



Florida Cable Telecommunications Association

Steve Wilkerson, President

VIA HAND DELIVERY

December 2, 2002

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RECEIVED FPSC
02 DEC -2 PM 4:24
COMMISSION
CLERK

RE: Docket No. 021061-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the Response of Florida Cable Telecommunications Association, Inc. to CNM Network, Inc.'s Motion to Dismiss the Petitions for Intervention, or, in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action.

Copies of the Response have been served on the parties of record. Please acknowledge receipt of filing of the above by stamping the duplicate copy of this letter and returning the same to me.

Thank you for your assistance in processing this filing. Please contact me with any questions.

Sincerely,

Michael A. Gross
Vice President, Regulatory Affairs &
Regulatory Counsel

Enclosure

cc: All Parties of Record

- AUS
- CAF
- CMP
- COM
- CTR
- ECR
- GCL
- OPC
- MMS
- SEC 1
- OTH

RECEIVED & FILED
RJM
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER DATE
13125 DEC-28
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of CNM Network)
For Declaratory Statement)
regarding Florida Public Service)
Commission Jurisdiction)
_____)

Docket No. 021061-TP

Filed: December 2, 2002

**RESPONSE OF FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.
TO CNM NETWORK, INC.'S MOTION TO DISMISS THE PETITIONS FOR
INTERVENTION, OR, IN THE ALTERNATIVE, TO CONDUCT A GENERIC
PROCEEDING OR RULEMAKING OR TO STAY PENDING FCC ACTION**

Florida Cable Telecommunications Association, Inc. (FCTA), hereby responds, pursuant to Rule 28-106.204(1), Florida Administrative Code, to CNM Network, Inc.'s (CNM) Motion to Dismiss the Petitions for Intervention, or, in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action (Motion to Dismiss), and states:

I. INTRODUCTION

1. October 18, 2002, CNM filed a Petition for Declaratory Statement pursuant to Rule 28-105.001, *et seq.*, Florida Administrative Code, and Section 120.565, Florida Statutes. In its petition, CNM requests that the Florida Service Public Commission (the Commission) issue a declaratory statement determining that phone-to-phone voice-over-Internet-protocol (VoIP) is not telecommunications under Florida law and, therefore, CNM is not a telecommunications company subject to the Commission's certification and tariffing requirements. In support of its petition, CNM alleges that as a provider of VoIP, it does not offer telecommunications and, therefore, is not a telecommunications company under Section 364.02(12), Florida Statutes.

Further, CNM alleges that it is not required to obtain a certificate of public necessity and convenience under Sections 364.33 and 364.337, Florida Statutes, and is not subject to the jurisdiction of the Commission.

2. CNM requests, in the alternative, that if the Commission believes it appropriate to regulate VoIP, it should do so in the context of a generic investigation or a rulemaking proceeding.

3. In its Motion to Dismiss, CNM requests that all Petitions for Intervention, including that of the FCTA, be dismissed, reiterates its request for a generic proceeding or rulemaking, and makes an additional request that its declaratory statement proceeding be stayed pending the FCC's resolution of a similar Petition for Declaratory Ruling filed by AT&T at the FCC, also on October 18, 2002.¹

4. The FCTA will show in this response that it unequivocally has standing to intervene in this docket. Indeed, the allegations of CNM's Petition and Motion to Dismiss by themselves show how FCTA's substantial interests will be affected by the outcome of this proceeding. Further, the FCTA suggests that a generic docket would provide a more appropriate forum to address such a profound issue as the regulatory status of VoIP and the full panoply of issues which would necessarily flow from any such determination. Additionally, the FCTA requests that the Commission stay its generic proceeding until the FCC has an opportunity to comprehensively consider the

¹ *In the Matter of AT&T Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket 02-361, Petition of AT&T (filed Oct. 18, 2002) (AT&T Petition).

issues presented by VoIP and to provide guidance to the States as to the direction of a national policy on this issue.

II. THE FCTA HAS STANDING TO INTERVENE IN THIS DOCKET

5. Section 120.565(3), Florida Statutes, requires the respective agency, in this case the Commission, to give notice of the filing of each Petition for Declaratory Statement in the Florida Administrative Law Weekly. *Chiles v. Dept. of State, Div. of Elections*, 711 So.2d 151, 155 (Fla. 1st DCA 1998). This provision accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties. *Chiles* at 155. Any substantially affected party can intervene in a declaratory statement proceeding before the agency. *Chiles* at 155. The FCTA is such a substantially affected party, as discussed with particularity below.

