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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of THE PROVISION OF INTERSTATE AND INTERNATIONAL INTEREXCHANGE TELECOMMUNICATIONS SERVICE VIA THE "INTERNET" BY NON-TARIFFED, UNCERTIFIED ENTITIES	RM No. 8775

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. § 1.405(b), hereby replies to comments submitted by other Parties in response to the Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking ("Petition") filed by the America's Carriers Telecommunication Association ("ACTA") on March 4, 1996 and subsequently assigned Rulemaking No. 8775.

I.

INTRODUCTION

In its Petition, ACTA urged the Commission, among other things, to "issue a declaratory ruling establishing its authority over interstate and international telecommunications services using the Internet . . . and [to] institute rulemaking proceedings defining permissible

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communications over the Internet." In its Comments, TRA advised the Commission that it shared ACTA's concern regarding the common carrier provision of voice telephony and other basic telecommunications services over the Internet without benefit of regulatory certification and/or tariffs and, critically, at little or no charge. TRA agreed with ACTA that the Commission's jurisdiction extended to the transmission of voice telephony and other basic interstate and international telecommunications services offered on a common carrier basis irrespective of the medium of transmission and hence supported ACTA's request for issuance of a declaratory ruling asserting jurisdiction over, and for initiation of a rulemaking to determine the extent to which the Commission should regulate, the provision of such services via the Internet.

TRA urged, however, that the rulemaking so initiated should not, as proposed by ACTA, address the end result, but rather the underlying cause, of the problem ACTA has identified. TRA explained that the principal harm arising from the common carrier provision of voice telephony and other basic telecommunications services over the Internet -- *i.e.,* the ability of Internet access providers ("IAPs") to offer these services at little or no charge -- flows directly from the exemption currently enjoyed by enhanced service providers ("ESPs") from payment of interstate switched access charges, as well as from payment of other fees and assessments levied on interexchange carriers ("IXCs"). TRA argued that this problem would be best remedied by reforming the Commission's existent access charge structure to remove all excess costs, as well as to eliminate all subsidies, currently embedded in interstate switched access charges and by then applying these rationalized access charges, as well as all other fees and assessments borne by IXCs, to all providers of interstate/international telecommunications services, including ESPs and IAPs.

II.

ARGUMENT

The carrier commenters,[1] including both IXCs and local exchange carriers ("LECs"), were virtually unanimous in their view that the root of the problem identified by ACTA lay with the exemption from payment of interstate switched access charges currently enjoyed by ESPs. The carrier commenters also concurred that the Commission should expeditiously reform its access charge regime, removing from interstate switched access charges all excess costs and embedded subsidies Many of the carrier commenters further agreed with TRA that the ESP exemption has outlived its usefulness and should be promptly eliminated. Carrier commenters, however, differed in their views regarding the extent to which the Commission could or should regulate voice telephony and other basic services provided over the Internet and how these services should be classified for regulatory purposes.

Users and providers of Internet services and software[2] espoused a far more parochial view. These commenters urged the Commission to maintain the status quo, arguing

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[1] *See, e.g.,* AT&T Corp. ("AT&T), Sprint Corporation ("Sprint"), WorldCom, Inc. d/b/a LDDS WorldCom, American Telegram Corporation ("ATC"), United States Telephone Association ("USTA"), Pacific Bell and Nevada Bell ("Pacific Bell"), Southwestern Bell Telephone Company ("SWBT") and U S West, Inc. ("U S West"), National Telephone Cooperative Association ("NTCA").

[2] *See, e.g.,* BBN Corporation ("BBN"), Business Software Alliance ("BSA"), Center for Democracy and Technology ("CDT"), Commercial Internet eXchange Association ("CIeA"), Compuserve, Incorporated ("Compuserve"), Computer Professionals for Social Responsibility and The Benton Foundation (collectively "CPSR/BF"), Information Technology Association ("ITA"), Microsoft Corporation ("Microsoft"), Information Technology Industry Counsel ("ITIC"), Millin Publishing Group, Inc. ("Millin"), Netscape Communications Corporation, Voxware, Inc. and Infosoft, Inc. (collectively "Netscape"), New Media Coalition for Marketplace Solutions ("NMCMS"), Software Publishers Association ("SPA"), Third Planet Publishing, Inc. and Freetel Communications, Inc. (collectively "Third Planet"), VocalTec Ltd and Quarterdeck Corporation (collectively "VocalTec"), and the Voice-on-the-Net Coalition ("VON Coalition").

