(text box: 1)BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

|  |  |  |
| --- | --- | --- |
| IN THE MATTER OF U S WEST COMMUNICATIONS, INC.’S FILING  OF TARIFF ADVICE NO. 96-03-SC | )))) | CASE NO. USW-S-96-1ORDER NO.  26677 |

On February 5, 1996, U S WEST Communications (U S WEST) filed Tariff Advice No. 96-03-SC to restrict the availability of its Centrex Plus service in southern Idaho effective February 20, 1996.  Centrex Plus services are central office-based services that provide internal switching capabilities to business customers.  U S WEST proposed to withdraw the general availability of Centrex Plus and limit the service to existing customers through the year 2005.  The Commission subsequently received formal complaints from MCI Telecommunications, Inc. (MCI) and AT&T Communications of the Mountain States, Inc. (AT&T) regarding U S WEST’s withdrawal and grandfathering of Centrex Plus.

On February 21, 1996, the Commission issued Order No. 26336 suspending the tariff advice filed by U S WEST.  The Commission noted that “fair questions are raised by U S WEST’s tariff filings and the complaints filed by the various companies regarding the Commission’s authority in these matters,” and decided to “first consider and determine whether and to what extent it has jurisdiction to address the issues raised by the filings.”  Order No. 26336 at pp. 2-3.  Following oral argument and a review of legal briefs regarding the Commission’s jurisdiction, the Commission issued Order No. 26452 concluding it had jurisdiction to receive evidence to determine whether Centrex Plus is subject to Commission review under Idaho Code § 62-605(5) and to hear the complaints of MCI and AT&T.  Order No. 26452 established a hearing for August 27, 1996.

Order No. 25452 did not definitively decide the jurisdiction issue. Instead, the Commission in that Order concluded it could convene a hearing to obtain facts necessary to determine the issue. The question of the Commission’s authority over Centrex Plus arises because Centrex Plus is a deregulated telecommunications service under the provisions of Title 62, Idaho Code.  The Idaho Telecommunications Act of 1988 gives a local exchange company (LEC) an election to have all of its telecommunication services regulated by the Commission under Idaho Code, Title 61 or, alternatively, to remove its nonbasic telecommunication services from traditional Title 61 regulation and have them subject to the provisions of Title 62.  U S WEST removed its nonbasic services from Title 61 regulation in March 1989.  See Order No. 22416 in Case No. MTB-T-89-1.

The election to remove telecommunications services from Title 61 regulation does not forever remove them from the Commission’s jurisdiction.  Commission authority to review the availability of Title 62 services is found in  Idaho Code § 65-605(5).   Section 62-605(5) states:

For any telecommunication service which was subject, on the effective date [July 1, 1988] of this act, to title 61, Idaho Code, and which at the election of the telephone corporation became subject to this chapter, the commission shall have continuing authority to review the quality of such service, its general availability, and terms and conditions under which it is offered.  Upon complaint to the commission and after notice to the telephone corporation providing such service and hearing, the commission finds that the quality, general availability or terms and conditions for such service are adverse to the public interest, the commission shall have authority to negotiate or require changes in how such telecommunication services are provided.  In addition, if the commission finds that such corrective action is inadequate, it shall have the authority to require that such telecommunication services be subject to the requirements of title 61, Idaho Code, rather than the provisions of this chapter.

By the terms of this Section, the Commission’s jurisdiction over Title 62 services depends on a preliminary factual determination that the particular service was regulated under Title 61 prior to July 1, 1988.  The Commission concluded in Order No. 26452 that Section 62-605(5) authorized a hearing for the Commission to receive evidence relating to the threshold jurisdiction question, i.e., whether Centrex Plus is a telecommunication service that was regulated prior to July 1, 1988.  If so, the Commission is authorized to determine, based on the evidence presented, whether the quality, general availability and terms and conditions of Centrex Plus are adverse to the public interest.  In this case it is the attempt by U S WEST to withdraw Centrex Plus, making it no longer generally available, that is challenged by MCI and AT&T.