6. Rule 25-22.039, Florida Administrative Code provides that persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding may petition for leave to intervene. Any such petition must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. It should be noted that the FCTA has been granted leave to intervene in a significant number of dockets at the Commission, too numerous to list in this response. Among those dockets at the Commission in which the FCTA is an intervenor is Docket No. 000075-TP, which is relied upon by CNM in paragraph 13 of its petition in support of its conclusion that reciprocal compensation does not apply to its VoIP service. Specifically, on January 21, 2000, the Commission

initiated Docket No. 000075-TP “to investigate the appropriate methods to compensate carriers for the exchange of traffic subject to Section 251 of the 1996 Telecommunications Act.”² Not only was the FCTA an intervenor with full party status in the reciprocal compensation docket referred to above, but the FCTA joined in a post-hearing brief filed on August 10, 2001, which the Commission considered persuasive in concluding that a broad sweeping decision on VoIP would be premature at this time, and that since VoIP is a relatively nascent technology with limited market application at this time, the Commission was hesitant to make a specific decision in the proceeding that could possibly serve to constrain an emerging technology. Accordingly, the Commission reserved any generic judgment on the issue until the market for VoIP develops further.³

7. In paragraph 22 of its Petition, CNM states that if the Commission believed it were appropriate to regulate VoIP, it should not do so in a proceeding involving an isolated provider such as CNM. CNM went on to state:

Instead, the Commission should address the regulation of IP telephony, including phone-to-phone, if at all, in the context of a generic investigation or a rulemaking proceeding that would afford a meaningful opportunity for participation by telecommunications, cable and Internet service providers, the Office of the Public Counsel, and other interested parties. Any decision to regulate IP telephony may have sweeping ramifications for many facets of the communications industry and could dramatically change the course of investment, development, and deployment of emerging IP

² In Re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP, at 5, September 10, 2002 (Reciprocal Compensation Order).

³ AT&T also relies on the Reciprocal Compensation Order. *AT&T Petition at Paragraph 7.*

services in the State of Florida, and elsewhere. Undoubtedly, other IP-based providers, including those who carry voice only and those who carry "convergent" services with video and data, will have a direct interest in participating. (emphasis supplied).

The reasons set forth by CNM above eloquently set forth the substantial interest which the FCTA has in this proceeding.

8. Moreover, the Commission's *Telecommunications Markets in Florida, Annual Report on Competition*, as of June 30, 2002 (December 2002), to the Legislature and the Governor (2002 Competition Report), discusses the cable industry's activities in the telephony market which have been made possible by massive infrastructure upgrades to digital systems using hybrid fiber coaxial cable. 2002 Competition Report at 10. The Report goes on to describe how cable companies are able to provide facilities-based telephone service to both residential and business customers and to sustain cable's substantial lead over DSL providers in broadband deployment and subscriber penetration. According to the Report, the NCTA states that almost one third of digital cable households are forecasted to take a cable local telephony service by 2005. Consequently, cable telephony is a key component of the cable industry's business strategy in coming years. 2002 Competition Report at 11.

The Report additionally claims that with the rollout of VoIP, cable-delivered telephone service could evolve into a simple telecommunications after-thought of consumers, rather than a separate, independent service. 2002 Competition Report at 12. As stated on Page 12-13 of the Report, the cable industry is looking to quickly move into VoIP instead of circuit-switched telephony for future cable voice offerings, and most of the major cable companies have begun trials of VoIP service. Page 13 of

the Report contains a discussion of the business plans of Comcast and Charter Communications with respect to deployment of VoIP technology in their networks.

9. A substantial number of the FCTA's Members will be substantially affected by the outcome of the Petition for Declaratory Statement. FCTA Members are certificated ALECs which pay and receive intercarrier compensation, including reciprocal compensation and access charges. A determination as to whether VoIP is a telecommunications service and whether or not such service is subject to intercarrier compensation in one form or another, will have a substantial impact on a substantial number of FCTA's Members. Virtually all of the FCTA's Member/Cable Companies are evaluating the potential of VoIP either through ongoing trials or internal review. Florida is a large and very lucrative state for deployment of telecommunications and advanced services, and there is obvious potential and interest on the part of the cable industry in investment in and deployment of VoIP in the State of Florida.⁴ A finding by the Commission that VoIP constitutes a telecommunications service subject to reciprocal compensation and access charges, as well as other regulations within the jurisdiction of the Commission, could discourage any planned investment in and deployment of VoIP in the State of Florida by FCTA Members. Moreover, any decision affecting intercarrier compensation will have a substantial impact on FCTA certificated ALECs which pay and receive reciprocal compensation and access charges.

⁴ According to the FCC's latest annual report, Florida is the fourth largest state in terms of number of high-speed access lines. *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 146 (Third Report) at Page 3 and Table 6 of Addendum.

