

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF) CASE NO. SIL-T-97-1
SILVER STAR TELEPHONE COMPANY'S)
REQUEST TO APPROVE A SPECIAL)
SERVICES CONTRACT.) ORDER NO. 27043
)

On February 27, 1997, Silver Star Telephone Company requested that the Commission approve a "special services contract" so that Silver Star may provide telecommunication services to J.R. Simplot's Smoky Canyon Mine. The mine is located in the Idaho portion of U S WEST Communications' Afton, Wyoming exchange. On March 6, 1997, the Commission issued a Notice of Modified Procedure soliciting written comments concerning Silver Star's request. Union Telephone Company objected to Silver Star serving the mine because Union had entered into, but had not closed, a purchase agreement for the Afton exchange. The Commission scheduled oral argument in this matter April 16, 1997. Following oral argument and a review of the record, the Commission finds there is no basis to restrict Silver Star from serving the mine. Consequently, the special contract is approved.

BACKGROUND

A. The Application

Silver Star proposed to construct and offer high-speed digital telecommunication services to the Smoky Canyon Mine. Silver Star asserted that services included in the special contract are beyond the scope of the Company's normally tariffed Title 61 services. Consequently, Silver Star requested that the Commission authorize the provision of such services to the mine by approving the special contract. The Commission exercises authority over utility service contracts pursuant to *Idaho Code* §§ 61-305 and -502. Silver Star proposed to serve the mine without requiring interconnection with U S WEST's facilities in the Afton exchange.

As set out in greater detail in the contract, Silver Star will provide the necessary equipment to be installed at the mine for voice and data communications services. In response to

a production request, Silver Star stated that "special circuits transmitting data would terminate in Pocatello, Idaho, on Simplot's corporate network." Silver Star Response to AT&T production request No. 13 (attached as Exhibit D to Union Telephone's Motion to Compel). The mine's local calling area would depend upon "the POTS/or trunks chosen by J.R. Simplot. . . . If Simplot chooses Freedom, Idaho, POTS/or trunks, the calling area would be all of Star Valley, Wyoming including Freedom, Idaho, Alpine, Idaho, and Tygee Valley, Idaho." *Id.*

Silver Star stated that "all portions of the Special Services Contract [are] confidential, proprietary and trade secrets pursuant to Commission rules, the Idaho Trade Secrets Act, I.C. § 48-801 *et seq.* and I.C. § 9-340." Transmittal letter (dated February 24, 1997). Silver Star maintained that the contract is exempt from public disclosure because

it contains information concerning the methods, techniques and processes by which the service [to the mine] will be provided, and the costs and charges therefor. By its nature, this information is not already available to, generally known by, or easily ascertainable by the general public or Silver Star's competitors, and Silver Star has exercised reasonable efforts to maintain its confidentiality.

Id. Silver Star claimed that disclosure of information contained within the special services contract would provide its competitors or potential competitors with economic value. Disclosure would also allow Silver Star's competitors to target its customers and to know the basis for its charges for competitive telecommunications services. "Silver Star is aware of no reason why treatment of the special services contract as confidential would impair the public interests." *Id.*

Given Silver Star's assertion that the special contract constitutes a trade secret, the contract has been maintained by the Commission under seal and has not been disclosed to the parties or the public. Silver Star did make the contract available to the Commission and the Staff for their *in camera* review.

B. The Prior Afton Proceeding

In August 1993, U S WEST and Union Telephone filed a joint Application to sell the Idaho portion of the U S WEST Afton exchange to Union.¹ In addition to the sale of the physical

¹ Approximately one-third of the Afton exchange is located in Idaho and the remaining portion is in Wyoming. Afton was one of eight U S WEST exchanges in Wyoming sold to Union Telephone. Union Telephone is a Wyoming corporation with its principal place of business in Mountain View, Wyoming.

assets, U S WEST and Union Telephone sought permission to transfer the Certificate of Public Convenience and Necessity (the service area franchise) for the Idaho portion of the exchange from U S WEST to Union. The Commission exercises authority over the certificate transfer pursuant to *Idaho Code* §§ 61-526 and -528. There are approximately 40 local access lines in the Idaho portion of Afton—less than 2% of the total number of lines in the entire exchange. A similar application to transfer U S WEST's Wyoming Certificate of Public Convenience and Necessity for the Afton exchange was also filed with the Wyoming Public Service Commission (WPSC).

