

SERVICE DATE

MAR 13 1992

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application)	
of ELECTRIC LIGHTWAVE, INC.,)	DOCKET NO. UT-901029
for an Order Authorizing)	
Registration of Applicant as a)	FOURTH SUPPLEMENTAL ORDER
Telecommunications Company.)	ON MOTION FOR PARTIAL
)	RECONSIDERATION AND
)	CLARIFICATION
.....)	

BACKGROUND

On September 18, 1990, Electric Lightwave, Inc. (ELI) filed an application with the Commission pursuant to the provisions of RCW 80.36.350 requesting an order to approve its registration as a telecommunications company authorized to provide service to the public in this state. The Commission entered its Third Supplemental Order Granting Registration Application in Part on December 6, 1991. Pursuant to the Commission's order, Electric Lightwave, Inc. was authorized to provide: (1) interexchange private line or special access services; and (2) intraexchange dark fiber services in U S WEST exchanges only. The application was denied in all other respects.

On December 16, 1991, intervenor U S WEST Communications, Inc. (U S WEST) filed with the Commission a motion for partial reconsideration and clarification of the Third Supplemental Order in this proceeding. Responses were filed by Commission Staff, Public Counsel, ELI, Washington Independent Telephone Association (WITA), GTE Northwest, Inc. (GTE), Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER), Digital Direct of Seattle, Inc. (DDS), and MCI Telecommunications Corporation (MCI).

SUMMARY

The Commission grants the motion for clarification of the definition of intraexchange service. The motion for reconsideration of the issue of dark fiber is denied.

MEMORANDUM

I. ISSUES

U S WEST raised two issues for Commission consideration in its motion for partial reconsideration and clarification. The issues are:

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- A. Whether a service is deemed to be intraexchange based upon the location of the facilities used to provide the service or the nature of the telecommunications traffic carried by the facilities; and
 - B. Whether dark fiber is a telecommunications service subject to Commission regulation.

II. DISCUSSION

A. Definition of intraexchange service

U S WEST claimed in its motion that the Commission's order was not clear as to the definition of intraexchange and interexchange access services. U S WEST requested clarification as to whether a service is deemed to be intraexchange based upon the location of the facilities used to provide the service or the nature of the telecommunications traffic carried by the facilities. Specifically, the company sought guidance whether, under the Third Supplemental Order, a special access service from an end user in a particular exchange to an interexchange carrier's point of presence in the same exchange, which the interexchange carrier then terminates in some other exchange within the state of Washington, would be defined to be an intraexchange or an interexchange service.

U S WEST noted that the Commission in its Third Supplemental Order accepted the Commission Staff's legal analysis that local exchange companies in Washington have a "quasi exclusive" right to provide wholly intraexchange services within exchanges covered by an exchange area map approved by Commission order after 1969, or as filed pursuant to the tariff process prior to 1969. In so doing, U S WEST asserted that the Commission also accepted the underlying testimony of Staff witness Wilson.

On the basis of Mr. Wilson's testimony, U S WEST interpreted the Third Supplemental Order to prohibit ELI from providing special access service "between an end user and an interexchange carrier's point of presence within the same exchange which ultimately terminates to an end user within the state of Washington since it is an intraexchange service within the exclusive rights of the local exchange company to provide." (See U S WEST memorandum, p. 5.) U S WEST concluded that the Commission's definition would therefore use a facilities-based determination.

Staff submitted that one must look to what the carrier offers to provide to the public to determine the nature of the service. For example, if ELI were to provide an intraexchange link to an interexchange carrier which then carries the traffic interexchange, but within the state, ELI's service would be intraexchange. Staff argued that if the service/facilities ELI provides comprise a link, both ends of which are in an exchange, the service is an intraexchange service subject to local exchange company rights. However, the service would not be intraexchange if the communications were interstate as a matter of fact (i.e., originate in one state and terminate in another state), or as a matter of allocation rules. (See, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd 5660, 1989, and, Recommended Decision and Order, 4 FCC Rcd 1352, 1989.)

ELI asserted that the characterization of telecommunications services depends upon the point of origin and the point of termination of the communications being carried, not on the physical location of the facilities used. ELI argued that federal law has preempted state regulation of this service. In National Association of Regulatory Utility Commissioners v. FCC, 746 F.2d 1492 (D.C. Cir. 1984) ("NARUC"), the court stated:

The dividing line between the regulatory jurisdiction of the FCC and states depends on "the nature of the communications which pass through the facilities (and not on) the physical locations of the lines."

Accordingly, ELI requested that any order of clarification define "interexchange services" to include service between an end user and an interexchange carrier located in the same exchange. Intervenors TRACER, DDS, and MCI supported ELI's position.

Intervenors WITA and GTE believed that the Commission's order was clear in adopting Staff's facilities based definition of intraexchange service. GTE did not agree with Staff's definition but intended to address it fully in its brief in the application proceeding of Digital Direct of Seattle, Inc. (UT-910776, 910777) as a matter of law. WITA also did not agree with Staff's definition, arguing that the proper definition should be "access to service." WITA's concern with Staff's definition was that U S WEST could reach in across its border and "cream skim" customers by providing a local exchange service on an interexchange basis. WITA requested that the Commission adopt a standard defining the "quasi-exclusive" right of LECs as the ability, right, and duty to provide telecommunications within an exchange and to provide access or connection to and from the end customer for other telecommunications services.

Public Counsel supported U S WEST's motion to the extent that the definition should be clarified. Public Counsel took no position as to what the definition should be, but requested that the Commission define the term "exchange" to clarify the order.

