

AUG 11 1992

Decision 92-08-009 August 11, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Triax Telecom, inc., for a)
certificate of public convenience)
and necessity to provide resale)
telecommunications services within)
California.)

ORIGINAL

Application 91-10-024
(Filed October 7, 1991)

OPINION

Triax Telecom, Inc. (applicant), a California corporation, seeks a certificate of public convenience and necessity (CPCN) under Public Utilities (PU) Code § 1001 to permit it to resell interLATA telephone services in California.¹ Applicant also seeks exemption from the requirements of PU Code §§ 816-830, dealing with the issuance of stocks and other evidences of ownership and bonds, notes, and other evidences of indebtedness.

As a reseller, applicant proposes to provide increased discounts for the interLATA long-distance telephone traffic of its shared tenant subscribers, primarily by using the telecommunications facilities of facilities-based carriers. Applicant's own facilities consist solely of telephone switches located on the premises of apartment buildings, condominium complexes, and other multi-unit properties.

¹ California is divided into ten Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes services, revenues, and functions that relate to telecommunications originating in one LATA and terminating in another. "IntraLATA" describes services, revenues, and functions that relate to telecommunications originating and terminating within a single LATA.

The Application

As proposed in its application, applicant will rely on the interLATA network ownership, operation and management of underlying carriers, such as, AT&T, MCI, and US Sprint. Applicant will not own, operate, or manage any telecommunications equipment or facilities other than its premises PBX switches. Applicant will engage the services of the certified underlying carrier chosen by the subscriber to provide interLATA service. Together, applicant and the underlying carriers will provide reliable call completion and prompt response to and resolution of service problems, including customer service troubleshooting 24 hours a day, seven days a week.

In Decision (D.) 90-08-032, as modified by D.91-10-041, the Commission established two major criteria for determining whether a CPCN should be granted: financial fitness and technical expertise. An applicant who does not own, control, operate, or manage telephone lines as conventionally defined (switchless reseller) must demonstrate that it has a minimum of \$75,000 in uncommitted cash or equivalent financial resources. An applicant who does own, control, operate, or manage telephone lines must have a minimum of \$400,000. These minimum requirements increase 5% per year starting in 1992. In addition, an applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

Applicant seeks to qualify for the reduced financial requirement of a switchless reseller. Applicant alleges that it meets the requirements of a switchless reseller approved in the Spectrum II application resulting in D.90-12-011.

The application is not protested.

Subsequent Information

On December 26, 1992, the assigned Administrative Law Judge (ALJ) requested that applicant address the more recent prerequisite for a switchless reseller in D.91-10-041, namely, the

prohibition against ownership, operation or control of switches. In response, applicant explained that it employs its switches solely for the purpose of providing shared tenant services and not to provide interLATA long distance services. The assigned ALJ indicated that under these circumstances she must limit the use of switches in any authority granted.

On or about February 25, 1992, the Commission Advisory and Compliance Division (CACD) informed the assigned ALJ that applicant was soliciting California residents to provide long distance service prior to the granting of its authority to operate these services in this state. The assigned ALJ immediately sent a letter to applicant enclosing a copy of applicant's December 1991 "Season's Greeting" card advertising long distance service. (The advertisement is attached as Appendix A.) This card was mailed to the residence of a Commission staff member in late 1991. The staff member forwarded the card to CACD and CACD, in turn, forwarded it to the assigned ALJ. The assigned ALJ asked applicant to explain this solicitation prior to the granting of authority, cautioned applicant that unlawful advertising is punishable under Public Utilities Code §§ 2107, 2108, and 2110, and informed applicant that unlawful advertising prior to certification may constitute sufficient evidence of unfitness to operate in California.

Applicant responded with arguments that its advertising was lawful. Applicant is an interstate carrier who contends it is lawful to provide intrastate service that occurs during interstate operations. Applicant contends that the Commission's policy of authorizing "incidental" intraLATA message toll services in interLATA communications applies to its provision of interstate services. We disagree.

Discussion

In this proceeding, applicant admits that it solicited long distance service in California without expressly disclosing that no California service is authorized. Applicant does not deny

that it provides interLATA and intraLATA service in California without Commission approval. Applicant argues that it is engaging in a claimed right to advertise interstate services for which federal approval is not needed. Applicant contends that it is lawfully treating intrastate calls that cannot be blocked or defaulted to local carriers as "incidental traffic", which is applicant's extension of our policy for certain intrastate message toll service. Applicant includes in the term, "incidental traffic", services which are not overtly offered for sale to the public. Applicant contends that its employees are instructed to inform customers that applicant is not yet certified to operate in California. Applicant contends that customers are also informed that, should they have an intrastate calling requirement, this traffic must be handled by applicant as "incidental traffic" until its operation is certified in California. However, applicant denies that it intends to hold itself out to provide, or that it provides, unlawful intrastate service.

Pending granting of the requested certificate, applicant requests authority to credit California customers with the amount of the margin (profit) applicant has and will obtain on the resale of its underlying carrier's services. Applicant believes that its willingness to make credits and its abstaining from overt sales of intrastate services removes any indication of "holding out" to provide unlawful service in California.