In October 1993, Silver Star filed a competing Application with this Commission to expand its Certificate of Public Convenience and Necessity to include the Idaho portion of the Afton exchange. Silver Star opposed the sale and transfer of the Afton exchange to Union Telephone. At that time, Silver Star suggested that the Idaho Commission "await the decision of the Wyoming Commission before conducting hearings" on its competing Idaho Application. With the concurrence of the parties, action on the two Applications was stayed. Order No. 25243.

In February 1994, the Wyoming Commission issued an Order denying the sale of the Afton exchange to Union and, instead, directed that U S WEST transfer the exchange to Silver Star. The WPSC's decision was subsequently overturned in February 1996 by the Wyoming Supreme Court with instructions to approve the transfer to Union Telephone. *Union Telephone Co. v. Wyoming PSC*, 910 P.2d 1362 (Wy. 1996).

In September 1996, this Commission issued Order No. 26619 requesting written comments concerning the remaining Idaho cases. On October 18, 1996, U S WEST, Union Telephone and Silver Star filed a Stipulation in the Idaho cases. The Stipulation provided that Silver Star did not oppose the Commission's approval of the U S WEST-Union sale and transfer of the Certificate of Public Convenience and Necessity. However, Silver Star desired to preserve its competing Application to serve the Idaho portion of the Afton exchange.

In Order No. 26687 issued November 15, 1996, the Commission conditionally approved the sale of the Afton exchange and the transfer of the Certificate to Union Telephone. The Commission ordered that Union Telephone

file its Articles of Incorporation with this Commission and complete those actions necessary to register as a foreign corporation with the Idaho Secretary of State. Union is further ordered to submit its [new] Certificate of Public Convenience and Necessity showing the Idaho portion of the Afton

exchange. Union shall complete these actions within 60 days of the closing of the sales transaction.

Order No. 26687 at 7. Silver Star's competing Application to expand its certificated service area to include Afton was dismissed without prejudice. *Id.*

C. Procedural History of This Case

On March 6, 1997, the Commission issued Order No. 26826 containing a Notice of Application and a Notice of Modified Procedure for this case. The Notice of Application portion stated that "the Afton exchange is in the process of being sold by U S WEST to Union Telephone Company." Order No. 26826 at 1. The Notice of Modified Procedure invited interested persons to submit written comments concerning Silver Star's request for approval of the special services contract no later than March 20, 1997. *Id.* at 2-3. Timely comments were filed by Silver Star, Union Telephone, the Commission Staff, and AT&T Communications. On March 27, 1997, Silver Star filed a response to those previously filed comments. On March 28, 1997, Union Telephone filed reply comments to Silver Star's response.

Following its review of the written comments, the Commission issued Order No. 26883 scheduling oral argument for April 16 on the legal issues in this matter. More specifically, the Commission sought oral argument concerning the applicable provisions of: (1) the Idaho Telecommunications Act (*Idaho Code* §§ 62-601 *et seq.*); (2) the federal Telecommunications Act of 1996 (47 U.S.C. §§ 251 *et seq.*); and (3) House Bill No. 313 which amended the Idaho Telecommunications Act (1997 Sess. Laws ch. 192). The Commission also stated that "it appears that the underlying facts [in this case] are not in dispute." Order No. 26883 at 7. Silver Star, Union, the Staff and AT&T participated in the oral argument.

On April 18, 1997, Union Telephone served a discovery request upon Silver Star seeking a copy of the "special services contract." Silver Star objected to the discovery request and on May 15, Union Telephone filed a Motion to Compel. On May 28, 1997, Silver Star requested that the Commission issue a protective order essentially denying Union's Motion to Compel.

