

SERVICE DATE

JAN 11 1995

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	
ELECTRIC LIGHTWAVE, INC.)	Docket No. UT-940403
for an Order Granting Amendment)	
to Competitive Telecommunications)	Order Granting Petition
Company Classification)	
.)	

BACKGROUND

By petition filed March 23, 1994, Electric Lightwave, Inc., ("ELI" or "company") seeks authority in Docket No. UT-940403 to amend ELI's competitive telecommunications company classification approved by the Washington Utilities and Transportation Commission ("Commission") in the First Supplemental Order Granting Petition, Docket No. UT-920148, October 27, 1992.

ELI was granted authority in Docket No. UT-940119¹ to offer intra-state intra-exchange switched telecommunications services statewide. The company here petitions that its competitive telecommunications company classification be amended to include classification of intrastate intraexchange switched services pursuant to RCW 80.36.320 and WAC 480-120-023.

On May 31, 1994, ELI filed written testimony in support of its petition for amendment of its competitive classification. On June 21, 1994, ELI amended its petition to drop the specific request for waiver of the requirements of WAC 480-120-131 relating to the reporting of accidents.

On its own motion, the Commission determined that on the face of the petition, no substantial issues of controversy were presented, and invoked the provisions of WAC 480-09-520, Formal investigation and fact-finding. A Notice of Formal Investigation and Fact-Finding was served on all interested persons on June 9, 1994. In that notice the Commission directed interested persons seeking to intervene to file a written petition to intervene not later than June 30, 1994. All interested persons were advised that, pursuant to WAC 480-09-520, no hearing was contemplated other than possible hearings for taking public testimony.

¹ See, Order Granting Amendment to Registration Application and Authorizing the Provision of Intra-Exchange Switched Telecommunications Services, Docket No. UT-940119, March 23, 1994.

On June 30, 1994, U S WEST filed a petition to intervene, which was granted on September 9, 1994. U S WEST stated in its petition that it did not object to use of the formal investigation and fact-finding procedure in this matter. No other parties sought to intervene.

Pursuant to RCW 80.36.145(3), the Commission called for written submissions on factual, legal, and policy issues raised by the ELI petition. U S WEST and Commission Staff were directed to submit their written comments no later than September 30, 1994. ELI was directed to file written rebuttal comments no later than October 21, 1994.

MEMORANDUM

I. ELI Petition for Amended Competitive Classification

In support of its petition, ELI argues that its services are designed to compete with other providers of intraexchange telecommunications services including, but not limited to, centrex-type services, switched data services, standard business and residential access lines, private shared telecommunications services, and private telecommunications services. The company states that customers have readily available, functionally equivalent alternatives, and that it has no captive customers. ELI lists U S WEST Communications, Inc. ("U S WEST"), GTE Northwest Incorporated, Enhanced Telemangement, Inc. ("ETI"), MetroNet Services Corporation ("MetroNet"), and others, as alternative providers of the services it proposes to offer.

In its petition, ELI requested an amendment to its competitive telecommunications company status to cover the provision of intra-state intra-exchange switched telecommunications services. In conjunction with such amendment, the company requested the following waivers:

- * RCW 80.04.300 (budgets of expenditures to be filed)
- * RCW 80.04.320 (budget rules for capital expenditures)
- * chapter 80.08 RCW (Securities)
- * chapter 80.12 RCW (Transfers of Property)
- * chapter 80.16 RCW (Affiliated Interests)
- * RCW 80.36.100 (tariff schedules to be filed)
- * RCW 80.36.110 (tariff changes - statutory notice)
- * RCW 80.36.150 (contracts)
- * chapter 480-80 WAC (Utilities General--Tariffs)
- * chapter 480-140 WAC (Commission General--Budgets)
- * chapter 480-143 WAC (Transfers of Property)
- * chapter 480-146 WAC (Securities and Affiliated Interests)

- * WAC 480-120-026 (tariffs)
- * WAC 480-120-032 (accounting - political activities)
- * WAC 480-120-036 (finance - securities, affiliated interests, transfers of property)
- * WAC 480-120-046 (classes of service offered)

On October 21, 1994, ELI filed an additional written statement in support of its petition in response to the Commission's September 9, 1994 letter. The company concurred in Commission Staff's analysis of the issue of whether ELI has captive customers. ELI did not respond to the issue concerning obligation to serve.

II. U S WEST's Petition to Intervene

The issues raised by U S WEST in its petition to intervene include:

1. Whether it is appropriate for ELI to continue to be classified as a competitive telecommunications company, since it must provide access service which enables competing carriers to reach ELI's customers and no available alternatives to that access service exists.
2. Whether RCW 80.36.090, which requires every telecommunications company operating in this state to furnish service as demanded, applies to companies which are classified as competitive.

