

SERVICE DATE

APR 20 1993

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of)
 DIGITAL DIRECT OF SEATTLE, INC.) DOCKET NO. UT-910776
 for an Order Authorizing)
 Registration of Applicant as a)
 Telecommunications Company)
)

In the Matter of the Petition of) DOCKET NO. UT-910777
 DIGITAL DIRECT OF SEATTLE, INC.) FIFTH SUPPLEMENTAL ORDER
 for Classification as a) ON REMAND GRANTING
 Competitive Telecommunications) REGISTRATION APPLICATION
 Company) AND COMPETITIVE
) CLASSIFICATION PETITION

BACKGROUND

On July 3, 1991, Digital Direct of Seattle, Inc. (DDS), filed an application with the Commission, pursuant to RCW 80.36.350, requesting an order approving its registration as a telecommunications company authorized to provide service to the public in the state of Washington. On the same date, DDS also filed with the Commission, pursuant to RCW 80.36.310, a petition for classification as a competitive telecommunications company. DDS proposed to provide services consisting of private line or special access services and dark fiber. The Commission entered an order consolidating the two proceedings on September 4, 1991.

The Commission approved the registration and competitive classification petition, in part, in its Fourth Supplemental Order entered April 29, 1992. Registration was limited to interexchange private line or special access services, and to intraexchange dark fiber services only in U S WEST exchanges. Intraexchange service was limited to dark fiber on the basis that the Commission had granted local exchange companies (LECs) "quasi-exclusive" rights to provide intraexchange service in their territories pursuant to RCW 80.36.230, and DDS failed to demonstrate that LECs, other than U S WEST, were providing unsatisfactory service. The petition for competitive classification was granted for the services authorized by the Commission under DDS's registration application.

Several parties, including DDS, appealed the Commission's decision to the Superior Court of the State of Washington for King County. On November 13, 1992, the King County Superior Court (court) entered its decision on the petitions for judicial review

of the Commission's Fourth Supplemental order in this docket.¹ The court reversed the Commission's decision that LECs had quasi-exclusive rights under RCW 80.36.230. The court affirmed the Commission's decision to permit DDS to operate statewide, and found that substantial evidence supported the Commission's findings of DDS's technical competence and financial adequacy. The court remanded this matter to the Commission "to exercise its discretion as required by law as found by the court . . . particularly with respect to Ordering paragraphs 1 and 4 in the [Commission's Fourth Supplemental Order]."

The Commission determined that the court's decision did not require additional evidentiary hearings in this matter. No party has objected to this determination. Accordingly, the Commission required the parties to file briefs on the following issues:

1. Does the record evidence justify the grant in full of DDS's registration application?
2. a. As a matter of law, does the public interest standard in WAC 480-121-040 permit the Commission to deny DDS authority to offer its proposed intraexchange services (other than what has been granted)?
b. If so, does the record justify the Commission doing so? And,
3. Does the record evidence support a finding that DDS should be classified as a competitive company?²

MEMORANDUM

The Commission has identified four issues it must resolve upon remand of this matter by the superior court.

1. Does the record evidence justify the grant in full of DDS's registration application?

A. Parties Responses

¹ On January 7, 1993, the court signed an order on reconsideration which was filed on January 11, 1993. The Washington Supreme Court permitted entry of that order on February 4, 1993.

² The notice inquired whether the services of DDS should be classified as competitive. The issue is more properly whether DDS should be classified as a competitive telecommunications company. In this instance, the analysis is the same.

DDS, Commission Staff, Public Counsel, TRACER, Electric Lightwave, Inc., MCI, and U S WEST³ argued that the record supports a grant in full of DDS's registration application. GTE Northwest Incorporated (GTE) disagreed, contending that DDS did not have adequate financial resources to provide the proposed services. Washington Independent Telephone Association (WITA) did not specifically address the issue of DDS's technical competence and financial adequacy to provide all of the proposed services.

B. Commission Discussion

In its Fourth Supplemental Order in this proceeding, the Commission found DDS to possess technical competence and adequate financial resources, to the extent it was granted authority pursuant to RCW 80.36.350 to provide service. The Commission now finds DDS has technical competency and financial adequacy, pursuant to RCW 80.36.350, to provide both intraexchange and interexchange service as requested in its application.

2. As a matter of law, does the public interest standard in WAC 480-121-040 permit the Commission to deny DDS authority to offer its proposed intraexchange service (other than what has been granted)?

