area, except through interconnection arrangements consented to by the certificate holder or [as] required by the Commission pursuant to” Idaho Code § 61-513. Idaho Code § 62-615(1) also provides that Certificates of Public Convenience and Necessity “shall represent an exclusive service area franchise for telecommunication services which remain subject to itle 61.”

The Staff is unaware of whether the mine is currently a Title 61 or Title 62 customer.  Further confusing this issue is the fact that House Bill No. 313 repealsthe existing Idaho Code § 62-615(1). Despite the fact that the Bill has passed both houses of the Legislature and the Governor has indicated that he intends to sign the Bill, the Bill does not become effective until July 1, 1997.(footnote: 3) Although the Commission has approved the Afton sales transaction, it has not issued a Certificate of Public Convenience and Necessity to Union Telephone for the Idaho portion of the Afton exchange,. Finally, Union has not indicated whether it desires to serve the Afton exchange exclusively as a Title 61 company or whether it would elect to remove services other than basic local service from Title 61 and have such services regulated pursuant to Title 62.

R E C O M M E N D A T I O N

Given the lack of sufficient information and the complexity of the questions set out above, Staff believes that the Commission should seek additional information before ruling upon Silver Star’s request.  Staff believes that a more thorough examination of the issues is necessary.  Consequently, Staff  recommends that the Commission convene a prehearing conference at its

earliest convenience so interested parties may supply the necessary information and advise the Commission of their respective positions.

RESPECTFULLY submitted this 20th day of March 1997.

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The second question, which must be answered before the third can be addressed is; who is the party in interest in this proceeding relating to the Afton exchange.  The third is the right of a company to enter the certificated area of another company.

May Silver Star provide telecommunications service outside its certificated area?  This question is governed by the conditions set forth in Section 61-526 Idaho Code.   The first part of this section states that:

No ...telephone corporation ...shall henceforth begin the construction of a ... line...or any extension of such...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...

This section goes on to qualify this statement.

...this section shall not be construed to require such corporation to secure such certificate for an extension within any city or county, within which it shall have theretofore lawfully commenced operation, or for an extension into territory whether within or without a city or county, contiguous to its ... line..and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it necessary in the ordinary course of its business: and provided further, that if any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, or if public convenience and necessity does not require or will require such construction or extension, the commission on complaint of the public utility claiming to be injuriously affected, or on the commission's own motion, may, after hearing, make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable...

A reading of this section appears to require Silver Star to obtain a certificate of public convenience and necessity (CPCN) before providing service in this territory which is outside of its current certificated area, and inside the certificated area of another telephone utility.  In its application, Silver Star did not ask for a CPCN.

The second question to be addressed then is; who is the party in interest in this proceeding relating to the Afton exchange?  This question is critical to the examination of a company’s right to enter the certificated territory of another company as addressed in ??62-615(1).  As of this day, this exchange is owned by U S WEST.  However, as stated in the background section of these comments, the ownership of this exchange will soon be transferred to Union Telephone.  In all likelihood such transfer will take place before a hearing on this issue could take place, if the Commission chooses to grant a hearing.  The fact that this sale has taken this long to be consummated is itself due to the litigation that has taken place involving this sale.

On a practical basis, however, it appears that Union Telephone will own the Afton exchange by the time Silver Star’s service would be installed and therefore should be considered the party in interest in this case.

The third question then to be addressed is the right of a company to enter the certificated area of another company.  The circumstances under which this may be allowed, or precluded, are addressed in ??62-605(3) and 62-615(1).

The right of a Title 61 company to exercise and exclusive franchise in an area is contained in Idaho Code 61-615(1).  This section states:

For telephone corporations, or their successors in interest, which provide basic local exchange service, their existing certificates of public convenience and necessity shall represent an exclusive service area franchise for telecommunication services which remain subject to title 61, Idaho Code, within the certificated area of such telephone corporation, provided that the commission may alter or amend the geographic area of a certificate upon a finding that such alteration or amendment is required by the public interest. No telephone corporation shall provide telecommunications services to customers or end-users located within another telephone corporation's certificated service area, except through interconnection arrangements consented to by the certificate holder or required by the commission pursuant to section 61-513, Idaho Code.

Staff has not established that Union Telephone is or intends to remain regulated under Title 61.  If Union chooses to remain regulated under Title 61, then the Afton exchange would represent an exclusive service area franchise and they would be protected from encroachment by another company.  If, however, they choose to be regulated under Title 62, then ??62-605(1) would apply.  This section states:

Nothing contained in the provisions of this chapter or title 61, Idaho Code, shall be construed to prevent any person or entity from providing telecommunication services in competition with a telephone corporation as to those services which have been excluded from regulation under title 61 (emphasis added), Idaho Code, pursuant to the provisions of this chapter...

To the extent that Union chose to be regulated under Title 62 and a competing company intends to provide only Title 62 services in the Afton service area, and, then provision of such services would be permitted.

CONCLUSION

On its surface, the current statutes, specifically 61-526, appear to restrict Silver Star from serving outside its own certificated area without receiving a certificate of public convenience and necessity to do so.  In addition, Union Telephone, depending on their status as a Title 61 or Title 62 company, may have an exclusive service area franchise which would preclude Silver Star from entering their service area.

These are complex issues, however, and not all the facts are known at this point, specifically, the status of the sale of the Afton exchange and Union’s status as a title 61 or title 62 company.  Also the nature of the service which Silver Star proposes to provide are not part of this record and may be a determining factor.

Staff believes that a more thorough examination of the issues in this case is needed and would best be accomplished by scheduling a hearing on the Application of Silver Star.

**FOOTNOTES**

1:

Union is a Wyoming corporation with its principal place of business in Mountain View, Wyoming.

2:

Staff also understands that Silver Star has filed a Petition with the Federal Communications Commission requesting that it preempt the Wyoming decision on the basis that the underlying state law is preempted by section 253 of the Telecommunications Act.  Section 253 provides that no state law (with some exceptions) shall prohibit any entity from providing any interstate or intrastate telecommunications service.

3:

Idaho Code § 62-605(3) further provides that neither Title 61 nor Title 62 “shall be constructed to prevent any person or entity from providing telecommunication services in competition with a telephone corporation as to those services which have been excluded from regulation under Title 61....”