U S WEST filed its written comments on September 30, 1994, in which it addressed only the first issue raised in its petition to intervene -- whether it is appropriate to classify ELI as a competitive telecommunications company. U S WEST did not address whether RCW 80.36.090 applies to companies which are classified as competitive.

U S WEST argues that it is physically and technically impossible for its customers to complete calls to ELI's customers over the wireline public switched network without using in some part ELI's switching and transport access service. U S WEST notes that ELI has not yet filed with the Commission a local exchange carrier access tariff as have the incumbent local exchange companies ("LEC"). U S WEST questions whether access service offered by a telecommunications company to other connecting carriers is a "service" as that term is used in RCW 80.36.320, and concludes that such service meets the statutory definition of a "service". U S WEST asserts that ELI will have a significant captive customer base for its access services and argues that ELI will have absolute market power, putting U S WEST "at ELI's mercy."

III. Commission Staff Comments

Commission Staff filed its written comments with the Commission on September 30, 1994, supporting ELI's petition for competitive classification. Commission Staff maintains that ELI's petition satisfies the requirements set forth in RCW 80.36.320 and WAC 480-120-023. Therefore, Staff recommends approval of ELI's petition because it believes ELI has demonstrated that its switched intra-exchange service is subject to effective competition. It is Staff's position that approval of the ELI petition will promote the state public policy goals for telecommunications services enumerated in RCW 80.36.300. Staff recommends the Commission grant ELI's petition and approve the waivers requested by the company.

Commission Staff argues that there are numerous alternative providers of functionally equivalent intra-state intra-exchange telecommunications services in the relevant market other than ELI, including resellers of centrex-type services, such as ETI and MetroNet. Staff points out that there are also radio communications service companies providing cellular services, private systems, radio systems, and private shared telecommunications service providers. Staff notes that ELI's market share is close to zero at this time and that in the future ELI will be competing for customers by attempting to attract them away from U S WEST and other alternative providers.

It is Commission Staff's position that the primary concern in determining whether ELI is subject to effective competition is the effect on end-use customers. Staff asserts that U S WEST's concern about being captive in terminating traffic on ELI's network is misplaced. Staff believes that since end-use customers are not ELI's "captives," then ELI cannot hold captive either U S WEST, or any other alternative connecting carrier.

In support of its arguments, Commission Staff points out that there are numerous issues to be overcome before effective competition occurs in the local exchange:

- (1) central office interconnection arrangements;
- (2) connections to un-bundled network elements;
- (3) seamless integration into LEC interoffice networks;
- (4) seamless integration into LEC signalling networks;
- (5) equal status in/control of network databases;
- (6) local number portability;
- (7) reciprocal inter-carrier compensation arrangements;
- (8) equal rights to/control over number resources;
- (9) cooperative practices and procedures;
- (10) economically efficient pricing signals; and
- (11) intraLATA equal access.

Commission Staff concludes that if U S WEST and ELI are unable to negotiate satisfactory interconnection and/or compensation arrangements for exchange of traffic between their networks, then either of them can file with the Commission a formal complaint, and the Commission can select among a variety of available remedies including:

- reclassifying ELI as a non-competitive telecommunications company; or
- ordering ELI to file a satisfactory tariff.

Commission Staff also commented on the issue of whether competitively classified telecommunications companies are subject to RCW 80.36.090. Staff recommends that ELI has not requested waiver of RCW 80.36.090, and therefore the statute applies to ELI, whether or not the petition is approved.

IV. Commission Discussion and Decision

RCW 80.36.320 governs petitions for classification as a competitive telecommunications company. Pursuant to RCW 80.36.320, the Commission will approve such petitions if it finds that the services offered or proposed to be offered are subject to effective competition. Effective competition means that the petitioning company's customers have reasonably available alternatives and that the petitioning company does not have a significant captive customer base. In determining whether ELI is a competitive telecommunications company in its provision of switched intra-state intra-exchange services, the Commission must consider factors including, but not limited to:

- the number and size of alternative providers of these services;
- the extent to which these services are available from alternative providers in the relevant market;
- the ability alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
- other indicators of market power which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

WAC 480-120-023 sets forth both the form and content requirements governing ELI's petition.

Rules involved include those within chapter 480-09 WAC, specifically WAC 480-09-520, and WAC 480-120-022, WAC 480-120-023, WAC 480-120-024, and WAC 480-120-025. Statutes invoked include RCW 80.36.145 and RCW 80.36.320. The ultimate issues are whether the company's newly authorized switched services should be included in their classification as a competitive telecommunications company, and the extent to which ELI should be relieved of regulatory requirements to which it would otherwise be subject.

