(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.  26752 |

This case was initiated when U S WEST Communications, Inc.  (U S WEST) notified the Commission that it intended to discontinue Centrex Plus, an unregulated telecommunications service for business customers.  Complaints thereafter were filed by AT&T Communications of the Mountain States (AT&T) and MCI Telecommunications Corp.  (MCI) alleging that the withdrawal of Centrex Plus was anticompetitive and adverse to the public interest.  AT&T and MCI asked the Commission to assume regulatory control over Centrex Plus pursuant to Idaho Code § 62-605(5).  That section allows the Commission to reassert regulatory control of a previously regulated service upon a finding that the terms and conditions of the service are adverse to the public interest. The Commission on November 14, 1996 issued Order No. 26677 concluding that the record did not support a finding that US WEST’s withdrawal of its Centrex Plus service would be adverse to the public interest.  On December 5, 1996, a Joint Petition for Reconsideration was filed by AT&T and MCI.  A separate Petition for Reconsideration was filed by McLeod Telemanagement, Inc. (McLeod), a company that had not previously participated in the case.  The Petitions request that the Commission reconsider its Order No. 26677.

The Petition of AT&T and MCI

As grounds for granting their Petition for Reconsideration, AT&T and MCI make the following assertions:

1.  The Commission concluded that the complaining parties (AT&T and MCI) had the burden of proof under Idaho Code § 62-605(5) to show an adverse effect on the public interest.  AT&T and MCI argue that, because this case was initiated as a tariff advice filing, the burden of proof should lie with U S WEST.

2.  AT&T and MCI interpret the Commission’s Order to require proof of immediate or permanent harm to the public interest to entitle them to relief under Section 62-605(5).  AT&T and MCI assert that “requiring proof of immediate and permanent harm to a specific person or company is an erroneous interpretation of the ‘adversity to the public interest’ test.”

3.  AT&T and MCI state that prior to enactment of the federal Telecommunications Act of 1996 (Act), resale of Centrex Plus in Idaho was illegal.  Thus, AT&T and MCI contend their present absence from the local market is an unreasonable basis upon which to conclude that consumers are not adversely effected by the Centrex Plus withdrawal.

4.  AT&T and MCI assert that the Commission decision was based in part on the finding that withdrawal of Centrex Plus would not have a permanent effect on local competition.  AT&T and MCI ask that the Commission reconsider its finding that the nonpermanent impact of the withdrawal of Centrex Plus demonstrates that the public interest is not adversely effected.

5.  AT&T and MCI contend that the availability of alternative services to Centrex Plus is not sufficient support for a conclusion that the public interest is not harmed by the withdrawal of the service.

On December 12, 1996, U S WEST filed a response to the Joint Petition for Reconsideration of AT&T and MCI, and also filed an Objection to the Petition for Reconsideration of McLeod.  In response to the Petition filed by AT&T and MCI, U S WEST contends the Commission correctly determined that AT&T and MCI carry the burden of proof under Section 62-605(5).  U S WEST also stated that Centrex Plus was available for resale prior to enactment of the Act, and that AT&T and MCI never sought to purchase the product and resell it to local customers.  U S WEST argues that MCI and AT&T failed to present any credible evidence that the withdrawal of Centrex Plus would adversely impact competition and thus the public interest in Idaho.  U S WEST argues that Section 62-605(5) was not created to address theoretical wrongs, and that “damage to the idea of competition, or to unparticipating competitors who might possibly take advantage of Centrex Plus as a reseller, are clearly insufficient to reach the level of adversity to the public interest.”

Commission Decision

AT&T and MCI contend the burden of proof should lie with U S WEST to show that the withdrawal of Centrex Plus is not adverse to the public interest, although they “do not deny they are the complaining parties or that complainants generally possess the burden of proof.”  Joint Petition, p. 4.  Indeed, counsel for AT&T stated at the outset of the hearing in this case “that on the claw-back provision [Idaho Code §62-605(5)] that AT&T and MCI bear the burden of showing that as adverse to the public interest.”  Tr. p. 3.  AT&T and MCI now argue that, because this proceeding began when U S WEST notified the Commission it intended to withdraw Centrex Plus, this is a tariff advice filing and U S WEST should be regarded as an applicant with the burden of proof.