In D.84-01-037 we prohibited the "holding out" to provide intraLATA carriage by interexchange carriers (IEC); however, we allowed intraLATA service which is "incidental" to interLATA carriage because it proved to be impractical to block such intraLATA service. We required that IECs engaging in incidental intraLATA service inform customers of the limits of their authority. Further, in D.90-08-066 we ordered IECs not to offer or advertise intraLATA services that they are not authorized to provide. Recently, in D.92-01-020 we defined unlawful intraLATA

traffic as service affirmatively intended to be offered without applicable authority. We declined to define incidental service based upon the quantity of intraLATA traffic carried.

Here, applicant seeks to broadly extend this policy, and define as "incidental to" applicant's interstate service, all intrastate traffic (both interLATA and intraLATA). This we are unwilling to do based upon an overbroad and impermissible construction of our decisions. We have never stated that we will not exercise our jurisdiction over intrastate telephone operations, even if such operations are "incidental" to interstate operations. Such intrastate operations are undisputably subject to our jurisdiction, and applicant points to no authority which states otherwise.

Since we decline to extend our policy on incidental intrastate traffic to applicant's interstate service and since applicant admits advertising and engaging in the provision of service prior to certification, we must find that applicant has engaged in unlawful operations. We will order applicant to cease these operations immediately.

We have no conclusive evidence that applicant wilfully engaged in unlawful operations. Nor have we conducted hearings on this issue. Therefore, daily fines for this behavior are not warranted. However, applicant's misinterpretation or ignorance of our regulations is no defense to its conduct. At any time prior to engaging in business in this state, applicant could have inquired about its interpretation of incidental service. Since applicant chose to act first and has never inquired if these acts are lawful, we have grave concerns of whether applicant will abide by the rules and regulations of this Commission. Therefore, we must find that applicant is not yet fit to conduct operations in this state.

Based upon applicant's offer to issue credits to California customers, applicant has obviously implemented unapproved tariffs containing rules and rates used to bill

California customers for unlawful services. We will order applicant to refund all amounts paid by California customers for interLATA and intraLATA service in California, plus 7% interest.

One of our greatest concerns in certifying reseller operations is financial ability to pay debts. Therefore, we will order applicant to pay all balances due to underlying carriers and other creditors accrued in connection with unauthorized California service. We will order applicant to pay all fees applicable to providing service. We will not allow the filing of a new application for certification until our orders in this proceeding are fully complied with.

Accordingly, we deny this application without prejudice and order applicant to provide within 30 days from the effective date of the order written proof that the order in this proceeding has been followed.

Findings of Fact

1. Applicant, a California corporation, requests authority to resell telecommunications services in California.
2. Prior to the certification of applicant's request, applicant solicited customers in California, provided telecommunications services to these customers, and received payment from these customers for the services provided.
3. Applicant has engaged in business operations without proper Commission authority.
4. Customers are entitled to a refund of amounts paid for unlawful service.
5. Underlying carriers and other creditors are entitled to payment for services rendered in the provision of unlawful service.

Conclusions of Law

1. Applicant has engaged in telecommunications operations in California without authority from this Commission.
2. Customer deposits and payments for unauthorized services should be refunded, plus 7% interest.

3. Applicant should pay all fees applicable to the provision of service.

4. Amounts incurred to provide unauthorized service in California owed to underlying carriers and other creditors should be paid in full.

5. This application should be denied without prejudice.

6. Because of the unlawfulness of applicant's acts, this order should be effective immediately.

ORDER

IT IS ORDERED that:

1. The application of Triax Telecom, Inc. (applicant) for a certificate of public convenience and necessity to provide the resale of telecommunications services within California is denied without prejudice.

2. Applicant shall immediately cease and desist telecommunications operations within California until it is authorized to operate these services.

3. Applicant shall immediately refund to California customers all deposits and payments received for California service, plus 7% interest.

4. Applicant shall pay all debts incurred to provide unauthorized service as they become due.

5. Applicant shall pay to the Commission the following fees:

a. A surcharge of 3.4% for service rendered prior to July 1, 1991, 3.0% for service rendered from July 1, 1991 to July 1, 1992, and 4.0% for service rendered on and after July 1, 1992, applicable to the service rate of intraLATA toll and intrastate interLATA toll for the Universal Lifeline Telephone Service Fund. (PU Code § 879; Resolution T-14081);

b. The current 0.3% surcharge on gross intrastate interLATA revenues for

Telecommunications Devices for the Deaf (PU Code § 2881; Resolution T-14400); and,

- c. The user fee provided in PU Code §§ 431-435, which is 0.1% of gross intrastate revenue for the 1991-92 fiscal year. (Resolution M-4754)

6. Applicant shall provide written confirmation that this order has been followed to: Commission Advisory and Compliance Division, Telecommunications Branch, 505 Van Ness Avenue, San Francisco, CA 94102.

