

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

September 26, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (BELLAK) *RCB DS*
DIVISION OF COMMUNICATIONS (MARSH) *or AD*

RE: DOCKET NO. 960355-TP - PETITION FOR DECLARATORY RULING,
INSTITUTION OF RULEMAKING PROCEEDINGS, AND INJUNCTIVE
RELIEF, REGARDING INTRASTATE TELECOMMUNICATIONS SERVICES
USING THE INTERNET, BY AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION

AGENDA: 10/08/96 - REGULAR AGENDA - DECISION ON DECLARATORY
STATEMENT - PARTICIPATION IS LIMITED TO COMMISSIONERS AND
STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\960355.RCM

CASE BACKGROUND

On March 18, 1996, America's Carriers Telecommunication Association (ACTA) filed a Petition for Declaratory Ruling, Institution of Rulemaking and Injunctive Relief. ACTA is an association of interexchange telecommunications companies. Specifically, ACTA asks that the FPSC 1) issue a declaratory ruling establishing its authority over intrastate telecommunications services using the Internet; 2) seek a temporary injunction to immediately stop the sale of Internet telephony software in Florida pending the software manufacturers' compliance with Florida laws; and 3) institute rulemaking proceedings defining permissible intrastate communications over the Internet.

On March 4, 1996, ACTA filed essentially the same petition with the FCC. On March 8, 1996, the FCC issued a public notice seeking comment on ACTA's petition (RM No. 8775). Comments to the FCC were filed on May 8, 1996; reply comments were filed June 8, 1996. Certain information contained in those comments is included in staff's recommendation. At this time, no action has been taken by the FCC on the petition.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

DISCUSSION OF ISSUES

ISSUE 1: Should ACTA's petition be granted?

RECOMMENDATION: No. The manufacture and sale of software to be used on the Internet does not constitute the provision of telecommunications services as defined by Florida Statute. Thus, the actions requested by ACTA are inappropriate. Staff recommends that ACTA's petition be denied.

STAFF ANALYSIS: ACTA's petition concerns software manufacturers who provide software with which users can make free or nearly free toll calls through their computer. Purchasers of the software may pay for it initially (in some cases, the software is paid for through advertising and provided to the user at no charge), but the purchaser pays no further charges to the software manufacturer. The only other charges paid are to the user's Internet provider and telephone company; however, such charges are not specific to Internet telephony, but rather are general usage charges.

ACTA's argument in support of its request begins with the assertion that the software manufacturers in question are intrastate telecommunications companies and are therefore subject to state regulation. ACTA cites provisions of Florida Statutes, which read:

"Telecommunications company" includes every corporation, partnership, and person... offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. (364.02(12), Florida Statutes)

"Telecommunications facility" includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state. (364.02(13), Florida Statutes)

ACTA also claims that the software companies are in violation of Florida law in that

A telecommunications company subject to this chapter may not, directly or indirectly, give any free or reduced service between points within this state. (Sec. 364.08(2), Florida Statutes)

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ACTA points out that its own members are "required to pay, directly or indirectly, various fees and charges in order to render their services to the public." (Petition, p. 2) Further, ACTA states that interexchange carriers must assess "specific charges within their rates to support various regulatory policies and programs used to sustain and advance state and national goals for telecommunications." (Petition, p. 2)

ACTA argues that the software manufacturers are not subject to the same statutory and regulatory requirements as its members, and therefore

distort the economic and public interest environment in which ACTA carrier members and nonmembers must operate. Continuing to allow such entities to operate without complying with or being subject to the same legal and regulatory requirements as ACTA carrier members threatens the continued viability of ACTA's members and their ability to serve the public and acquit their public interest obligations under Florida law. (Petition, pp. 2-3)