The initial determination for the Commission under Section 62-605(5) is whether Centrex Plus was available as of July 1, 1988, making it previously regulated under Title 61.  U S WEST established that it notified the Commission on December 20, 1991 with a tariff filing, Transmittal No. 91-23-SC, that Centrex Plus was available as a new service.  Tr. p. 176.  AT&T and MCI did not dispute that the particular product called Centrex Plus was first introduced in 1991, but contended that Centrex Plus was similar to, and was thus merely a continuation of, predecessor products that were  available in 1988.  Tr. p. 8; 60-61.  The Complainants presented evidence to demonstrate the similarity of Centrex Plus and the products it replaced.  AT&T witness John Blake testified that “Centrex is nothing more than loop dial tone, central office functionalities, partitioning of the switch NARS in various forms over a number of years starting about 30 years ago.”  Tr. p. 20.  MCI witness Bennett testified that “while Centrex Plus may be somewhat different from previous versions of Centrex, the basic core of Centrex Plus is the same as the original Centrex service.”  Tr. p. 61.  U S WEST acknowledged that Centrex Plus is a “ similar service” to Centron Custom, the service it replaced, but argued that “Centrex Plus was a new product separate and distinct from Centron Custom.”  Tr. p. 178-79.

After reviewing the record, we initially determine but do not finally decide that Centrex Plus is subject to Commission review under Section 62-605(5).  The record is undisputed that Centrex Plus is a service similar to its predecessor and is intended for the same class of customers.  Although the particular features have been enhanced over the years, the Centrex family of services has always been a central office-based switching service for medium to large business customers using similar core elements that have remained unchanged since 1988.

We need not finally determine, however, that Centrex Plus is the same service as Centron Custom that was subject to Title 61 regulation before July 1988.   Under Section 62-605(5), the Commission’s authority to “negotiate or require changes in how [Centrex Plus is] provided” depends upon a determination, following a complaint and hearing, that the withdrawal of Centrex Plus is adverse to the public interest.  The complaining parties, in this case AT&T and MCI, have the burden of proof to establish the requisite detriment to the public interest.  We cannot find on the record an adverse effect on the public interest sufficient to require remedial action by the Commission.

Both AT&T and MCI witnesses presented testimony of the effect on the public interest of  withdrawing Centrex Plus.   AT&T and MCI testified that the availability of Centrex Plus for resale would assist competitors seeking entry to the local telecommunications market.  According to Blake, “total service resale enables competition to establish a presence in the market and to begin to acquire customers.”  Tr. p. 8.  Blake testified that “AT&T and other new entrants will desire to purchase the elements from Centrex service to provide local exchange service. . . .  The new entrant may choose to use the dedicated switch capabilities of Centrex service to serve a single customer or to use the same dedicated switch capabilities and the loops to serve multiple exchange customers.”  Tr. p. 14.

MCI witness Bennett likewise testified that the withdrawal of Centrex Plus “is adverse to the public interest because it will delay the development of competition in the local market.”  Tr. p. 84.  Bennett also stated that “Centrex Plus is an important service that will be a vital tool in the promotion of local competition.”  Tr. p. 69.

The critical component of  Centrex Plus for resellers identified by MCI and AT&T is the “transmission service and facilities necessary for the connection between the customers’ premises and the local network switching facility,” often called the local loop.  Tr. p. 9.  AT&T witness Blake testified that it is U S WEST’s control of the local loop that makes it the sole supplier of Centrex service. Id.  Likewise, Bennett testified that it is “the local transport or local exchange service portion of Centrex Plus,” which is available only from U S WEST, that gives U S WEST a monopoly over the service.  Tr. p. 56.  Thus, according to MCI and AT&T, it is the availability of the local loop portion of Centrex Plus that is essential to the development of competition in the local market.

In response, U S WEST witness Karen Baird testified that Centrex Plus is not essential to competition in the local market because competitors will have access to U S WEST’s “local transport function” as a result of the federal Telecommunications Act of 1996 (Telecom Act).  Tr. p. 189.  Baird testified that this function will be available to competitors because the Telecom Act requires U S WEST to unbundle its products (provide separate wholesale prices for separate functions) and make available its unbundled loop and other products to competitors.  Tr. p. 189.

