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

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| McLEODUSA TELECOMMUNICATIONS SERVICES, INC. (FORMERLY McLEOD TELEMANAGEMENT, INC.) Complainant,vs.U S WEST S WEST COMMUNICATIONS, INC.,Respondent. | )))))))))))) | CASE NO. USW-T-97-5MTI-T-97-1ORDER NO.  27233 |

McLeodUSA Telecommunications Services, Inc. (McLeod) initiated this case by filing a complaint against U S WEST Communications, Inc. (U S WEST) on January 31, 1997, challenging U S WEST’s removal of a retail telecommunications service called Centrex Plus.  The crux of McLeod’s complaint is that “the withdrawal of Centrex Plus prevents McLeodUSA from competing in the local exchange market in the near term as McLeodUSA’s primary service is the resale of Centrex Plus service and there exists no practical or economical way to replicate a similar service in the near term.”  Complaint, p. 3.

U S WEST’s withdrawal of Centrex Plus predates McLeod’s Complaint by nearly one year.  U S WEST filed Transmittal Nos. 96-03-SC and 96-01-N on February 5, 1996, notifying the Commission that Centrex service would no longer be available to its customers.  Thereafter two complaints, including a request for an order to stay the Centrex withdrawal, were filed by MCI Telecommunications Corp. (MCI) and AT&T Communications of the Mountain States, Inc. (AT&T) on February 14, 1996, which became Case No. USW-S-96-1.  Noting that U S WEST’s withdrawal of Centrex occurred shortly before the February 8, 1996, effective date of the federal Telecommunications Act of 1996 (Telecom Act), AT&T and MCI asserted that the removal of Centrex service violated both state law and the new Telecom Act.  The Commission on February 20, 1996, issued Order No. 26336, temporarily suspending the effective date of U S WEST’s action until the Commission could consider its authority in light of the complaints filed by AT&T and MCI.

Following an August 27, 1996 hearing, the Commission issued Order No. 26677, concluding that the Telecom Act did not prevent U S WEST from withdrawing Centrex, and that no evidence had been presented to show an adverse impact on the public interest sufficient to require a Commission remedy under Idaho Code § 62-605(5), the relevant state statute.  Petitions for reconsideration were filed by MCI and AT&T, as well as McLeod, although McLeod had not been a party in the case.  None of the parties requested a stay of the Commission’s Order pending reconsideration or appeal.  On January 3, 1997, the Commission issued Order No. 26752, denying the petitions for reconsideration. The parties appealed from the Commission’s orders in Case No. USW-S-96-1 to the Idaho Supreme Court.

McLeod thereafter initiated this case by filing its Complaint on January 31, 1997.(footnote: 1)  The Commission convened a hearing on August 27, 1997, to hear the evidence presented by the parties.  AT&T was granted intervenor status in this case, but did not actively participate in the hearing or file a post-hearing brief.

THE COMMISSION’S JURISDICTION

The previous proceeding is relevant only in that it presented the same issue regarding the Commission’s authority to order remedial action.  As with all state agencies, the Commission has only the jurisdiction accorded it by the Idaho Legislature.  See, Washington Water Power Company v. Kootenai Enviro. Alliance, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979).  If the conditions of the relevant statutes are not met, the Commission has no jurisdiction and may not invoke the authority of the state to affect the conduct of the parties.  Id.

The Commission in Order No. 26677 reviewed its jurisdiction under Idaho law and the Telecom Act regarding the withdrawal of Centrex Plus.  Pursuant to the Idaho Telecommunications Act of 1988, Centrex Plus is not subject to the Commission’s traditional regulatory authority under Title 61, Idaho Code, and instead is subject to the provisions of Title 62, Idaho Code.  Idaho Code § 62-605(5) grants the Commission limited authority over services that previously were regulated under Title 61.  If Centrex Plus were subject to the Commission’s Title 61 regulation prior to July 1988, the Commission has authority to negotiate or require changes in how Centrex service is provided “upon a determination, following a complaint and hearing, that the withdrawal of Centrex Plus is adverse to the public interest.”  Order No. 26677, p. 3.  Whether an action is adverse to the public interest is a legal conclusion of the Commission that must be based upon factual evidence demonstrating the adverse impacts to the public interest by the challenged activity.