The argument by AT&T and MCI ignores the process by which this case was presented.  Centrex Plus is a Title 62 service  which the Commission normally does not economically regulate.  Had AT&T and MCI not filed their complaints, this matter would have ended with the notice filed by U S WEST.  The Commission’s authority  to review the terms and conditions of Title 62 services arises only by Section 62-605(5), which is invoked upon a complaint to the Commission, notice to the telecommunications provider, and a hearing.  Given this process and the limited authority of the Commission to review Title 62 services, we believe the statute places the burden of proof with the complaining party to meet the evidentiary standards of Section 62-605(5).

The remainder of the exceptions argued by AT&T and MCI focus on isolated findings contained in Order No. 26677.  For example, the Commission stated that no evidence was presented showing that AT&T or MCI had a “present need to have Centrex Plus available for a single customer of theirs”, or that “Centrex Plus withdrawal will have a permanent effect on the offering of competitive local services.”  Order No. 26677, p. 4.  AT&T and MCI deduce from this a burden created by  the Commission to prove an immediate and permanent harm to the public interest under Section 62-605(5).

This argument by the complainants misconstrues the findings of the Commission.  The Commission in the quoted language summarized a portion of the evidence that was presented, but did not hold that proof of immediate and permanent harm was required.  Instead, the Commission reviewed all the evidence to determine whether adverse harm to the public interest had been shown.  Among the factors considered by the Commission in reaching its determination was the absence of evidence showing a present or immediate need for Centrex Plus by either AT&T or MCI, and no lasting effect on the offering of competitive local services.  These findings, which are not challenged by AT&T and MCI, would not have been possible if either party had demonstrated a specific desire to resell Centrex Plus.  This finding, rather than establishing an impossible burden of proof, was one factor in the Commission’s conclusion that the evidence did not establish an adverse impact on the public interest by the withdrawal of Centrex Plus.

The next argument of AT&T and MCI is similar to the previous one.  Arguing that “ prior to enactment of the Telecommunications Act, resale of Centrex in Idaho was illegal,” AT&T and MCI contend the Commission relied too much on the fact that neither Company has yet entered the local market in Idaho.  First, this argument misstates the evidence.  The evidence is undisputed that Centrex Plus, a Title 62 service, was available for resale prior to enactment of the federal Act.  Second, the fact that neither AT&T nor MCI had attempted to resell the service and did not have definite plans to resell the service in the future were merely factors in the Commission’s finding of no adverse impact.  As part of this argument the complainants also contend that the Commission erroneously concluded that “Centrex Plus features will be available to AT&T and MCI when U S WEST services are unbundled and available to competitors on a resale basis.”  Joint Petition p. 7.  However, as discussed in Order No. 26677, the witnesses of MCI and AT&T either agreed with that conclusion or did not know whether it was true.  Order No. 26677, p. 4-5.  That finding of the Commission is supported by the evidence of U S WEST and MCI, and is not refuted by AT&T.

In their next argument, AT&T and MCI again turn to the Commission’s statement that there was no evidence “that Centrex Plus withdrawal will have a permanent effect on the offering of competitive local services.”  Joint Petition, p. 8.  The complainants do not dispute this summary of the evidence presented but contend that requiring a showing of permanent harm “is unreasonable because it places a virtually impossible evidentiary burden on the parties.”  Joint Petition. p. 9.  This argument is nearly identical to one previously made by the parties.  The Commission did not hold that evidence of permanent harm is required, but merely stated that no evidence of permanent harm was presented.  AT&T and MCI do not dispute this finding, which was but one factor in the Commission’s determination that no adverse harm to the public interest was demonstrated by the evidence.

Finally, AT&T and MCI argue that “the fact that alternative services to Centrex Plus are available does not support the conclusion that the public interest is not harmed by the withdrawal of the service.”  Joint Petition, p. 9.  The parties again isolate one finding and argue that, by itself, it is an insufficient basis to conclude the public interest is not harmed by the withdrawal of Centrex Plus.  The Commission did not reach its conclusion based on a single finding.  Instead, it was the totality of the evidence—showing no present need or desire of AT&T or MCI to resell Centrex Plus, no actual customer of AT&T and MCI desiring Centrex Plus, no immediate or permanent effect on local competition, and the availability of alternative services to customers—that is the basis of the Commission’s decision.   AT&T and MCI do not identify evidence in the record to show that the Commission’s findings are erroneous. On this record, we find that AT&T and MCI do not state adequate reasons to grant reconsideration.