not only that the Commission should not, but could not, grant the ACTA Petition. According to these commenters, the Commission simply lacks the authority necessary to regulate the provision of voice telephony and other basis services provided over the Internet, adding that even if its jurisdiction extended to the Internet, the Commission should not exercise that authority because any such regulatory intrusion would hinder the growth and development of Internet services. These commenters contend that the ACTA Petition constitutes little more than an exercise in "technological ludditism" and "regulatory protectionism."

In opposing the ACTA Petition as reactionary and protectionist, users and providers of Internet services and software miss the central point of this debate. The effort here is not to stymie competition or to slow innovation; rather it is to ensure fair and equitable competition. As TRA and other commenters have demonstrated in their comments, the price advantage enjoyed by Internet voice telephony and other basic services is a function of a regulatory aberration, not a cost or technological superiority. IAPs can provide voice telephony and other basic services at little or no charge to consumers primarily because the Commission classifies them as ESPs and ESPs are currently exempted from paying interstate switched access charges,[3] as well as other regulatory fees and assessments levied on IXCs.[4] Whatever the merits of the ESP exemption may have once been, it is certainly not "regulatory protectionism" to demand that all similarly-situated providers of like services shoulder the same regulatory cost

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[3] ESPs generally pay local business rates and interstate subscriber line charges, or in the case of private lines, special access surcharges to originate and terminate interstate switched traffic.

[4] Among other things, IXCs pay regulatory fees (Assessment and Collection of Regulatory Fees for Fiscal Year 1995, 10 FCC Rcd. 13512 (1995)), contribute to the Telecommunications Relay Services fund (Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, 8 FCC Rcd. 5300 (1993)), and will soon directly fund universal service support (Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 96-93 (released March 8, 1996)).

burdens. As Internet voice telephony becomes less and less distinguishable from traditional voice services, differences in the regulatory treatment of the two services will become more and more glaring and harmful.

As TRA and others pointed out in their comments, the exemption afforded ESPs from interstate access charges in 1983 was intended to be "temporary," designed to avoid unduly burdening the then "fledgling" ESP industry and disrupting the provision of information services to the public.[5] The Commission, however, was always cognizant of the discriminatory aspects of the ESP exemption, repeatedly expressing concern that "to the extent enhanced service providers are exempt from switched access charges, other users of exchange access are forced to bear a disproportionate share of the local exchange costs that access charges are designed to cover."[6] The Commission nonetheless elected to retain the exemption in 1988 and again in 1991, reasoning that other countervailing factors then justified such action.[7] The Commission reasoned in both instances that because the enhanced services industry was "in a uniquely complex period of transition," imposition of switched access charges could result in industry disruption, market displacement and service impairment "without yielding concomitant benefits."[8]

Today, elimination of the ESP exemption would yield "concomitant benefits" by eliminating an unfair competitive advantage afforded IAPs in the provision of voice telephony

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[5] Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd. 2631, ¶ 2 (1988).

[6] Id. at ¶¶ 2, 19.

[7] Id. at ¶¶ 13-20; *see also* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd. 4524, ¶¶ 544-65 (1991).

[8] Id.

and other basic services over the Internet. Moreover, the Commission is in a position to minimize the adverse impact of the elimination of the ESP exemption on the enhanced services industry by implementing the access charge reform it has already committed to undertake in conjunction with its implementation of the local competition and universal service mandates embodied in the Telecommunications Act of 1996 ("'96 Act").[9] The Congress has already directed that universal service funding be "explicit," instructing the Commission to recover subsidies through express contributions rather than by means of implicit payments such as those embedded in the carrier common line charge ("CCLC").[10] And it is imperative that interstate switched access charges be driven toward cost as part and parcel of the Commission's implementation of the local competition provisions of the '96 Act.[11]

If the Commission's access charge regime is rationalized, there is no reason not to extend interstate switched access charges to IAPs and other ESPs. Not only would access charges be reduced by a substantial margin, thereby mitigating any adverse impact on IAPs and ESPs, but the significant maturation of the "fledgling" enhanced services industry in the decade following adoption of the ESP exemption and in the five years since the Commission last elected

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[9] Pub. L. No. 104-104, 110 Stat. 56 ("'96 Act"); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-182, ¶¶ 3, 165 (released April 19, 1996).