The Commission has granted competitive classification to many telecommunications companies. The modern telecommunications industry is comprised of hundreds of service providers and each is in the business of providing connections for the purpose of telecommunications. The Commission does not agree with U S WEST's arguments opposing ELI's petition. Rather, we find Commission Staff's analysis of the issues posited by the ELI petition to more closely comport with actual experience to date of the telecommunications industry in this state.

The fact that ELI has not yet filed an access tariff is not surprising to the Commission. It is our view that until the petition in the instant proceeding is decided, ELI cannot legally offer access services under tariff without first showing that prices for these services do not cross-subsidize ELI's other competitively classified services.² A decision regarding ELI's petition for competitive classification of its intra-state intra-exchange services will remove its provision of access services from a non-competitive, tariffed service to a competitive, price listed service. Therefore, it entirely appropriate that ELI has not filed a local access tariff for switched intra-exchange service. Given that ELI's market share is virtually zero, and that U S WEST is the incumbent monopoly provider with virtually a 100% market share, it stretches credibility to consider U S WEST being "at ELI's mercy".

ELI clearly has no market power whatsoever, other than any advantage that may be gained by efficient provision of competitive services through innovation in technology and network operations. Until the minimum prerequisites for local exchange competition have been addressed by U S WEST, it is unlikely that ELI's status as a competitive company will change.³

² See, RCW 80.36.330.

³ The Commission has invited U S WEST to address such issues on numerous occasions, including the Notice of Inquiry on a Successor Alternative Form of Regulation, Docket No. UT-931349. December 3, 1993.

With regard to the issue of ELI's obligation to serve, the Commission agrees with the analysis of Commission Staff. ELI has not requested, and is not granted, waiver from a statutory obligation to serve. If issues arise concerning ELI's obligation to serve customers, we will address them through the legal processes that are available to us.

Finally, the Commission finds appropriate the waivers requested by ELI, with the exception that waiver of RCW 80.36.150 is denied. ELI's current price list on file with the Commission explicitly provides that rates for dedicated non-switched services are to be negotiated on an individual case basis. The Commission believes the public interest requires that we continue to be able to monitor pricing activity in ELI's business transactions as a regulated telecommunications company. Therefore, ELI will be subject to the minimal administrative procedures required by compliance with RCW 80.36.150, as delineated in WAC 480-120-027. The petition for an order granting amendment to competitive telecommunications company classification should be granted.

Based upon the entire record and the file in this matter, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

- 1. Petitioner Electric Lightwave, Inc., is registered as a competitive telecommunications company with the Commission, providing inter-exchange and intra-exchange telecommunications services.
- 2. Alternative providers of services to those offered by ELI include U S WEST Communications, Inc., GTE Northwest Incorporated, Enhanced Telemanagement, Inc., MetroNet Services Corporation, and others. All services are fully available from alternative providers in the relevant market.
- 3. The relevant market is the state of Washington.
- 4. ELI has no captive customer base.
- 5. The services offered by ELI are subject to effective competition.

CONCLUSIONS OF LAW

- 1. ELI should be permitted to provide services under price list.

2. ELI requested waivers of certain laws and rules relating to telecommunications services. The laws and rules for which waivers should be granted are listed on Appendix A, attached and by this reference made a part of this Order.

ORDER

THE COMMISSION ORDERS:

1. The petition of Electric Lightwave, Inc., for an order granting amendment to competitive classification is granted.

2. Waivers of the laws and rules listed in Appendix A, attached and by this reference made a part of this Order, are granted.

3. Electric Lightwave, Inc., is authorized to offer services under price list, the format of which is subject to prior approval by the Commission, to be effective after 10 days notice to the Commission and to customers. In the event of a price reduction or a change in terms or conditions which do not have rate impact, personal notice to customers is not required. Although the Commission does not have authority to waive this notice requirement, petitioner does have the option to publish notice of price reductions by a display advertisement in such newspaper or newspapers as are geographically situated so as to be circulated over the company's service area.

DATED at Olympia, Washington, and effective this 11th day of January 1995.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner

APPENDIX A

- RCW 80.04.300, Budgets to be filed by companies;
- RCW 80.04.320, Budget rules;
- RCW Chapter 80.08, Securities (except RCW 80.08.140 State not obligated);
- RCW Chapter 80.12, Transfers of Property;
- RCW Chapter 80.16 Affiliated Interests;
- RCW 80.36.100, Tariffs;
- RCW 80.36.110, Tariff Changes;
- WAC Chapter 480-140, Budgets;
- WAC Chapter 480-143, Transfers of Property;
- WAC Chapter 480-146, Rules Relating to Securities and Affiliated Interests;
- WAC Chapter 480-80, Tariff Rules;
- WAC 480-120-026, 480-120-032, 480-120-036, and 480-120-046 (general telephone rules).