7. Applicant shall comply with this order prior to the filing of another application for the resale of telecommunications services in this state.

This order is effective today.

Dated August 11, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

Commissioner John B. Ohanian,
being necessarily absent, did not
participate.

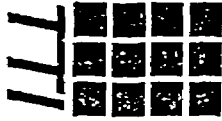
I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY


NEAL J. SHULMAN, Executive Director

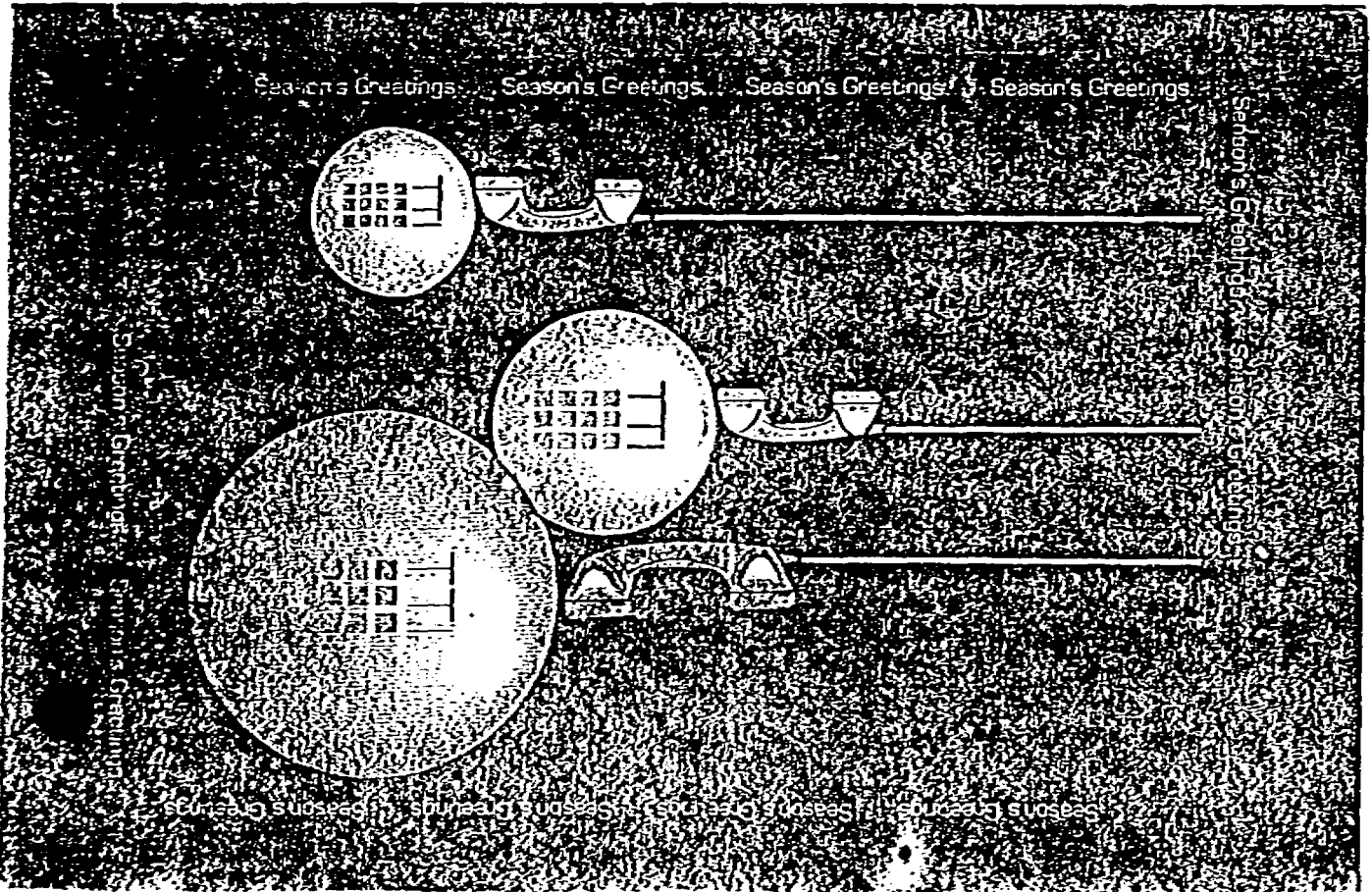
APPENDIX A

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Triax Telecom, Inc. is an affiliate of Triax Communications Corporation, reported in 1990 by Inc. magazine as the 180th fastest growing company in America. Triax is headquartered in Denver, Colorado.



1-800-117-1111
Triax Telecom, Inc.
275 Millar Avenue
Mill Valley, CA 94041



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APPENDIX A

Page 2

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A.91-10-024 /ALJ/PAB/Jac

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A.91-10-024 /ALJ/PAB/J&C

APPENDIX A
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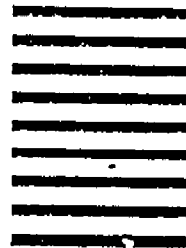
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(END OF APPENDIX A)