[10] 47 U.S.C. § 254(e).

[11] 47 U.S.C. §§ 251, 252.

to retain the exemption has dramatically reduced the justification for the additional protections afforded ESPs.[12] As to the continuing dramatic changes brought about by legislation, regulation and technological advancements, the enhanced services industry is not being uniquely impacted; indeed, the entire telecommunications industry is being buffeted seemingly on a daily basis. Other recipients of "temporary" exemptions from the Commission's "comprehensive" access charge regime -- including TRA's resale carrier members -- now pay interstate switched access charges,[13] further fulfilling the Commission's stated goal of "distribut[ing] the costs of exchange access service fairly among all users of exchange access, regardless of their designation as carriers, non-carrier service providers or private customers."[14] It is time for ESPs to do likewise.

In TRA's view, the debate over the appropriate regulatory classification of voice telephony and other basic services provided on a common carrier basis over the Internet would effectively be rendered moot if the Commission levied upon ESPs interstate switched access charges and the other fees and assessments currently borne by IXCs. If the regulatory cost burden were to be equalized, the question of whether such Internet services are "basic," "enhanced," or "adjunct to basic" would lose much of its relevance. While TRA firmly believes that the Commission has the authority to regulate the common carrier provision of voice

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[12] As the Commission has recognized, the enhanced services industry is now a multi-billion dollar market segment populated by major corporate providers and experiencing double-digit growth. Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 10 FCC Rcd. 8360, ¶ 33 (1995) (*citing* U.S. Industrial Outlook 1994, U.S. Department of Commerce/International Trade Administration (January, 1994)).

[13] WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, FCC 86-115 (released March 21, 1986), FCC 86-377 (released August 26, 1986).

[14] Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd. 2631 at ¶ 2 (*citing* MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 77 (1983)).

telephony and other basic services irrespective of the medium of transmission,[15] its primary interest here is not in seeing Internet services regulated. Rather, TRA seeks to ensure that voice telephony and other basic services provided over the Internet are not afforded an unfair competitive advantage merely by reason of a chance regulatory classification.

The only "regulatory protectionism" being sought here is by those who are currently afforded a clear cost advantage due to a regulatory quirk. Remove that advantage by equalizing the regulatory cost burdens imposed on IXCs and IAPS/ESPs and competition becomes fair and equitable, "ensur[ing] that a firm's prowess in satisfying consumer demand . . . determine[s] its success or failure in the marketplace."[16] This is the only regulatory relief that TRA believes is necessary here.

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[15] As TRA argued in its Comments, voice telephony and other basic services provided over the Internet are not being enhanced in any manner; the service being provided is basic voice or other service no different that than being provided over the public switched telephone network. The Commission has recognized, at least in spirit, that protocol conversions that are used "merely to facilitate provision of an overall basic service" should be treated as basic, not enhanced, services. Independent Data Communications Manufacturers Association, Inc.: Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service, 10 FCC Rcd. 13717, ¶¶ 11-18 (1995). And the Commission has classified as "adjunct to basic" and treated as basic for regulatory purposes, services that "might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly 'basic' in purpose and use." North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, 101 F.C.C.2d 349, ¶ 24 (1985). Neither Section 502 nor 509 of the '96 Act alter this structure. The former merely states that nothing in Section 502 (Obscene or Harassing Use of Telecommunications Facilities Under the Communications Act of 1934) provides the Commission with an additional basis for treating interactive computer services as common carriers or telecommunications carriers; Section 502 does not alter current Commission regulatory structures and applies only to interactive computer services. Section 509 articulates a general policy that governance of "Internet and other interactive computer services" be left to the market rather than regulation. This policy, however, does not speak to telecommunications services -- the offering of the "means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153 (r)(48), (51) -- which the Commission is clearly empowered to regulate. Voice telephony and other basic services are telecommunications services irrespective of the medium of their transmission.

[16] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-182 at ¶ 1.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking filed by America's Carriers Telecommunication Association to the extent consistent with the positions taken by TRA here and in its earlier filed Comments.

Respectfully submitted,

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