D. The Federal Telecommunications Act

A brief review of the Telecommunications Act of 1996² is helpful to understanding the issues in this case. The Telecommunications Act is generally intended to foster competition in all telecommunication markets, including the local service market. Except as noted below, the Act allows new competitive local exchange carriers (CLECs) to enter the established local service market of incumbent local exchange carriers (ILECs). Idaho ILECs have historically operated as regulated monopolies in their service areas. See *Idaho Code* § 62-615(1) (repealed July 1, 1997). Idaho has about 20 ILECs including U S WEST, GTE, and Silver Star. An ILEC may also be considered a CLEC when it competes in the local market of another ILEC.

Entry into the local service market is to occur in one of three ways: (1) through the purchase of unbundled network elements from the ILEC; (2) through the purchase of wholesale local services from the ILEC for resale by the CLEC to customers; or (3) through the CLEC's construction of its own facility-based network. In the first two instances, the CLECs and ILECs enter into an "interconnection" agreement that contains the terms and conditions for the CLEC to "interconnect" to the ILEC's network for the purpose of offering competitive local exchange service.

Subsections 251(b) and (c) of the Act list the interconnection obligations of all LECs and additional obligations of ILECs, respectively. All LECs have obligations to provide resale, number portability, and dialing parity. 47 U.S.C. § 251(b). Subsection (c) lists additional interconnection obligations of ILECs including the duty to: negotiate in good faith; provide interconnection; provide unbundled access; offer for resale at wholesale rates any telecommunication service; provide a reasonable public notice of changes in facilities or networks affecting interoperability; and provide for collocation.

Although the Act generally promotes competition in local exchange markets, it recognizes that competition may not exist or may not be in the public interest in certain rural local markets. Consequently, rural LECs³ are exempt from the obligations of Section 251(c) until they receive an interconnection request and the state commission determines that competition is in the

² Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections at 47 U.S.C. §§ 151 *et seq.*).

³ The term "rural telephone company" is generally defined as a small LEC serving rural America and does not include the Bell Operating Companies (BOCs) such as U S WEST. See 47 U.S.C. § 153(37) and *Idaho Code* § 62-603(10) (July 1, 1997).

public interest. 47 U.S.C. § 251(f)(1)(A). In addition to this “automatic” exemption, rural LECs may seek suspensions or modifications from the obligations listed in subsections (b) and (c). A rural LEC may petition the state commission for a suspension or modification of the obligations. The state public utilities commission “shall grant” the petition if it finds that such suspension or modification is necessary to avoid: significant adverse economic impact on users, imposing a requirement that is unduly economically burdensome, or imposing a requirement that is technically infeasible; and is consistent with the public interest. 47 U.S.C. § 251(f)(2).

Finally, Section 253(a) of the Telecommunications Act provides that no state may prohibit “the ability of any entity to provide any interstate or intrastate telecommunications services.” States may continue to impose on a competitively neutral basis actions to preserve and advance universal service and to manage public rights-of-way. 47 U.S.C. §§ 253(b) and (c). Section 253(f) also provides protection for rural LECs by allowing states to require a CLEC to serve all customers in a rural service area if the CLEC desires to offer services in such an area.

THE POSITIONS OF THE PARTIES

A. Silver Star

Silver Star noted in its comments, that it has entered into a contract with Simplot to provide the mine with “dedicated, high-volume data and voice transmission and bundled services through more than five access lines.” Silver Star Comments at 1. At oral argument, Silver Star asserted that the mine will own all the facilities that are to be located within the Afton exchange and located on the Simplot premises. Tr. at 2-3. Silver Star explained that the special use permit issued by the Forest Service requires that the mine own all the facilities within the Forest Service boundary. Silver Star’s facilities will be located within its certificated service area. The point of interconnection for the Simplot facilities and the Silver Star facilities will be located within the Wayan exchange. Tr. at 3. Silver Star stated that under Idaho and federal law, it “is entitled to provide, and Smoky Canyon is entitled to obtain, the services contemplated by the Contract regardless of the fact that the Smoky Canyon Mine is located within an area presently certificated to U S WEST Communications, Inc.” Comments at 2. The Company declared that the special contract was negotiated in arms-length bargaining and that the mine has chosen to obtain services from Silver Star.