A. Parties Responses

Staff, Public Counsel, ELI, and TRACER contended that the application could be denied if it did not satisfy the requirements of the registration statute, or if it was inconsistent with, or in violation of, Washington law. GTE and WITA went further and argued that the Commission could lawfully consider whether DDS's application comports with public policy goals, such as the preservation of affordable universal telecommunications service. DDS disagreed, arguing that the Commission could not do indirectly under a public interest standard what the court stated it could not do under RCW 80.36.230.

³ U S WEST did not directly address any of the issues as stated in the Commission's Notice of Procedure Upon Remand. U S WEST simply stated that "[t]he Commission could restrict the authority to serve of new telecommunications companies to just those territories where the record supports a finding that they have a reasonably immediate ability to serve on demand, but the public interest does not require the Commission to so find." The Commission interprets U S WEST's brief to support a full grant of DDS's application, and that it is in the public interest to do so.

B. Commission Discussion

In its orders in both the DDS case and the ELI case, the Commission concluded that LECs are entitled to be the exclusive provider of wholly intraexchange services. (See the first sentence of Conclusion of Law No. 4, Third Supplemental Order, Docket No. UT-901029, and the first sentence of Conclusion of Law No. 4, Fourth Supplemental Order, Docket Nos. UT-910776 and UT-910777).

The King County Superior Court, in Conclusion of Law No. 1 of its November 13, 1992 decision, held in pertinent part that "RCW 80.36.230 does not permit the Commission to establish exchange areas or territories which are quasi-exclusive in nature." Ordering paragraph A of the court's decision on the exclusivity issue was expressly premised on this Conclusion of Law by the court. The court further clarified its decision in its January 7, 1993 reconsideration order. In that order, the court makes clear that its reversal of the remaining sentences of the Commission's Conclusions of Law No. 4 (and corresponding Order paragraphs), in both the DDS case and the ELI case was only "to the extent each was based on the first sentence of Conclusions of Law No. 4."

From the foregoing we conclude that the court's decision, and its reversal of the pivotal Commission Conclusions of Law on the exclusivity issue, applies only to RCW 80.36.230. ELI, TRACER, and DDS argue that the court's holding applies not just to RCW 80.36.230, but to any statutory basis for territorial exclusivity. This argument is inconsistent with the court's orders, and we therefore reject the argument. ELI, TRACER, and DDS are incorrect for the additional reason that the Commission in its orders did not address any other statutory basis for prescription of exchange areas or recognition of exclusive exchange areas. If their argument is correct, the court would have had to resolve an issue that was not even addressed by the Commission. We decline to assume that the court would issue an advisory ruling of this nature.

Given that the court has held that RCW 80.36.230 does not empower the Commission to create exclusive exchange areas, the issue is whether any other sections of Title 80 RCW permit the creation of exclusive exchange areas, and whether the "public interest" provision in WAC 480-121-040 would permit the Commission to deny the applicant's registration to the extent it seeks to offer intraexchange services.

It is our opinion that the Commission lacks the requisite statutory authority to create, or permit the creation of, exclusive territories. It follows therefore that WAC 480-121-040 cannot confer such authority.

The Commission has broad authority to regulate in the public interest in accordance with the public service laws. RCW 80.36.230 has been the basis for prescribing exchange areas boundaries for telecommunications companies. The court has held that RCW 80.36.230 is insufficient to empower the Commission to create exclusive exchange areas, and if that section is insufficient, we do not believe any other provision of chapter 80.36 RCW would be sufficient either.

It follows from this conclusion that the "public interest" factor in the registration rule, WAC 480-121-040, cannot constitute sufficient authority, since rules must be premised upon a legitimate statutory basis.

In any event, the "public interest" factor in WAC 480-121-040 has never been used by the Commission to create exclusive exchange area boundaries. Moreover, the registration statute, and rules enacted to implement that statute, were not envisioned to be used as a process in which the general policies of chapter 80.36 RCW would be applied to deny a registration.

The public interest standard in WAC 480-121-040 is more properly interpreted to apply to the situation in which a registrant may be technically competent and financially adequate, and make the necessary provisions to protect customer deposits, but whose proposed operations would violate other provisions of chapter 80.36 RCW (e.g., the rate discrimination statute, or the long and short toll discrimination provisions), or applicable Commission rules (e.g., the rule on discontinuance of service). That is how WAC 480-121-040 was applied in the instant case.

