DECISION MEMORANDUM

TO:COMMISSIONER NELSON

COMMISSIONER SMITH

COMMISSIONER HANSEN

MYRNA WALTERS

TONYA CLARK

DON HOWELL

STEPHANIE MILLER

DAVE SCHUNKE

JOE CUSICK

GARY RICHARDSON

WORKING FILE

FROM:WELDON STUTZMAN

DATE:MAY 10, 1996

RE:PROCESSING APPLICATION OF AT&T COMMUNICATIONS FOR AMEND­MENT TO ITS CERTIFICATE OF PUBLIC CONVENIENCE AND NECES­SITY; CASE NO.  ATT-T-96-1

On February 29, 1996, AT&T Communications of the Mountain States, Inc. (AT&T) filed a Notice and Application for an Amended Certificate of Public Convenience and Necessity requesting an amendment authorizing it to provide local exchange telecommunications service in the state of Idaho.  AT&T asserts that the recently enacted Telecommunications Act of 1996 is intended to promote the development of competition in local exchange service markets and that any limitations on its ability to provide such services contained in Title 61 and Title 62, Idaho Code, are preempted by the federal Act.  AT&T currently provides unregulated services under Title 62 and requests an amendment to its authority in order to provide statewide all Title 61 regulated telecommunications services, including basic exchange services.

AT&T intends to provide local exchange service in areas currently served by U S WEST Communications and GTE Northwest Incorporated (GTE) after it completes negotiations with those companies concerning necessary interconnection and operational arrangements.  AT&T asserts that local exchange competition will benefit Idaho consumers by making new, innovative and high quality service options available to Idaho consumers.  Other telephone companies recently have filed applications seeking authority to provide local exchange service.  AT&T’s Application is unique because it already has a Certificate of Public Convenience and Necessity, and seeks an amendment rather than a new certificate.

AT&T’s Application asserts that the present or future public convenience and necessity will require its services, that its services will not interfere with existing utilities’ operations, and that AT&T has the financial ability to provide basic exchange services and other services in the state of Idaho.  AT&T intends to provide local service on a resale or facilities basis, or a combination of both, after the necessary interconnection and operational arrangements with the incumbent local exchange carriers (LEC) are in place.  The Commission issued a Notice of Application on March 29, 1996.  Petitions to Intervene have been filed by U S WEST Communications, Inc., GTE Northwest Incorporated, and eight independent local exchange telephone companies.

Prior to the enactment of the federal Telecommunications Act of 1996 (Telecom Act), telephone companies were precluded by state law from entering the franchised areas of existing LECs.  Idaho’s Telecommunications Act of 1988 (Idaho Act) specifically grants “an exclusive service area franchise for telecommunication services” to LECs holding a Certificate of Public Convenience and Necessity issued by the Commission.  Idaho Code § 62-615.  However, the Telecom Act expressly preempts state laws that prohibit “the ability of any entity to provide any interstate or intrastate telecommunications service.”  Section 253, Telecom Act.  Section 253 by its terms thus invalidates the grant of an exclusive service area franchise by Idaho Code § 62-615.

AT&T intends to enter the service areas of U S WEST and GTE, and neither of those companies has raised a legal challenge to the effect of Section 253 on Idaho Code § 62-615.  In other words, the incumbent LECs apparently do not question the ability of congress to preempt state laws that preclude telecommunications competition.  Because it is not presented as an issue in this case, it is not necessary for the Commission to determine the preemptive effect of Section 253 of the Telecom Act.

Idaho statutes and the Commission’s rules are directed toward exclusive service areas and thus do not expressly establish a process for the Commission to amend a certificate to allow non-exclusive local telephone exchange service.  A provision of the Idaho Act does allow a telecommunication provider to file a notice of intent to provide telecommunication services on a non-exclusive basis when seeking to serve an otherwise unserved and uncertificated area.  Idaho Code § 62-615(2).  In that event, the Commission is required to “determine whether it would be in the public interest to allow a telephone corporation to serve the area on a non-exclusive basis.”(footnote: 1)  Id.  The section does not require the Commission to conduct hearings to make the determination, leaving open the possibility that such an application could be processed by the Commission’s rules for modified procedure.  Although the situation identified in Section 62-615(2) is not presented by AT&T’s application, the Section does suggest a process for the Commission to authorize service on a non-exclusive basis.

The Commission’s Rule of Procedure 112 sets forth the requirements for an application to amend a Certificate of Convenience and Necessity, and AT&T appears to have satisfied the requirements.  AT&T included with its Application a map of the area it intends to serve, a 1994 annual report demonstrating the financial strength of the Company, copies of its Articles of Incorporation, and its Form 10-K annual report filed with the Securities and Exchange Commission.

Given the preemption of exclusive service franchise areas previously granted by state law, the Commission’s existing authority to process an application to authorize telecommunications service on a non-exclusive basis, and AT&T’s compliance with applicable Commission rules, Staff recommends that AT&T’s Application be processed by Modified Procedure.  Staff also recommends approval of the petitions to intervene.  During the comment period on modified procedure, U S WEST, GTE and other interested entities can file comments to assist the Commission’s determination whether AT&T’s non-exclusive provision of telecommunications service is in the public interest.

Commission Decision

1.  Should the Petitions to Intervene filed by U S WEST, GTE and the independent companies be granted?

2.  Should AT&T’s Application to Amend Its Certificate of Convenience and Necessity be processed by Modified Procedure?

Weldon Stutzman

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**FOOTNOTES**

1:

Even where a telephone corporation is granted an exclusive franchise area by state law, Idaho Code 61-514 authorizes the Commission to direct the use by one utility of another’s “poles, pipes or other equipment,” suggesting at least some limitation on the exclusivity of a utility’s property and territory.