The Commission also may have jurisdiction under provisions of the Telecom Act.  The Legislature this year enacted Idaho Code § 62-615(1),  specifically granting to the Commission “full power and authority to implement the federal Telecommunications Act of 1996.”  We noted in Order No. 26677 that “Section 251(b) of the Act imposes on LECs [local exchange carriers] a duty to not prohibit and not impose unreasonable or discriminatory conditions or limitations on the resale of their telecommuni­ca­tions services.” Additionally, “Section 251(c)(4) requires LECs to offer for resale telecommunications services they provide at retail to subscribers, and to not impose discriminatory limitations on the resale of such services.”  Order No. 26677, p. 6.  In other words, the Telecom Act requires evenhandedness by a LEC in the resale of its services. It does not, however, prevent a LEC from withdrawing a service. Thus we concluded, as did the Federal Communications Commission when it considered the effect of the Act on the withdrawal of a service, that “the Telecom Act does not by its terms preclude withdrawal of a service.”  Id. The relevant state law provides jurisdiction to the Commission only after a finding that the removal of a previously regulated retail service is adverse to the public interest.

MCLEOD’S EVIDENCE AND ARGUMENTS

McLeod summarized its evidence and presented its legal arguments in its initial post-hearing brief, and also distinguished its case from that of AT&T and MCI in the previous proceeding.  McLeod contends the evidence here is different than the evidence presented in Case No. USW-S-96-1 because AT&T and MCI did not provide evidence showing a present or immediate need for Centrex Plus.  McLeod asserts that it presented compelling evidence showing such a need.  McLeod’s witness testified that “McLeodUSA’s entire marketing strategy and operational systems have been designed to use Centrex service, ” and McLeod’s witness clearly committed the company to providing telecommunication services through Centrex resale in Idaho.  Tr. pp. 40-41.

McLeod also contends the record in this case shows that it has been successful in attracting customers using the Centrex platform as a basis. McLeod witness Stephen C. Gray testified that the Company has grown to serve 100,000 access lines using the Centrex platform, demonstrating a desire of customers for the service provided.  Mr. Gray also testified that the withdrawal of Centrex Plus severely limits if not completely negates McLeod’s ability to compete in a local service market in Idaho in the near term.  According to Mr. Gray, “McLeodUSA believes that it has no realistic alternative to Centrex Plus service to provide competitive local exchange service in Idaho in the near term.”   Tr. p. 29.  McLeod argues that “the evidence in this case demonstrates what the evidence in Case No. USW-S-96-1 did not: that McLeod can, and will, rapidly bring the benefits of competition to local exchange customers in Idaho, if Centrex Plus service is available.”  Initial Brief of McLeod, p. 11.

McLeod also argues that the withdrawal of Centrex Plus violates terms of the Telecom Act.  According to McLeod, Centrex is structured to make it attractive to users requiring a single-system to serve multiple locations, which is precisely the need of resellers.  McLeod refers to an order from the FCC’s Common Carrier Bureau, as well as a recent FCC order, to support its argument that the Telecom Act  allows traffic aggregation by Centrex resellers.  In a recent order preempting a Texas Public Utilities Commission decision, the FCC struck down restrictions on the resale of a Centrex service that had been approved by the Texas PUC.  McLeod quotes part of the order stating an FCC finding “that enforcement of the provision effectively precludes new entrants from providing competitive Centrex services through resale due to their inability to aggregate small users into a large group, and thereby offer rates, services and features that are otherwise unavailable to a single-user.”  Initial Brief of McLeod, p. 14.  McLeod argues, based on the FCC’s preemption of the Texas order, that even if other alternatives are available to McLeod, “the fact that McLeod would be required to entirely change its operations to do business in Idaho would be an unlawful barrier to entry under section 253(a) of the Act.”  Initial Brief of McLeod, p. 14.

COMMISSION DISCUSSION AND DECISION

All of the evidence presented by McLeod is relevant to the Commission’s jurisdiction under state law, i.e., whether the facts demonstrate an adverse impact on the public interest to authorize action by the Commission pursuant to Idaho Code § 62-605(5). McLeod noted that the Commission based its decision in Case No. USW-S-96-1 on “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.” Order No. 26752, p. 3-4; Initial Brief of McLeod, p. 2.  McLeod argues that its evidence requires a different finding on each of these four factual issues.

McLeod did present evidence to justify a different finding regarding its desire to resell Centrex Plus. McLeod’s testimony clearly demonstrates a desire and willingness by the company to enter the Idaho telecommunications market within the next 12-18 months through the resale of Centrex Plus.  Tr. p. 64.  Mcleod’s willingness to enter the market relatively soon also is support for a finding that its inability to enter the market may have an effect on local competition in the near term.  If Centrex Plus is not available for resale, and McLeod is unwilling to provide service in Idaho by any other means, then customers would have one less option for local service.