1. The Idaho Telecommunications Act of 1988. Silver Star argued that when U S WEST elected to remove its non-basic local exchange services from the Commission's Title 61 regulation,⁴ U S WEST consented to competition for Title 62 services. Because the mine is currently served by more than five lines, such Title 62 services are subject to competition. Silver Star noted that its position is further supported by *Idaho Code* § 62-605(3) which provides that neither Title 61 nor Title 62 prevents "any person or entity from providing telecommunications services in competition with a telephone corporation as to those services which have been excluded from regulation under Title 61. . . ." Silver Star claimed that the exclusive franchise provisions contained in *Idaho Code* § 62-615(1)⁵ only apply to services which remain subject to the Commission's Title 61 authority, i.e., none of which are provided to the mine.

2. The federal Telecommunications Act. Silver Star noted that the purpose of the federal Act was "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by *opening all telecommunications markets to competition. . .*" Silver Star Comments at 4, *citing* H.R. Conf. Rpt. No. 104-458 (1996) (emphasis added). The Company argued that Section 253 of the federal Telecommunications Act provides that no state statute or regulation "may prohibit or have the affect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a); Tr. at 4, 8. This section explicitly allows Silver Star to enter the Afton local exchange market and compete for the mine's business. Title 61 or Title 62 statutes that limit Silver Star's ability to compete are preempted by the federal Act. Tr. at 30.

⁴ The Commission's traditional regulatory authority is found in Title 61 of the *Idaho Code*. The Idaho Telecommunications Act of 1988 added a new chapter to Title 62 and created a modified form of regulation for telephone companies providing other than basic local exchange services in Idaho. Basic local exchange service for business customers with five or fewer access lines remains under the Commission's Title 61 ratesetting authority. U S WEST elected to remove its non-basic local service from the Commission's Title 61 authority in March 1989. The requested telecommunications services to be provided by Silver Star would be subject to the Commission's Title 61 ratesetting authority.

⁵ *Idaho Code* § 62-615(1) provided that Certificates of Public Convenience and Necessity for telephone corporations providing Title 61 basic local service "shall represent an exclusive service area franchise for telecommunication services which remain subject to title 61. . . within the certificated area of such telephone corporation. . . ." This subsection was repealed with the recent amendments to the Idaho Telecommunications Act effective July 1, 1997.

Silver Star next insisted that the exemption, modification, and suspension provisions concerning rural telephone carriers under Section 215(f) are not applicable in this instance. “Silver Star is seeking to provide intrastate competitive service in this exchange as a facilities-based carrier. It’s not requesting or requiring interconnection or resell.” Tr. at 12. Consequently, the interconnection provisions do not apply. Silver Star also maintained that U S WEST is not a rural carrier as defined in the Act nor has U S WEST petitioned for suspension or modification of the Section 251 provisions. Tr. at 10. Likewise, Union has not filed any petition for modification or suspension.

3. House Bill 313. The Company next insisted that a major goal of House Bill 313 was to extend the competitive provisions of the 1988 Act. Tr. at 12. The Bill amended various provisions of the Idaho Telecommunications Act to conform to the recent federal Act and to promote reasonable local competition in Idaho where practicable. *Idaho Code* § 62-602 (July 1, 1997). Silver Star pointed out that Section 5 of the Bill repealed the exclusive franchise provision once contained in 62-615(1). “Thus, if there were any lingering questions regarding Silver Star’s right to provide services, and Smoky Canyon’s right to choose its provider under the Contract, or regarding the public policies behind those rights, H.B. 313 eliminates them.” *Id.* at 5. Silver Star argued that there is no other provision of the 1997 amendments to the Idaho Telecommunications Act which would prohibit Silver Star from serving the mine.