**III. THE COMMISSION SHOULD OPEN A GENERIC PROCEEDING TO ADDRESS
VoIP AND STAY THAT PROCEEDING PENDING AN FCC
DETERMINATION OF THE ISSUES PRESENTED**

A. The Commission Should Open a Generic Proceeding to Address VoIP

10. Section 25-22.039, Florida Administrative Code, provides that persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding may petition for leave to intervene. Any substantially affected party can intervene in a declaratory statement proceeding before the agency. *Chiles* at 155. Where a declaratory statement provides a response which is not limited to specific facts and specific petitioners, but in reality adopts a broad agency policy or provides statutory or rule interpretations that apply to an entire class of persons, it will be set aside on appeal. *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach, d/b/a Palm Beach Kennel Club and Palm Beach Jai Alai et al.*, 747 So.2d 374, 376 (Fla. 1999). In *Investment Corp.*, the Florida Supreme Court considered an appeal which involved organizations in thoroughbred racing seeking review of issuance of a declaratory statement by the Division of Pari-Mutuel Wagering regarding applicability of several statutory provisions in determining distribution of uncashed tickets and breaks. *Investment Corp.* at 375. In *Investment Corp.*, the Division issued a declaratory statement and additionally recognized that a similar fact pattern may exist between other tracks in Florida, and that the same dispute may reoccur between one of these Petitioners and a non-Petitioner. Therefore, the Division expressed its intention to initiate rulemaking to establish an agency statement of general applicability. *Investment Corp.* at 376. The Court held that if an agency is presented with a petition for a declaratory statement

requiring a response that amounts to a rule, the agency should decline to issue the declaratory statement and initiate rulemaking. *Investment Corp.* at 381. The Court continued by stating that a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person. The Court ultimately concluded that it was not aware of any rule of law that precludes an agency from simultaneously pursuing a declaratory statement and initiating rulemaking. *Investment Corp.* at 385. Consequently, it is arguable under *Investment Corp.*, that the Commission could issue a declaratory statement and initiate a generic proceeding followed by rulemaking, if warranted. However, in *Investment Corp.* the circumstances involved a unique industry having very limited participants engaged in almost identical operations. *Investment Corp.* at 385.

11. In the present docket, intervention has been requested by the three large ILECs, six small ILECs, and the FCTA on behalf of the entire cable telecommunications industry in Florida. A declaratory statement by the Commission would necessarily adopt a broad agency policy and provide statutory construction that would apply to an entire class of persons. Section 120.565(3), Florida Statutes, provides that the declaratory statement or denial of the petition must occur within 90 days after the filing of the petition. Consequently, the declaratory statement mechanism and 90 day time restriction cannot accommodate meaningful participation by the multiple parties in a very large communications industry. Accordingly, the issues raised by CNM in its Petition should more appropriately be addressed in a generic proceeding which would also permit the identification of all relevant related issues.

B. The Commission Should Immediately Stay Its Generic Proceeding Pending a Determination by the FCC of the Issues Presented by VoIP.

12. The FCC in its 1998 Report to Congress stated:

We also consider below the regulatory status of various forms of "phone-to-phone" IP telephony service mentioned generally in the record. The record currently before us suggests that certain of these services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services," **but we do not believe it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.** (emphasis supplied).

In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), released April 10, 1998, at 4. Thus, while the FCC included dictum in its Report to Congress to the effect that VoIP service may have more of the characteristics of telecommunications services than information services, it declined to make any definitive pronouncements. Under the FCC's framework, Internet service providers are not treated as carriers for purposes of interstate access charges, interconnection rights under Section 251, and universal service contribution requirements. Report to Congress at 106. The FCC further held that hybrid services that include telecommunications and information service components are information services. Report to Congress at 56-57. In the final analysis, the FCC to date has not formally considered the legal status of VoIP. Report to Congress at 83. The FCC did determine that computer-to-computer VoIP does not appear to be providing telecommunications to its subscribers. Report to Congress at 87. Significantly, in its Report to Congress, the FCC stated the following:

Because of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.

Report to Congress at 90. Currently, the FCC has indicated that VoIP is generally exempt from access charges under the enhanced service provider (ESP) exemption. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, (Notice of Proposed Rulemaking) released April 27, 2001, at 6.

13. VoIP still constitutes a minute fraction of global voice traffic, close to one percent of that traffic at best. *In the Matter of Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP (Phase II) Hearing on Friday, July 6, 2001, (Reciprocal Compensation Docket), Transcript at 745. On March 29, 2001, FCC Chairman Powell testified before Congress that:

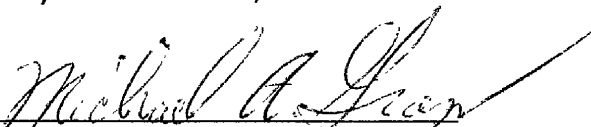
[O]ne of the reasons I tend to resist prematurely intervening in a context of IP telephony is because it is engaged in a wonderful period of innovation, experimentation ... and consumers are really reaping the benefit of its deployment.