The Petition of McLeod

 McLeod was not a party in the case and, in fact, has not been authorized to provide services in Idaho.  Simultaneous to its filing of a Petition for Reconsideration in this case, McLeod filed an Application with the Commission for a Certificate of Public Convenience and Necessity. McLeod states in its Petition that it “plans to enter in designated Idaho markets in the near future by reselling Centrex Plus if the service is available from U S WEST.” According to its Petition, McLeod currently provides local exchange services in Iowa and Illinois exclusively through resale of Centrex Plus services.

McLeod’s Petition states that the Commission “may have been less than fully informed as to the critical elements of Centrex Plus service that makes its availability essential for a reseller to enter and compete by virtue of the fact that the two complaining parties, AT&T and MCI, do not have extensive experience reselling Centrex Plus service.”  McLeod Petition, p. 6.  McLeod takes exception to specific findings made by the Commission and states that it could present evidence showing  (1) the availability of Centrex Plus services for resale is essential to its ability to enter Idaho markets in the near future, (2) the withdrawal of Centrex Plus service creates a barrier to McLeod’s entry into Idaho, (3) access to the local loop is not the only element of Centrex Plus service essential to McLeod’s ability to provide competitive local exchange services in Idaho, and (4) a functionally equivalent alternative to Centrex Plus may not be available through unbundling.

In its objection to McLeod’s Petition, U S WEST asserts that because McLeod failed to Petition to Intervene and participate in this case, its Petition for Reconsideration is untimely.  U S WEST argues that “McLeod’s effort to participate in this docket for the first time upon reconsideration plainly disrupts, creates prejudice and unduly broadens the issues.”  According to U S WEST, McLeod’s request to participate as an active party is untimely under the Commission’s Rules.  U S WEST notes that McLeod’s position is different than AT&T’s and MCI’s and thus McLeod seeks reconsideration of issues or arguments not presented to the Commission in the case.  U S WEST states that “the reconsideration format does not allow the Company an adequate opportunity to respond to the entirely new factual allegations and issues that are raised by the Petition.”  U S WEST suggests that a separate case and forum is available to McLeod to assert that withdrawal of Centrex Plus violates federal law.

Commission DecisonU S WEST objects to McLeod’s Petition in part because McLeod did not previously petition to intervene and participate as a party in this case.  Idaho Code 61-626 authorizes “any corporation, public utility or person interested therein” to petition for reconsideration of a Commission order.  This section has been construed to allow petitions for reconsideration by broad groups of entities and individuals.  See e.g., Malone v. Van Etten, 67 Idaho 294, 178 P.2d 382 (1947) (Petitions for Reconsideration not limited to a party, stockholder, bondholder or party pecuniarily interested in the utility).

Petitions for reconsideration nonetheless are limited in the issues that may be the subject of the petition. Idaho Code § 61-626 restricts petitions for reconsideration of Commission orders to “any matter determined therein”.  The Commission in Order No. 26677 determined on the record created the issues presented by the complainants as possible  resellers of Centrex Plus.   It is evident from McLeod’s Petition that, because it may be in a different position than AT&T and MCI,  it seeks to litigate issues that are different from those previously heard. That would be an entirely new case  rather than reconsideration of this case.  Even were the Commission inclined to allow the presentation of evidence on issues not determined in its Order, the schedule by which rehearing must be concluded would not allow enough time for that to occur.  Because McLeod’s petition asks the Commission to hear and decide many issues not determined in Order No. 26677, it must be denied.

O R D E R

IT IS HEREBY ORDERED that the Petitions for Reconsideration of AT&T, MCI and McLeod are denied.

THIS IS A FINAL ORDER ON RECONSIDERATION.  Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. USW-S-96-1 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules.  See Idaho Code § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                  day of January 1997.

                                                                                                                                       RALPH NELSON, PRESIDENT

                                                                                            MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

bls/O-usws961.ws3

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

January 3, 1997