4. Ownership of Afton. Turning to the issue of whether Union could be considered the incumbent or owner of the Afton exchange, Silver Star asserted that Union has neither equitable title nor ownership in this exchange. Tr. at 14. The Company asserted that the sale has

not been consummated, and may never be consummated. As a “successor” to U S WEST in the certificate or service area, Union acquires no greater protection from facilities-based competition for Title 62 services than U S WEST had. Any exemption or suspension that Union might obtain from the requirements of the 1996 Act if it acquires the exchange from U S WEST would apply only to resale or interconnection. Neither resale nor interconnection are contemplated by the Contract.

Comments at 5. Silver Star renewed its request that the Commission approve the contract and protect the contract from public disclosure.⁶

B. Union Telephone

1. Ownership of Afton. Union first asserted that it should be treated as the equitable owner of the Afton exchange. Union observed that the Commission's Order No. 26687 approved the sale and certificate transfer of the Afton exchange and dismissed Silver Star's Application to amend its certificate to serve the same area. Union argued that but for Silver Star's conduct in attacking the sale of the Afton exchange, the sale would have been consummated by now. Tr. at 19. Union characterized Silver Star's conduct as asking the Commission "to sanction [Silver Star's] conduct and allow it to raid the exchange under the guise of deregulation, pirating away profitable customers which help maintain lower rates for less profitable residential rural customers." Union Comments at 4.

2. State Utility Law. Union relied upon several state statutes to support its position. First, as the equitable owner of the Afton exchange, Union asserted it is entitled to possess an exclusive franchise to provide telecommunication services pursuant to *Idaho Code* § 62-615(1).⁷ Tr. at 20. Union insisted that Silver Star is attempting to take advantage of a "window of opportunity" attributable to the prolonged Idaho and Wyoming regulatory proceedings "which abuse has unjustly delayed consummation of the Afton exchange to Union Telephone." Comments at 5. Union has closed on the other seven Wyoming exchanges. Tr. at 19. If the sale had been consummated, Union would have sought to serve the Afton exchange on an exclusive basis.

Second, Union Telephone asserted that Silver Star may not begin construction of facilities to serve the mine until it has obtained a certificate from the Commission that the present and future public convenience and necessity (*Idaho Code* § 61-526) requires such construction. Tr. at 24. Union maintained that service to the mine "is a direct interference with Union Telephone's

⁶ AT&T concurred with Silver Star's interpretation of the federal Act, the Idaho Act, and House Bill 313. Tr. at 27. AT&T did express concern that Silver Star may, or has the potential to, subsidize its Title 61 services with any Title 62 services it might furnish the mine. The Staff maintained that the Commission need not be concerned with cross subsidization pursuant to *Idaho Code* § 61-622A because all the proposed services to the mine are Title 61 services. Tr. at 28. To the extent that Silver Star may earn a profit under the contract, "it may work to reduce [Silver Star's] revenue requirement for all services and the need for an explicit Idaho USF subsidy." Reply Comments at 3.

⁷ As previously mentioned, the exclusive franchise provision formerly contained in Section 62-615(1) was repealed on July 1, 1997.

equitable ownership of the Afton exchange system.” Comments at 6. Union insisted that this is not a case of a customer installing its own equipment as is its federal right. It is a fiction that Silver Star is not serving this mine in the Union exchange. Tr. at 24.

Third, Union argued the Commission has an obligation to protect the public interest and ensure customers are provided with high quality services. Tr. at 25. The Commission should review this contract in light of its authority to determine just and reasonable rates, ensure adequate levels of service, prohibit discrimination, and prohibit cross-subsidization. *Idaho Code* §§ 61-301, -302, -315, -526, and 62-613.

3. The federal Telecommunications Act. Union next asserted that Section 253(b) of the federal Act allows the Commission to impose regulations concerning universal service, public safety, consumer protection and quality of service so long as it is done on a competitive neutral basis. Tr. at 22. It is the FCC that must decide whether laws are preempted per Section 253(d). Union argued that nowhere “in the 1996 Telecommunications Act is there a statement that competition should automatically be allowed where the equitable owner of the exchange is a rural carrier.” Reply Comments at 2.