Agenda and Plans for Reform of the FCC: Hearing before the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee, 107th Cong. 24, Testimony of Chairman Powell (March 29, 2001).

VoIP is an issue simmering in several dockets at the FCC, including the impact of VoIP on Federal Universal Service Funding, the Intercarrier Compensation docket, and the AT&T Petition for Declaratory Ruling. With respect to the AT&T Petition for Declaratory Ruling, the FCC, on November 18, 2002, has already solicited comments due on December 18, 2002, and reply comments due on January 7, 2003. Only a ruling by the FCC can provide the necessary leadership and uniform national policy that can provide guidance to the states. Accordingly, the Commission should stay the generic proceeding pending a determination by the FCC of the regulatory status of VoIP and the numerous related issues.

WHEREFORE, the FCTA respectfully requests (1) that the Commission enter an Order sustaining the FCTA's standing and grant its Petition to Intervene in this docket; (2) that the Commission open a generic investigative docket to comprehensively consider the issues presented by VoIP followed by a rulemaking if warranted, and (3) that the Commission immediately stay its generic proceeding pending a determination by the FCC of the regulatory status of VoIP and the numerous related issues.

Respectfully submitted this 2nd day of December, 2002.


Michael A. Gross
Vice President, Regulatory Affairs
& Regulatory Counsel
Florida Cable Telecommunications Association
246 E. 6th Avenue
Tallahassee, FL 32303
Tel: 850/681-1990
Fax: 850/681-9676

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response of Florida Cable Telecommunications Association, Inc.'s to CNM Network, Inc.'s Motion to Dismiss the Petitions for Intervention, or, in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action in Docket 021061-TP has been served upon the following parties by U.S. Mail this 2nd day of December 2002:

Samantha Cibula, Esq.
Division of Legal Service
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399

Floyd Self, Esquire
Messer, Capareello & Self, P.A.
215 South Monroe Street, Suite 701
P.O. Box 1876
Tallahassee, FL 32302

BellSouth Telecommunications, Inc.
Nancy White/James Meza III
c/o Ms. Nancy H. Sims
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Ausley Law Firm
J. Jeffry Wahlen
P.O. Box 391
Tallahassee, FL 32302

Blooston Law Firm
Benjamin Dickens
2120 L Street, NW
Suite 300
Washington, DC 20037

CNM Network, Inc.
4100 Guardian Street
Simi Valley, CA 93063

Gibson, Dunn & Crutcher, LLP
Robert Metzger/Joseph Scavetta
333 South Grand Avenue
Los Angeles, CA 90071

Harriett Eudy
Northeast Florida Telephone
11791 110th Street
Live Oak, FL 32060

McWhirter Law Firm
Joseph McGlothlin/Vicki Kaufman
117 S. Gadsden St.
Tallahassee, FL 32301

Sprint
Susan Masterton/Charles Rehwinkel
(MC FLTLH00107)
P.O. Box 2214
Tallahassee, FL 32316-2214

Verizon
Kimberly Caswell
FLTC0007
201 North Franklin Street
P.O. Box 110
Tampa, FL 33601-0110

ALLTEL Corporate Services, Inc.
Steve Rowell/Bettye Willis
One Allied Drive
Little Rock, AR 72203-2177

Coral Telecom, Inc.
Angela Green
2292 Wednesday Street, Suite 2
Tallahassee, FL 32308-4334

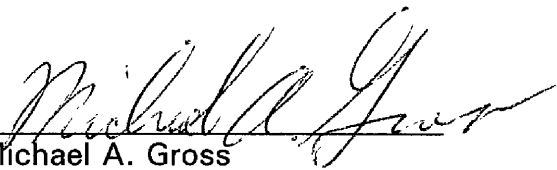
Chris Burke
Tom McCabe
c/o David B. Erwin
127 Riversink Road
Crawfordville, FL 32327

Frontier Communications of the
South, Inc.
180 South Clinton Avenue
Rochester, NY 14646-0700

ITS Telecommunications Systems,
Inc.
P.O. Box 277
Indiantown, FL 34956-0277

NEFCOM
Ms. Harriet Eudy
11791 110th Street
Live Oak, FL 32060-6703

TDS Telecom/Quincy Telephone
107 Franklin Street
Quincy, FL 32351


Michael A. Gross