

SERVICE DATE

APR 20 1993

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))	FIFTH SUPPLEMENTAL ORDER
Telecommunications Company))	ON REMAND GRANTING
.))	REGISTRATION APPLICATION

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 the state of Washington. ELI proposed to provide services consisting of private line or special access services and dark fiber.

The Commission approved the registration in part in its Third Supplemental Order entered December 6, 1991. 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 the local exchange companies (LECs) "quasi-exclusive" rights to provide intraexchange service in their territories pursuant to RCW 80.36.230. ELI failed to demonstrate that LECs, other than U S WEST, were providing unsatisfactory service.

Several parties, including ELI, 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 Third and Fourth Supplemental orders in this docket¹. 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 ELI to operate statewide, and found that substantial evidence supported the Commission's findings on ELI'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 paragraph 1 in the [Commission's Third Supplemental Order]."

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.

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 ELI'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 ELI authority to offer its proposed intraexchange services (other than what has been granted)? And,
2. b. If the rule permits the Commission to deny intraexchange authority to ELI, does the record justify the Commission doing so?

MEMORANDUM

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

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

A. Parties Responses

ELI, Commission Staff, Public Counsel, TRACER, Digital Direct of Seattle, Inc. (DDS), MCI, U S WEST², and the Department of Defense (DOD) argued that the record supports a grant in full of ELI's registration application. GTE Northwest Incorporated (GTE) and the Washington Independent Telephone Association (WITA) disagreed, contending that ELI did not have adequate financial resources to provide the proposed services.

B. Commission Discussion

In its Fourth Supplemental Order in this proceeding, the Commission found ELI to possess the technical competence and adequate financial resources, to the extent it was granted

² 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 ELI's application, and that it is in the public interest to do so.

authority pursuant to RCW 80.36.350, to provide its proposed services. The Commission now finds ELI 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 ELI authority to offer its proposed intraexchange service (other than what has been granted)?

A. Parties Responses

ELI, Commission Staff, Public Counsel, TRACER, and DOD 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 ELI's application comports with public policy goals, such as the preservation of affordable universal telecommunications service. DDS and MCI 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.

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 first sentence of Conclusion of Law No. 4, Third Supplemental Order, Docket No. UT-901029, and 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. 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.

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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. However, RCW 80.36.230 has been the basis for prescribing exchange areas 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 haul toll 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 ELI registration to the Puget Sound area. U S WEST concedes that once ELI or DDS present 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 ELI'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 ELI, does the record justify the Commission doing so?

A. Parties Responses

ELI, Staff, Public Counsel³, TRACER, DDS, U S WEST, MCI, and DOD 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 ELI 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 LECs' 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.

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.

³ Public Counsel renewed its recommendation that a generic proceeding be conducted to investigate the consequences of allowing entry of competitive access providers (CAPs) into the Washington telecommunications market.

2. On September 18, 1990, Electric Lightwave, 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.

3. The Commission approved the registration, in part, in its Third Supplemental Order entered December 6, 1991. Registration was limited to interexchange private line or special access services, and to intraexchange provision of dark fiber only in U S WEST exchanges.

4. Several parties, including ELI, filed petitions for judicial review of the Commission's Third and Fourth Supplemental orders in this docket. On November 13, 1992, the King County Superior 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 ELI to operate statewide, and found that the record supported ELI'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 paragraph 1 in the [Commission's Third 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 authorizing ELI to provide the requested services, the Commission in no respect endorses the financial viability of Electric Lightwave, Inc., nor the investment quality of any securities it may issue.

10. ELI filed a motion to strike portions of WITA's brief on remand on March 16, 1993. Appendix A to WITA's brief is a written response to a bench request by Citizens Utilities Company of California filed in December 1992, in a California public

utilities commission docket. ELI argued that Appendix A and WITA's references to it in its brief should be stricken because Appendix A was not offered nor admitted as an exhibit and is not the type of document which the Commission can take official notice. WITA responded that it was not offering Citizens Utilities' comments as evidence, but merely as a persuasive public policy argument on the issues before the Commission.

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 Electric Lightwave, 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 Electric Lightwave, Inc., as a telecommunications company is consistent with the public interest in that it violates no public interest laws or rules.

4. Electric Lightwave, Inc.'s application for registration as a telecommunications company should be granted in its entirety.

5. Electric Lightwave, Inc.'s motion to strike portions of the WITA brief should be granted. WITA should be able to make its argument without quoting or citing to statements made outside this record.

ORDER

THE COMMISSION ORDERS:

1. On the effective date of this order, the application of Electric Lightwave, Inc., requesting an order approving registration as a telecommunications company pursuant to RCW 80.36.350 is granted in its entirety.

2. Registration of Electric Lightwave, Inc., shall not be construed as an endorsement by the Commission of the financial viability of Electric Lightwave, Inc., nor the investment quality of any securities it may issue.

3. As a telecommunications company providing service to the public in this state, Electric Lightwave, 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, with the exception of those rules for which ELI was granted a waiver in the Commission's First Supplemental Order Granting Petition for Competitive Classification, Docket No. UT-920148, entered October 27, 1992.

4. Electric Lightwave, Inc.'s motion to strike Appendix A and all references thereto in WITA's brief is granted.

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

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Sharon L. Nelson
SHARON L. NELSON, Chairman

R.D. Casad
RICHARD D. CASAD, Commissioner

A. J. Pardini
A. J. PARDINI, Commissioner