Union also argued that Section 253(f) evidences Congress’ concern that competitors not “cherry pick” or “pirate” large and lucrative customers served by rural telephone company. Tr. at 23. In pertinent part, Section 253(f) provides that

it shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements . . . for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.

47 U.S.C. § 253(f). Before a carrier may be designated as an eligible telecommunications carrier (ETC), it must generally offer telecommunication services “throughout the service area and advertise the availability of such services and the charges therefore using media of a general distribution.” 47 U.S.C. § 214(e). Union argued this section creates a specific exception to the general prohibition contained in 253(a) to discourage competitors from merely pirating large rural customers instead of serving an entire service area. Tr. at 23.

4. Disclosure of the Contract. Finally, Union Telephone argued the special services contract should be made public and Union should have the right to review it. Tr. at 19. Union

maintained that the “closure” of the special contract hampers its ability to comment upon Silver Star’s proposal. Union insisted that various utility statutes “require that Union Telephone be able to review and comment upon Silver Star’s ‘special services contract.’” Comments at 8; Tr. at 21. Without reviewing the Silver Star contract, Union maintained it is uncertain whether the mine is getting the most reasonable deal. Union declared that it has no ability to contract with Simplot until the Afton sales transaction closes.

Union also takes issue with Silver Star’s position that there is no interconnection required. Union maintains that it does not know if interconnection will occur because Silver Star has not provided the contract to the parties for review. Tr. at 26.

DISCUSSION

1. Who “owns” the Afton exchange. The threshold question to be decided in this case is whether U S WEST (the current certificate holder) or Union Telephone (the purchaser) is the owner of the Afton exchange. The answer to this question may be dispositive. If the Commission determines that the owner of the Afton exchange is indeed U S WEST, then it is argued that service to the mine is a Title 62 service, rural protections afforded by state and federal laws are not applicable, and federal law permits CLECs to enter the Afton local market. On the other hand, if the Commission were to find that Union Telephone is the “equitable owner” of the Afton exchange, then various provisions of federal and state statutes may preclude Silver Star from serving the mine. We now turn to this issue.

In Order No. 26687 issued November 18, 1996, the Commission approved the sale of the Afton exchange from U S WEST to Union Telephone. That Order required Union Telephone to complete certain actions “within 60 days of the closing of the sales transaction.” Order No. 26687 at 7. Silver Star maintains that the Afton transaction has not been completed. Silver Star Comments at 5. Union Telephone acknowledges that the sales transaction has not been closed. Tr. at 19. Based on these uncontested statements we find that the Afton transaction has not been completed. In addition, the Commission may reasonably infer that the transaction has not closed because Union has not filed its Articles of Incorporation nor a new Certificate of Public Convenience and Necessity for the Idaho portion of the Afton exchange as required by Order No. 26687.

Having determined that Union Telephone is not in fact the owner of the Afton exchange, i.e., it has not closed on the transaction, we now turn to Union's argument that it should be considered the equitable owner of the Afton exchange. In essence, Union argued that "but for" Silver Star's conduct before the Wyoming and Idaho Commissions as well as the FCC, the sale would have closed by now. Tr. at 19. However, our review of the record reveals that Union neither offered nor specifically explained how and in what manner Silver Star's conduct has precluded it and U S WEST from closing. As we observed in our prior Order in this matter, both state regulatory commissions and the FCC have approved the sale of the Afton exchange to Union. Order. No. 26883 at 7. It appears there were no regulatory barriers to closing. Indeed, Union may have been able to close the sale anytime after Silver Star filed the present Application in February. Consequently, based on the record before us, we are constrained to find that Union has failed to present substantial and competent evidence demonstrating why it has not closed the transaction or why it should be considered to be the equitable owner of the Afton exchange.