The Commission agrees that the definition of intraexchange service should be clarified. The Commission adopts the Staff's analysis of the issue and the resulting definition of intraexchange service. First, the Commission must look to the nature of the service that ELI is holding out to the public to provide. If the service and/or facilities ELI provides comprise a link, both ends of which are in an exchange, the service is an intraexchange service subject to local exchange company rights.

The Commission notes that Staff's definition is based upon a determination of the operational nature of the particular service and does not follow jurisdictional rules for communications in reaching its conclusions. Whether ELI's proposed service is jurisdictionally either an interstate or intrastate service is a separate question. The Commission adopts staff's definition of intraexchange service pursuant to current Washington case law as set forth in Prescott Telephone and Telegraph Co. v. Washington Utilities and Transportation Commission, 30 Wn. App. 413, 634 P.2d 897 (1981).¹

B. "Dark fiber" as a telecommunications service

U S WEST contended that the Commission's holding that dark fiber is a telecommunications service was arbitrary and capricious, wrong as a matter of law, and should be reconsidered. U S WEST stated that the substance of a telecommunications service is the "transmission of information" by the telecommunications company pursuant to RCW 80.04.010. U S WEST argued that dark fiber cannot, by definition, transmit information. The fact that dark fiber in U S WEST's rate base is a facility subject to Commission regulation is not dispositive of the issue of whether dark fiber is a service. U S WEST argued that holding such a facility to be a service is unnecessary to the order in this case and would lead to unintended, adverse consequences for the Commission and the industry. U S WEST requested that the Commission reconsider its decision on the issue of dark fiber and delete its findings and conclusions that dark fiber is a telecommunications service.

¹ See discussion of Prescott in the Third Supplemental Order in this proceeding.

Staff contended that dark fiber is a telecommunications service regulated by the Commission because the customer does not obtain it for any purpose other than telecommunications. Staff agreed that dark fiber is a facility. Staff then stated that when a facility is used by a telecommunications company to facilitate the provision of telecommunications service, the facility is subject to regulation.

ELI, DDS, and TRACER supported U S WEST's position. Public Counsel, GTE and WITA took no position with respect to dark fiber. MCI agreed with staff that dark fiber is a facility that should be regulated by the Commission.

The Commission believes its previous analysis of this issue contained in the Third Supplemental Order is correct. Dark fiber is a facility that cannot be used for any purpose other than for telecommunications service. While service vehicles may be used by U S WEST for telecommunications service, that is not their sole use. Pursuant to RCW 80.04.040(3), the Commission is required to regulate facilities of telecommunications companies. The motion to reconsider the Commission's decision with respect to dark fiber is denied.

III. COMMISSION DECISION

The Commission grants the motion for clarification of the definition of intraexchange service. Intraexchange service consists of any telecommunications service offered by a telecommunications company for hire, sale, or resale to the general public, where both ends of the service offered originate and terminate within an exchange. All intraexchange service is subject to the rights of the local exchange company (as described in the Third Supplemental Order) unless the communications are interstate as a matter of fact or as a matter of allocation rules. The motion for reconsideration of the issue of dark fiber is denied.

The Commission notes that MCI did not participate in this proceeding until it filed a response to U S WEST's motion for reconsideration. In the future, the Commission expects parties granted intervenor status to participate in the hearing process. If they are unable to attend the hearing, they should submit their position in closing briefs. The Commission incurs considerable expenses in copying and serving the parties in these proceedings. It is not appropriate nor is it fair to the Commission and to the parties who participated in these proceedings to be first made aware of an intervenor's position on a motion for reconsideration.

The majority notes with dismay the continuing dissent of the chairman and the restating of what the dissent would like the law to be rather than what is the law in this state. The majority is well aware of the complexity of the issues engendered by the ELI filing and the changes in the provision of telecommunications services being driven by technological advances. Nonetheless, we continue to believe that an orderly transition through this technological "mine field" is the proper way to ensure the widest array of services will be offered at affordable prices. Telecommunications services must be capable of being both economically produced and affordably offered to consumers wanting basic telephone service as well as those consumers wanting state of the art telecommunications technology.

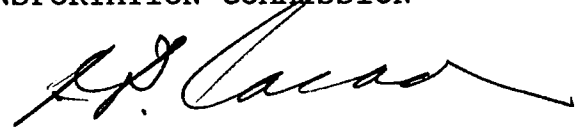
The majority believes dramatic changes in an industry so vitally charged with the public interest as the telecommunications industry should be fashioned in the arena of public debate and legislative involvement rather than by bureaucratic edict. This is the manner in which the industry was restructured following the modified final judgement and in which further restructuring should now be considered. The majority is simply not prepared to embark upon a path of slash-cut deregulation of the telecommunications industry.

ORDER

THE COMMISSION ORDERS That the motion for clarification filed with the Commission by U S WEST be granted. The motion for partial reconsideration filed by U S WEST is denied.

DATED at Olympia, Washington, and effective this *13th* day of March, 1992.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



RICHARD D. CASAD, Commissioner



A. J. PARDINI, Commissioner

Sharon L. Nelson, Chairman (Dissenting) - I must restate my dissenting opinion in this matter. I continue to believe that the plain meaning of RCW 80.36.230, principles of statutory construction, legislative history, and public policy considerations, militate against conferring upon local exchange companies quasi-exclusive rights to provide intraexchange services. This proceeding, wherein parties seek clarification and/or reconsideration, illustrates the complex questions and unexpected consequences that inevitably must flow from the holding of the Third Supplemental Order. In my view, the majority's continued adherence to the theory of the Third Supplemental Order will engender future contentious litigation which will have no benefit for producers or consumers of telecommunication services in this state.

Sharon L. Nelson
 SHARON L. NELSON, Chairman