We therefore reject GTE's argument that the Commission is authorized to regulate in the public interest the number and type of intraexchange providers, with multiple providers being authorized based on "substantial evidence."

U S WEST argues in its brief that the Commission has legal authority to use RCW 80.36.230 to limit the geographic scope of the DDS registration to the Puget Sound area. U S WEST concedes that once DDS presents evidence that they are ready to serve another territory, the Commission would have to grant the additional territory.

However one reads the decision in Prescott Tel. & Tel. v. Utilities & Transp. Comm'n., 30 Wn. App. 413, 634 P.2d 297 (1981), there appears to be no argument that the prescription of exchange areas under RCW 80.36.230 must be ordered by the Commission. 30 Wn. App. 413, 417. The Commission has invoked RCW 80.36.230 to prescribe local exchange areas, and correspondingly, to determine whether a registrant's proposed operations would impinge upon the exchange areas prescribed for LECs. There is no showing that

prescription in this case would serve a useful purpose. Consistent with its treatment of other registrants, the Commission declines to use RCW 80.36.230 to prescribe territory for the applicant in this case.

The Commission concludes that the only "public interest" basis for denying a registration application would be where the proposed service did not satisfy the requirements of the registration statute, or it violated applicable public service laws. Consistency with general statutory policy factors is not relevant to such a determination. The Commission finds that DDS's proposed services are not in violation of any public service law or Commission regulation.

3. If WAC 480-121-040 permits the Commission to deny intraexchange authority to DDS, does the record justify the Commission doing so?

A. Parties Responses

DDS, Commission Staff, Public Counsel⁴, TRACER, ELI, and U S WEST argued that a grant of the application was in the public interest. These parties also noted that the limited nature of the services to be offered by DDS diminished the effect on universal service from a grant of the application. In general, GTE and WITA contended that the application was not in the public interest because of the effect it would have upon the LEC's ability to provide affordable universal service.

B. Commission Discussion

Many parties have analyzed the policy factors in RCW 80.36.300 in their arguments to the Commission. Certain parties argue these policy factors compel the grant of the registration application as to intraexchange services, while other parties argue for the opposite result from these same policy factors. Based on the court's conclusion that under RCW 80.36.230 the Commission is not empowered to create exclusive areas for telecommunications companies, and our conclusion that absent RCW 80.36.230 there is no other statutory basis for such action, we do not reach the issue whether the applicant's proposed intraexchange operations are or are not consistent with the general policies enunciated in RCW 80.36.300.

⁴ Public Counsel renewed its recommendation that a generic proceeding be conducted to investigate the consequences of allowing competitive access providers to enter the Washington telecommunications marketplace.

4. Does the record evidence support a finding that DDS should be classified as a competitive telecommunications company?

A. Parties Responses

The positions of the parties remain the same as summarized in the Commission's Fourth Supplemental Order at page 9, with the exception of Public Counsel and U S WEST. Public Counsel took no position, pending the outcome of a generic proceeding, and U S WEST stated no position on this issue.

B. Commission Discussion

The Commission previously found in its Fourth Supplemental Order that DDS's petition for classification as a competitive telecommunications company should be granted. The Commission now finds that it is in the public interest to grant DDS's petition for all of the services it proposed. The competitive classification will apply to all of the company's services and will not be restricted to the East Puget Sound Area, because the record supports a finding that the relevant market is the state of Washington. The Commission finds that requested waivers of certain laws and rules relating to telecommunications service are in the public interest because competition will serve the same purpose as public interest regulation. The waivers to be granted are listed in Appendix B of the Fourth Supplemental Order in this proceeding. All remaining waivers are not in the public interest and should be denied.

Having discussed in detail the evidence in this proceeding and having stated findings and conclusions, the Commission makes the following summary of those facts and conclusions. Those portions of the preceding detailed findings pertaining to the Commission's ultimate facts and conclusions are incorporated by this reference.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

2. On July 3, 1991, Digital Direct of Seattle, Inc., filed an application with the Commission pursuant to RCW 80.36.350 requesting an order approving its registration as a telecommunications company authorized to provide service to the public in this state. On the same date, DDS also filed with the

Commission pursuant to RCW 80.36.310 a petition for classification as a competitive telecommunications company. DDS proposed to provide services consisting of private line or special access services, and dark fiber. The Commission issued an order consolidating the two proceedings on September 4, 1991.