ACTA continues that "it is incumbent upon the Commission to exercise jurisdiction over the use of the Internet for unregulated intrastate telecommunications services. As a first step, ACTA submits that the Commission may deem it appropriate to issue a declaratory ruling officially establishing its interest in and authority over intrastate telecommunications services using the Internet." (Petition, p. 4) Additionally, ACTA requests that the FPSC "ask the circuit court to temporarily enjoin the Respondents from arranging for, implementing, and marketing non-tariffed, uncertified telecommunications services without first complying with applicable provisions of Florida law and regulations, to include Florida Statute Sec. 364.04, 364.08, and 364.33." (Petition, p. 5)

ACTA's final request is the Commission

examine and adopt rules, policies and regulations governing the uses of the Internet for the provisioning of telecommunications services. The use of the Internet to provide telecommunications services has an impact on the traditional means, methods, systems, providers, and users of telecommunications services. The unfair competition created by

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the current unregulated bypass of the traditional means by which local and long distance services are sold could, if left unchecked, eventually create serious economic hardship on all existing participants in the traditional telecommunications marketplace and the public which is serviced by those participants. Ignored, such unregulated operations will rapidly grow and create a far more significant and difficult to control "private" operational enclave of telecommunications providers and users. (Petition, p. 5)

ACTA's argument in support of its position that the FPSC has jurisdiction in this matter centers on the notion that this is a new technology, and although heretofore unregulated, is nevertheless subject to regulation. ACTA cites United States v. Southwestern Cable Co., 392 U.S. 157 (1968), in which the Supreme Court found that regulatory authority over cable television was necessary if the FCC was to perform its other responsibilities. ACTA submits that, similarly, the FPSC must exercise jurisdiction over Internet telephony.

ACTA concludes

The Commission should take action in order to preserve fair competition and the health of the Florida's [sic] telecommunications industry. Absent a healthy industry, with users paying telecommunications companies a fair price for telecommunications services, the Commission's duty to effectively promote universal service cannot be achieved. Absent action by the Commission, the new technology could be used to circumvent restrictions traditionally found in tariffs concerning unlawful uses, such as gambling, obscenity, prostitution, drug traffic, and other illegal acts. (Petition, pp. 7-8)

Discussion

Staff believes the critical issue to be addressed here is whether the manufacture and sale of software to be used on the

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Internet constitutes "telecommunications services for hire." Failing that, all other issues become moot.

Staff believes that the sale of the software in question is not the provision of two-way telecommunications services to the public for hire. In fact, the software manufacturers are not providing service. What is being provided is more closely akin to customer premises equipment (CPE).

A brief explanation of how the software works is needed to understand its function in the process of Internet telephony.

In order for the software to function, the user must first subscribe to other service providers, including a local exchange company (LEC), and an Internet Service Provider (ISP). Through a modem, the user first dials the ISP's telephone number to obtain Internet access. Such connection is generally achieved through local access on the part of both the user and the ISP. In the case of the ISP, this is often a business line. Once connected, the user can contact other users through the telephony software. The person receiving the call must be connected to an ISP and have the telephony software running at the time the call is placed. Additionally, the users at both ends must have a sound card, a microphone, and speakers (alternatively, a headset).

Assuming these conditions have been met, the sender speaks into the microphone attached to the personal computer. The soundcard digitizes the signal, and then the telephony software compresses the voice signal and converts it into packets. The packets are sent through the modem to the ISP, and routed through the ISP's equipment over the Internet. At the receiving end, the process is reversed, and the sound comes out over the speakers.

It is clear from this description that the use of telephony software is not the same as provision of two-way telecommunications services to the public for hire, as defined in Florida Statutes. The purpose of the software is to convert the voice signal into a form that can be transmitted over the Internet. Such transmission is actually accomplished through a combination of services provided by the LEC and the ISP (in some cases, also an IXC). The software manufacturers provide no facilities for transmission, nor do they resell transmission over the facilities of other carriers.