These factual findings are not sufficient for the Commission to conclude that U S WEST’s removal of Centrex Plus is adverse to the public interest, thus authorizing remedial action by the Commission, especially in light of additional legal issues presented in this case affecting the authority of the Commission.  First, unlike in Case No. USW-S-96-1, Centrex Plus has already been withdrawn by U S WEST.  The Commission’s Order allowing the withdrawal of Centrex was not stayed by the appeal, and thus McLeod is in a position of claiming jurisdiction for the Commission to reinstate Centrex Plus rather than to prevent its withdrawal.  See, Idaho Code § 61-635.  Assuming the other conditions of the statute are met, it is not apparent from the language of Idaho Code § 62-605(5) that the Commission has the authority to order a telecommunications carrier to reintroduce a Title 62 service it previously withdrew.

Second, as discussed by U S WEST in its post-hearing briefs, it is possible that the way in which McLeod intends to provide service through the resell of Centrex violates another recently enacted Idaho statute.  Idaho Code § 62-622(4) provides that a “telephone corporation shall not resell …(c) a category of service to circumvent switched or special access charges.”  McLeod’s witness testified that its intended use of Centrex will provide it the ability to aggregate and route inter and intraLATA toll calls to specific carriers, which avoids the paying of switched access charges.  Tr. p.111-112.  McLeod argued in its Reply Brief that this section “cannot apply to McLeod, because McLeod is not “circumventing” the payment of access charges; it is simply availing itself of the opportunity, presented to all large customers, to utilize the special access charges associated with dedicated facilities, rather than switched access charges.”  Reply Brief of McLeod, p. 6.  Although the record on this issue was not well developed, the new statute at least raises a significant question regarding the Commission’s authority to order reinstatement of Centrex service where its intended use may be unlawful.

Finally, we note that the Commission during the past year has approved several interconnection agreements for competing carriers and has approved numerous applications for certificates of public convenience and necessity for new providers.  See, IPUC Rule of Procedure 263, IDAPA 31.01.01.263, allowing the Commission to take notice of its own orders, certificates and permits.  This suggests that the inability of customers to select McLeod as a provider after the next 12-18 months will not significantly impact local competition.

In sum, although McLeod presented evidence that it desires to be a Centrex reseller, the record does not justify a finding that the removal of Centrex is adverse to the public interest.  Accordingly, Idaho law does not provide the Commission jurisdiction to order U S WEST to reintroduce Centrex Plus.

McLeod did not present evidence to show that the Commission has jurisdiction to act pursuant to provisions of the Telecom Act.  Jurisdiction might obtain, for example,  upon a showing that a LEC was discriminating against one carrier in favor of another, in violation of the Section 251(c)(4) duty of a LEC in the resale of its retail services.  McLeod did make a legal argument, however,  that the unavailability of Centrex Plus for resale violates the Telecom Act.  McLeod’s argument is the same as the Commission considered in the previous case, with a subsequent FCC order offered as additional support by McLeod.  McLeod suggests the Commission “should revisit its earlier decision.”  Initial Brief of McLeod, p. 16.

We decline to reconsider the legal issue of the Commission’s jurisdiction under the Telecom Act that we decided in Order No. 26677.  The FCC order McLeod relies upon has no bearing in this case because it involves circumstances unrelated to the withdrawal of Centrex.  Additionally, in the absence of new evidence in a new case, the proper venue to challenge the Commission’s previous decision is by appeal to the Supreme Court.  See Idaho Code § 61-625; Utah-Idaho Sugar Company v. Intermountain Gas Company, 100 Idaho 368, 597 P.2d 1058 (1979) (final Orders of the IPUC should ordinarily be challenged either by petitions for rehearing or appeal to the Supreme Court).  The question of the effect of the Telecom Act on U S WEST’s with­drawal of Centrex has been identified as an issue on appeal in the previous case.  The Commission will, of course, abide by the Court’s ruling on that issue.

Despite McLeod’s desire to resell Centrex service in Idaho, the Commission simply has no jurisdiction, on the established facts, to order U S WEST to reintroduce the service.  Neither state law nor the Telecom Act authorize the extraordinary relief requested by McLeod.

O R D E R

IT IS HEREBY ORDERED that the request by McLeod for an order directing U S WEST to reinstate Centrex Plus service is denied.

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 these Case Nos. USW-T-97-5 and MTI-T-97-1 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 these Case Nos. USW-T-97-5 and MTI-T-97-1 .  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 December 1997.

                                                                                                                                       DENNIS S. HANSEN, PRESIDENT

                                                                                            RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

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**FOOTNOTES**

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McLeod also filed a Notice of Appeal to the Idaho Supreme Court in the previous case, but subsequently withdrew that appeal.

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

December 1, 1997