3. The Commission approved the registration, in part, in its Fourth Supplemental Order entered April 29, 1992. Registration was limited to interexchange private line or special access services, and to intraexchange provision of dark fiber only in U S WEST exchanges. The petition for competitive classification was granted for the services authorized by the Commission under DDS's registration application.

4. Several parties, including DDS, appealed the Commission's decision to the Superior Court of the State of Washington for King County. On November 13, 1992, the King County Superior Court entered its decision upon petitions for judicial review of the Commission's Fourth Supplemental order in this docket. The court reversed the Commission's decision that LECs had quasi-exclusive rights under RCW 80.36.230. The court affirmed the Commission's decision to permit DDS to operate statewide, and found that the record supported DDS's technical competency. The court remanded this matter to the Commission "to exercise its discretion as required by law as found by the court . . . particularly with respect to Ordering paragraphs 1 and 4 in the [Commission's Fourth Supplemental Order]."

5. The applicant has secured commitment of the requisite financial resources to construct its network facilities and to provide the proposed services.

6. The applicant has retained personnel with professional telecommunications experience, proposes a state-of-the-art telecommunications system, and satisfies the requirement of sufficient technical competency to provide the proposed services.

7. A generic proceeding is not required to address the public policy issues raised in this proceeding. The Commission has adequately explored and decided the issues before it in this proceeding.

8. The applicant will be permitted to file individual case basis contracts for the approved services.

9. In this proceeding, the Commission in no respect endorses the financial viability of Digital Direct of Seattle, Inc., nor the investment quality of any securities it may issue.

10. Alternative providers of service include the local exchange companies, the interexchange companies, and ELI. All services or functionally equivalent services are fully available from alternative providers in the relevant market.

11. The relevant product market is private or special access services statewide. The relevant geographic market is the state of Washington. DDS has no captive customer base in these markets. The services offered by DDS pursuant to its registration with the Commission are subject to effective competition.

12. DDS requested waivers of certain laws and rules relating to telecommunications service. The requested waivers are listed in Appendix A to the Commission's Fourth Supplemental Order. The Commission continues to find that only some of the requested waivers are in the public interest, because competition will serve the same purpose as public interest regulation pursuant to RCW 80.36.320(2). The waivers granted by the Commission are listed in Appendix B to the Fourth Supplemental Order. The remaining requested waivers not listed in Appendix B are not in the public interest and should continue to be denied.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.

2. The form of the Digital Direct of Seattle, Inc., application filed with the Commission meets the requirements of RCW 80.36.350, and the rules and regulations which the Commission has adopted.

3. The registration of Digital Direct of Seattle, Inc., as a telecommunications company is consistent with the public interest in that it violates no public interest laws or rules.

4. Digital Direct of Seattle, Inc.'s application for registration as a telecommunications company should be granted in its entirety.

5. Digital Direct of Seattle, Inc., should be classified as a competitive telecommunications company pursuant to RCW 81.36.320(1).

6. Digital Direct of Seattle, Inc., should be granted waivers of the laws and rules listed in Appendix B to the Fourth Supplemental Order. All remaining requested waivers of laws and rules should be denied.

ORDER

THE COMMISSION ORDERS:

1. On the effective date of this order, the application of Digital Direct of Seattle, Inc., requesting an order approving registration as a telecommunications company pursuant to RCW 80.36.350 is granted in its entirety.
2. Registration of Digital Direct of Seattle, Inc., shall not be construed as an endorsement by the Commission of the financial viability of Digital Direct of Seattle, Inc., nor the investment quality of any securities it may issue.
3. As a telecommunications company providing service to the public in this state, Digital Direct of Seattle, Inc., is subject to the jurisdiction of this Commission under the provisions of Title 80 RCW, and all rules and regulations adopted by the Commission, except as waived pursuant to RCW 80.32.320(2).
4. The petition of Digital Direct of Seattle, Inc., for classification as a competitive telecommunications company is granted.
5. Digital Direct of Seattle, Inc. is granted waivers of the laws and rules listed in Appendix B of the Commission's Fourth Supplemental Order in these dockets. All remaining requested waivers of laws and rules are denied.

DATED at Olympia, Washington, and effective this 19th day of April 1993.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Sharon L. Nelson

SHARON L. NELSON, Chairman

Richard D. Casad

RICHARD D. CASAD, Commissioner

A. J. Pardini

A. J. PARDINI, Commissioner