If the software is considered to be an enhancement of the customer's CPE, and therefore is treated in a like manner for regulatory purposes, it must be noted that the provision of CPE is not regulated by this Commission, nor by the FCC. In its Computer

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II inquiry, the FCC found that "[t]he offering of customer-premises equipment is not a common carrier activity and is severable from the provision of common carrier transmission services." Additionally, it was determined that "equipment, by itself, is not a 'communication' service..." (Computer II, 77 F.C.C.2d 384, 1980)

Further, the FCC recognized that Telecommunications service is no longer just 'plain old telephone service' to the user. A subscriber may use telephone service to transmit voice or data. Both domestic and international networks allow for voice and data use of the same communications path. Thus in providing a communications service, carriers no longer control the use to which the transmission medium is put. More and more the thrust is for carriers to provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile, or other forms of transmission. (ibid.)

Related Matters

Although not the subject of ACTA's petition, it is important to be aware that experiments are currently being conducted to provide a "gateway" which allows users to make Internet telephony calls through the telephone. Under this scenario, specialized "gateways" may be located at a local Internet telephony provider's (ITP's) premises. The user accesses the provider by telephone and is connected to the gateway. The voice signal is digitized and compressed and formed into packets for switching over the Internet. Again, the process operates in reverse at the receiving end, with the data converted into voice and the call completed over the public switched network. Calls can only be made to localities with a gateway provider. The Internet telephony provider may, or may not, be the software provider. While such a service is still in the experimental stages, we believe it bears watching. Such service may indeed fall under the classification of "telecommunications service." However, as noted, this is not the subject of ACTA's petition as filed. The matter is addressed here to make it clear that such provision of service may be treated differently for regulatory purposes than the mere provision of software.

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Additionally, while not the subject of ACTA's petition, numerous issues were raised in comments to the FCC. Notably, the exemption from payment of access charges currently enjoyed by the ISPs was discussed at length by many of the parties. Staff has addressed this matter in Issue 2.

Conclusion

Staff does not believe that the manufacture and sale of software to be used on the Internet constitutes the provision of telecommunications services as defined by Florida Statute. Rather, such software is more akin to CPE, which is not regulated by this Commission. The software manufacturer provides no transmission services under the current provisioning scheme; in fact, transmission services are provided by other parties, including LECs. Therefore, it is inappropriate to grant ACTA's request as filed. Staff recommends that ACTA's petition be denied.

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ISSUE 2: Should the Commission take further action regarding the issues raised as a part of, or ancillary to, this proceeding?

RECOMMENDATION: Yes. The Commission should conduct workshops to investigate issues raised during the course of this proceeding, particularly those issues which may impact universal service. Such issues should not be limited to Internet telephony, but may concern Internet usage in general.

STAFF ANALYSIS: As recommended in Issue 1, the provision of software does not constitute "telecommunications service." ACTA's request is narrow in that what it asks for is regulation of the software makers. However, other issues were raised in various comments to the FCC that bear further investigation.

While staff does not envision regulating the Internet, nevertheless, we have concerns which we believe should be considered. In particular, the current manner by which ISPs are charged for interconnection may be inappropriate. It may be necessary for Internet providers to pay interconnection charges just as other interconnectors, such as ALECs and Commercial Mobile Radio Services (CMRS) providers, pay. The example of the CMRS is particularly apt. The FPSC does not regulate CMRS in Florida, but it does regulate the pricing and other terms by which CMRS providers interconnect with the LEC. In a similar fashion, it may wish to determine the manner in which Internet providers interconnect with the LEC, without regulating the Internet.

It is also of paramount importance that we evaluate the potential impact of Internet usage on universal service, 911, and any other such issues that are of major concern to the citizens of Florida. We must be certain that vital services are not jeopardized by Internet traffic.

An expansion of the description of Internet usage provided in Issue 1 is needed to comprehend the potential impact of Internet usage on the network. A study provided by ACTA describes the process.