MCI agreed that “once the U S WEST network is unbundled and there are interconnection agreements available,” competitors will have alternatives to duplicate the features and functionalities of Centrex Plus.  Tr. p. 91.  Thus MCI’s concern of delay in the emergence of competition is only the delay that occurs until alternatives are available through unbundling.  Tr.  p. 96.  Bennett was not able to say, however, whether MCI would enter the local market in Idaho as a Centrex Plus reseller within the next 10 months.  Tr. p. 97.  When AT&T witness Blake was asked whether the Centrex features will be available to AT&T through unbundling as required by the Act, he responded “I do not know the answer to that,” because he was not part of the negotiation process in Idaho.  Tr. p. 31.  When pressed, Blake reiterated that he did not know whether the Centrex Plus components would be available when U S WEST’s services are unbundled and available for resale. Tr. p. 32.  Blake also testified that he did not know whether AT&T desired to resell Centrex Plus in Idaho. Tr. p. 33.

It is undisputed on the record that the federal law requires U S WEST to unbundle its products and that Centrex Plus features will be available to AT&T and MCI when U S WEST’s services are unbundled and available to competitors on a resale basis.  The Act provides a specific process and timeline, some of which is under the control of potential competitors, for an incumbent LEC to provide resale of its products.  Neither AT&T or MCI presented evidence of a present need to have Centrex Plus available for a single customer of theirs.  The testimony was of a theoretical, anticompetitive effect of withdrawing Centrex Plus, rather than actual impairment to specific attempts by MCI or AT&T to provide service.  Nor is there evidence that Centrex Plus withdrawal will have a permanent effect on the offering of competitive local services.  On this record, we cannot find that the withdrawal of Centrex Plus is adverse to the public interest.

Evidence was also presented of possible adverse effects on customers if Centrex Plus is withdrawn.  For example, Bennett testified that new retail customers, unable to purchase Centrex Plus, could be forced “to purchase costly and, possibly unnecessary, customer premise equipment.  It could also delay some retail companies from even starting business, which could have a trickle down effect on other companies, consumers and the general economy of Idaho.”  Tr. p. 84.  However, Baird testified that only 188 customers subscribe to Centrex Plus service, although there are in excess of 30,000 small business customers in Idaho. Tr. p. 244. According to Baird, most businesses purchase an alternative service, such as customized call management services, rather than Centrex Plus. Id.  The record also indicates that the purchase or lease of private branch exchange (PBX), or customer premises, equipment is an alternative to Centrex Plus. Tr. p. 194.

The record does not support a finding that the withdrawal of Centrex Plus is harmful to customers. The relatively low number of customers using the service will be protected by the grandfathering provision to enable them to obtain the service through the year 2005.  Potential new customers have alternative services available, as evidenced by the overwhelming number of business customers that decline to purchase Centrex Plus.  Because we cannot find facts to conclude that the withdrawal of Centrex Plus is adverse to customers and thus to the public interest, U S WEST is free to withdraw the service subject, however, to provisions of the Telecom Act.

The Complainants presented testimony that U S WEST’s withdrawal of  Centrex Plus violates provisions of the Telecom Act.  Section 251(b) of the Act imposes on LECs a duty to not prohibit and not impose unreasonable or discriminitory conditions or limitations on the resale of their telecommunications services. Moreover, Section 251(c)(4) requires LECs to offer for resale telecommunications services they provide at retail to subscribers, and to not impose discriminitory limitations on the resale of such services. AT&T and MCI contend U S WEST’s attempted withdrawal of Centrex Plus violates both provisions of the Telecom Act, and that the Commission has jurisdiction to enforce those provisions of the Act.