Having concluded that Union Telephone has not satisfactorily demonstrated that it is entitled to be considered the equitable owner of the Afton exchange, it is apparent U S WEST remains the owner of the Afton exchange. Silver Star has persuasively argued that the state and federal Telecommunications Acts permit it to compete for the mine's services. Based upon the uncontested representations, we find that the mine is currently being provided with U S WEST Title 62 services. Consequently, Silver Star is permitted under state law to offer the mine competing services. Under the Idaho Telecommunications Act, *Idaho Code* § 62-605(3) provides that neither Title 61 nor Title 62 shall "prevent any person or entity from providing telecommunication services in competition with a telephone corporation as to those services which have been excluded from regulation under title 61."

Based upon the particular facts of this case, we further find that Silver Star need not amend its Certificate of Public Convenience and Necessity to include the mine in its service area. Silver Star asserted that the mine will own all of the facilities and equipment necessary outside of Silver Star's service area. Thus, Silver Star's plant and the interconnection point between the mine and the Company will be located in Silver Star's service area.

We next turn to the services provided under the contract. Because Silver Star has not elected to remove its non-basic services from our Title 61 jurisdiction, it therefore follows that the

telecommunications services offered in the special contract are Title 61 services. As Union argued and we accept, the Commission has the authority to determine that the rates and quality of service are fair, just and reasonable. Tr. at 6. After reviewing the contract, we find the contract rates are reasonable because the rates are set above Silver Star's comparable tariff rates for such services. We further find it is reasonable to presume that the contracted services will be of sufficient quality to meet the needs of the mine. Drawing such a presumption is reasonable given the arms-length bargaining between the parties, the sophistication of the purchaser, and the lack of any objection from the mine in this proceeding.

2. Is the contract a trade secret? We now turn to Union Telephone's Motion to Compel disclosure of the special services contract. After the oral argument, Silver Star and Union Telephone filed additional motions. On May 15, 1997, Union Telephone filed a Motion to Compel requesting that the Commission direct Silver Star to produce a copy of the "special services contract." By way of reply, Silver Star filed a Motion for Protective Order on May 28, urging the Commission to deny Union's Motion to Compel. On June 5, 1997, Union Telephone filed a response to Silver Star's Motion for a Protective Order.

In its Motion for a Protective Order, Silver Star stated that the contract contained information concerning the "means, methods, techniques and processes" by which telecommunication services are going to be supplied to the mine. Motion for Protective Order at 4. Silver Star maintains that this information "create[s] independent economic value to Silver Star by not being known by its competitors." *Id.*

Union's Motion compels us to consider whether the special services contract is subject to public disclosure or should be protected from disclosure as a trade secret pursuant to the Idaho Trade Secrets Act, *Idaho Code* § 48-801 *et seq.* The Idaho Trade Secrets Act defines a trade secret as "information, including a formula, pattern, compilation, program, computer program, devise, method, technique, or process, that:

- a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Idaho Code § 48-801(5). In addition, an otherwise public record may be exempt from public disclosure under the Idaho Public Records Law if it is a trade secret. *Idaho Code* § 9-340(4)(a).

Resolution of this issue requires the Commission to balance two competing interests and statutory schemes. On the one hand, documents submitted to the Commission for its regulatory consideration are generally deemed to be public records and available for public inspection. *Idaho Code* § 9-338. In addition, *Idaho Code* § 61-305 provides that every utility “shall file with the commission. . .and **keep open to public inspection** schedules showing all rates. . .together with all rules, regulations and contracts. . .which in any manner affect or relate to rates. . .or services.” On the other hand, Idaho has enacted the Trade Secrets Act and specifically provided that trade secrets may be exempt from public disclosure. *Idaho Code* §§ 48-801 and 9-340(4). The parties have not brought to our attention and we are unaware of any Idaho cases construing the Trade Secrets Act.

Having reviewed the information contained in the contract, we find such information does not have independent economic value and much of it has already been disclosed or is ascertainable by proper means. Through the course of this proceeding, Silver Star disclosed what services it will provide the mine—voice and high-speed data services. Silver Star has also publicly admitted that it will provide telecommunication services from the mine to the Company’s Wayan exchange, and eventually Pocatello. Tr. at 2-3. The contract further provides that the charges for the telecommunication services “are subject to change due to Federal and State Tariff and rate changes.” Thus, the contract service rates are not specifically developed by some formula or compilation of costs/investment/earnings but are derived from federal and state tariffs—tariffs available for public inspection. What has not been publicly disclosed thus far is the actual manner of how the services are to be provided to the mine.

