

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Declaratory) DOCKET NO. 960355-TP
Ruling, Institution of) ORDER NO. PSC-96-1545-FOF-TP
Rulemaking Proceedings, and) ISSUED: December 19, 1996
Injunctive Relief, Regarding)
Intrastate Telecommunications)
Services Using the Internet, by)
America's Carriers)
Telecommunication Association)
_____)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING PETITION FOR DECLARATORY RULING,
INSTITUTION OF RULEMAKING AND INJUNCTIVE RELIEF

BACKGROUND

By the Commission:

On March 19, 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 asked that we 1) issue a declaratory ruling establishing our authority over intrastate telecommunications services using the Internet; 2) issue 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.¹

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. Comments to the FCC were filed on May 8, 1996; reply comments were filed June 8, 1996. Certain information contained in those comments is referred to in n. 2, infra.

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FPSC-RECORDS/REPORTING

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 the following provisions of the Florida Statutes:

"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(1), Florida Statutes)

ACTA further claims that the software companies violate Section 364.08(2):

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)

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, p. 2-3)

ACTA asserts 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 Statutes Sec. 364.04, 364.08, and 364.33." (Petition, p. 5)

ACTA's final request is that 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 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.

ACTA's argument in support of its position that we have 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 U.S.

Supreme Court found that regulatory authority over cable television was necessary if the FCC was to perform its other responsibilities. ACTA submits that, similarly, we 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, p. 7-8).

DISCUSSION

The critical issue to be addressed here is whether the manufacture and sale of software to be used on the Internet constitutes "telecommunications services for hire". Failing that, the other issues presented become moot. We believe 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 the provision of two-way telecommunications services to the public for hire, as defined in the above-cited 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 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. (id.)

Related Matters

Although not the subject of ACTA's petition, it is significant 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. 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 provisions of service may be treated differently for regulatory purposes than the mere provision of software.

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. We have addressed this matter below. N. 2, infra.

We conclude that 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. 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. We therefore deny ACTA's petition for declaratory ruling, and deny the further relief requested as moot.

In addition, we also conclude that workshops are necessary 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.

It is of particular 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.²

A study provided by ACTA describes the process by which those services may be impacted. 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.

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 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 five times the normal cost per line for office equipment. At the same time, revenues generated by the ISP totaled about \$20,000 per month.

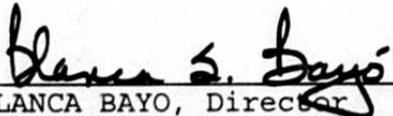
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In view of the above, it is

ORDERED by the Florida Public Service Commission that America's Carriers Telecommunications Association's Petition for Declaratory Ruling, Institution of Rulemaking and Injunctive Relief is denied. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 19th day of December, 1996.



BLANCA BAYO, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.