After the first testimony was prefiled in this case, the Federal Communications Commission (FCC) issued a First Report and Order implementing local competition provisions of the Telecom Act, FCC Docket No. 96-98 and 95-185.  AT&T testified regarding the FCC’s discussion of the effect of Section 251 of the Act on the ability of LECs to withdraw and grandfather a service.  AT&T witness Blake quoted portions of paragraph 968 of the FCC Order, including FCC statements that “we are concerned that the incumbent LEC’s ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent” and “many state commissions have rules regarding the withdrawal of retail services and have experience regulating such matters.”  Tr. p. 154.  Blake concluded from the FCC Order that it is the responsibility of state commissions to rule on withdrawals of service, such withdrawals may have anticompetitive effects and, each state commission should investigate withdrawals when it receives complaints.  Tr. p. 154.

We agree with AT&T and the FCC that it is for state commissions to determine whether withdrawal of a service is permissible.  The Telecom Act does not by its terms preclude withdrawal of a service.  Instead, the issue is for state commission “rules regarding withdrawal of retail service and .... experience regulating such matters.”  Nor are we presented with the situation for which the FCC expressed concern when a service is withdrawn — “where resellers are purchasing such services for resale in competition with the incumbent.”  Neither AT&T nor MCI currently resells Centrex Plus.  In fact, the record does not demonstrate a specific, immediate desire of the Complainants to become resellers of Centrex Plus.

The language of the Telecom Act does require U S WEST, so long as it provides Centrex Plus to its grandfathered customers, to provide the service for resale to those customers.  Section 251 (c)(4) requires offering “for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”  We interpret this section to require, where a retail service is provided to grandfathered customers, that the LEC must make the service for those customers available to a reseller.  Accordingly, U S WEST may withdraw Centrex Plus and provide it to existing customers until 2005, but the Company must also allow AT&T, MCI and other resellers an opportunity to purchase Centrex Plus for resale to those customers.  This conclusion is consistent with the FCC’s interpretation of Section 251(c)(4) regarding the withdrawal of retail service by an LEC.  See FCC First Report and Order, CC Docket No. 96-98 and 95-185, paragraph 968.

Finally, AT&T and MCI in testimony and after the hearing directed our attention to decisions by other state commissions that prevent U S WEST’s withdrawal of Centrex Plus in whole or in part in those states.  For example, on October 21, 1996, AT&T filed a motion asking the Commission to take official notice of an order issued in September by the Utah Public Service Commission (UPSC), and on November 6, 1996 filed a similar motion regarding a North Dakota Public Service Commission order.  The UPSC concluded, in light of U S WEST’s continuation of service to existing customers, that “as long as [U S WEST] offers this service on a retail basis it must offer it for resale.”  UPSC Order at p. 6-7.  This conclusion, based on Section 251(c)(4), is consistent with our holding in this case.  Other results and findings of the Utah Order, as well as some of the decisions in other states, rest on individual state laws.  The Commission’s Rules of Procedure readily allow official notice of orders from sister states and, while they can be informative, this Commission ultimately must decide cases on the record presented in each case and the laws of this State.  Idaho statutes limit the Commission’s authority over Title 62 services, allowing the Commission to act only where evidence establishes an adverse effect to the public interest.  This record does not convincingly demonstrate that U S WEST’s withdrawal and grandfathering of Centrex Plus is adverse to the public interest.  However,  Section 251(c)(4) of the Telecom Act requires U S WEST “to offer for resale at wholesale rates” the service it provides to the existing customers.

O R D E R

IT IS HEREBY ORDERED that the suspension of Tariff Advice No. 96-03-SC is rescinded.  U S WEST may withdraw Centrex Plus in its southern Idaho service area and limit it to existing customers.  However, U S WEST is directed, so long as Centrex Plus is available to existing customers, to make it available to resellers to provide the service to those same customers.

THIS IS A FINAL ORDER.  Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No.  USW-S-96-1  may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No.  USW-S-96-1 .  Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration.  See Idaho Code § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                  day of November 1996.

                                                                                                                                       RALPH NELSON, PRESIDENT

                                                                                            MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

vld/O:usws961.ws2

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

November 14, 1996