The most common interconnection arrangement is to use the existing DDD network to provide dial-in access to an analog "modem pool" for those customers who can reach the hub central office on a local call basis. The ISP's subscribers dial in to the lead number of the multiline hunt group serving the ISP, and the DDD network makes the connection. Depending upon the size of the multiline hunt group, and

the features and functionality desired, many ISPs decide to purchase either Business Dial Tone Line, Engineered CENTREX or [confidential] from the hub central office. (ACTA exhibit, p. 3)

According to the study, the heaviest concentrations of traffic loads are occurring in the central offices that serve the ISPs. The usage is measured in "hundred call seconds" (CCS) on an hourly basis. There are 3600 seconds per hour, or 36 CCS if the line is used continuously during the hour. The following table shows the results of the study.

SAMPLE SEGMENT	AVERAGE PEAK HOUR CCS	PEAK HOUR FOR SEGMENT
ISPs on business service	26 CCS	11:00 PM
ISPs on PRI (primary rate interface)	28 CCS	10:00 PM
Business Customers with MLHG*	12 CCS	5:00 PM
Office average (entire central office)	3 CCS	4:00 PM

*Multiline Hunt Group

The conclusion drawn was that:

At the traffic levels they are generating, we estimate that the overall traffic loads on the local network would double if only a 15% penetration of households were connected to the Internet. Stated another way, if just 15% of households went on line to the Internet at one time and had a call hold time of one hour, it would double the capacity demanded. The reason is that 15% of households on line for an hour has the same effect as 100% of households making a nine minute call in that same hour (5 CCS). With on-line data services, a relatively small user group can stress the network in ways which have not previously occurred, and were not contemplated in designing the network. (ACTA exhibit, p. 4)

The results reported are increases in trouble reports, problems with dial tone delay, and other problems which are

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attributed to the heavy traffic of ISPs. Resolution of the problem in one central office was at a reported cost of \$2 million for labor and equipment. The cost was reportedly 5 times the normal cost per line for office equipment. At the same time, revenues generated by the ISP totaled about \$20,000 per month. Such figures lead one to believe that the provision of services to ISPs at current flat rates are being subsidized by other services. Additionally, there is no incentive for users to use the public switched network efficiently when service is flat-rated.

At the root of the matter appears to be the current exemption from access charges that ISPs enjoy. In 1983, the FCC granted an exemption from interstate access charges to enhanced service providers, which includes ISPs. Such providers are considered end-users by the FCC. Thus, ISPs pay the flat-rated subscriber line charge (SLC), but do not pay usage-sensitive charges, such as carrier common line charges. Many parties have urged the FCC to consider elimination of this exemption as part of its access reform proceedings.

Staff's concern is that the flat-rated nature of service to ISPs as provided today is sending incorrect economic signals, both to service providers, such as ISPs, and to the users of the services. It may be exactly these economic signals that have allowed the proliferation of many of the Internet services available today, from flat-rated Internet access, to Internet telephony, to free-net services. Yet the interconnection is not free, nor are the costs likely to be flat. There may be implicit subsidies supporting such services which may be inappropriate in the competitive environment.

Our primary concern should be with the impact on universal service. Although it does not appear that a threat is imminent, the potential for problems will undoubtedly increase in the foreseeable future. While the example provided was not a Florida LEC, and probably is an extreme example, nevertheless, at the growth rate of the Internet, problems could occur in the near future which may have a negative impact on universal service, quality of service, and other matters long considered important in this state. A balance may be needed whereby these concerns are addressed, without stifling the innovations occurring on the Internet.

Staff recommends that the Commission conduct workshops to investigate issues raised during the course of this proceeding, particularly those issues which may impact universal service. Such issues should not be limited to Internet telephony, but may concern Internet usage in general.

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ISSUE 3: Should the docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: This recommendation disposes of ACTA's petition. It is not necessary to keep the docket open to conduct the workshops recommended in Issue 2. If further action is needed as a result of information obtained through workshop or other avenues, a new docket should be opened as appropriate. Since there is no further action needed in this docket, we recommend that it be closed.