We further find that the pricing information contained in the contract was certainly available to the other party to the contract—J.R. Simplot. The contract contains no restriction on the use of such information by either of the parties to the contract. The mine may be at liberty to divulge such information to a potential competitor of Silver Star or to anyone for that matter. See *Carbonic Fire Extinguishers v. Heath*, 547 N.E. 2d 675 (Ill. App. 1989). We believe that making the contract available for public inspection furthers the legitimate public interest that information used by the Commission should, to the extent practical, be available for public scrutiny. Requiring special contracts be made public also comports with our past practices regarding special contracts

for other utility industries. See Order Nos. 25988, 22759, 22736. Based on the facts of this case and the reasoning set out above, we conclude that the information contained in the contract does not qualify as a trade secret and should not be exempt from public disclosure.

Notwithstanding our resolution of this dispute, we do recognize that as telecommunication markets become more competitive there is a corresponding need to protect information qualifying as a trade secret from public disclosure. Our decision in this case does not imply any disagreement with that principle. We find only, based on the facts of this case, that the contract information in question does not meet the statutory test of a trade secret.

It is our intention to make the contract available for public inspection. In fairness to Silver Star, we will withhold the contract until the afternoon of July 18, 1997. We believe that this will provide ample opportunity for Silver Star to review our Order and to seek a stay of our decision to make the contract available for public inspection, if it believes such action is necessary. This will also provide Union with sufficient time to review the contract within the time limit set for reconsideration.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Silver Star Telephone Company is a telecommunications corporation subject to our regulatory jurisdiction pursuant to Idaho Code, Title 61 and 62. Union Telephone Company is a Wyoming telephone corporation certified by the Wyoming Public Service Commission to conduct utility operations in Wyoming. This Commission has jurisdiction over the special services contract pursuant to *Idaho Code* §§ 61-305 and 61-502.

We find that Union Telephone has failed to demonstrate by substantial and competent evidence that it should be considered the equitable owner of the Idaho portion of the Afton exchange. We further find that state law permits Silver Star to offer telecommunications services in competition with those Title 62 services offered by U S WEST in southern Idaho. We further find that the terms of the special contract entered into between the Smoky Canyon Mine and Silver Star are just and reasonable and in the public interest.

We further find that information contained in the special contract does not meet the statutory standards of a trade secret to justify exemption from public disclosure under the Idaho Trade Secrets Act and the Idaho Public Records Act.

We conclude that there is no basis to restrict Silver Star from serving the mine and that Silver Star's request to approve the special services contract should be granted.

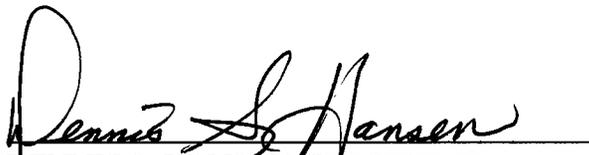
ORDER

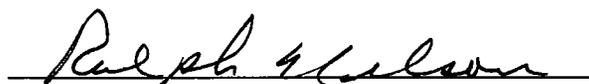
IT IS HEREBY ORDERED that Silver Star's request to approve the special services contract is granted.

IT IS FURTHER ORDERED that Union Telephone's Motion to Compel is granted and Silver Star's Motion for Protective Order is denied. The special services contract shall be made available for public viewing as a public record not exempt from disclosure no earlier than the afternoon of July 18, 1997.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. SIL-T-97-1 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. SIL-T-97-1. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 10th
day of July 1997.


DENNIS S. HANSEN, PRESIDENT


RALPH NELSON, COMMISSIONER


MARSHA H. SMITH, COMMISSIONER

ATTEST:


Myrna J. Walters
Commission Secretary

cm/O:SIL-T-97-1.dh3