

TELECOMMUNICATIONS MARKET COMMISSION

Case no: **2001/5239**

MS/ab

In connection with the request made by the entity **FLASH10 FIBRE OPTICS NET, S.A.** on 17 August 2001, and for its information, due notification and other purposes, we attach the Resolution adopted by the Council of the Telecommunications Market Commission at its Meeting of 27 September 2001.

Madrid, 2 October 2001.

[signed]

Juan Junquera Temprano

DIRECTOR OF OPERATOR REGULATION
PP COMMISSION COUNCIL
(Resolution of 15/12/2000, gazetted on 26/12/2000)

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I, JOSÉ GIMÉNEZ CERVANTES, Esq., Secretary of the Council of the Telecommunications Market Commission, employing the powers granted by Article 40 of the Regulations of the Telecommunications Market Commission, approved by Royal Decree 1994/1996, of 6 September, hereby

CERTIFY:

That, at its Meeting of 27 September 2001, the Council of the Telecommunications Market Commission adopted the following **RESOLUTION** in connection with **case no. 2001/5239**.

"In compliance with the provisions of the General Telecommunications Act 11/1998, of 24 April, Royal Decree 1652/1998, of 24 July, regulating the Special Register of Holders of General Authorisations and the Ministerial Order of 22 September 1998, which establishes the regime applicable to general authorisations for telecommunications services and networks and the conditions to be complied with by the holders thereof, and in view of the following

I.- BACKGROUND FACTS

One. By means of a document submitted on 17 August of this year, **Agustín Bas Serra, Esq.**, acting for and on behalf of the entity **FLASH10 FIBRE OPTICS NET, S.A.**, tax number A-62/204516, with business address (and address for notification purposes) at c/ Mogoda, 1, Barberá del Vallés, Barcelona, provides notice of its desire to provide the following services: "on-demand audio-visual", "quasi on-demand audio-visual", "a la carte audio-visual", "audio-visual broadcasting", "videoconferencing", "messaging", "tele-banking", "tele-medicine", "tele-processing", "tele-shopping", "tele-booking", "tele-work", "tele-security", "tele-domotics" and interactive games, under the coverage of the Type C General Authorisation which it possesses.

Two. Accompanying the notification document is a responsible declaration assuming the conditions established in the Ministerial Order of 22 September 1998 for General Authorisations and those which, in each individual case, are applicable.

Three. In the technical documentation submitted, the applicant company states that the services it intends to provide shall be supplied via the company's data network. As regards the formats of the audio-visual and/or television content, these shall be supplied in the form of specific programmes, television channels with or without postproduction, supplied by audio-visual production companies (public, private, foreign) or other telecommunications operators, with or without interactivity.

Tele-banking, tele-medicine, tele-processing, tele-shopping, tele-booking, tele-work, tele-security, tele-domotics and interactive games shall also be provided by third parties, as shall videoconferencing and messaging services. In all cases, the applicant company shall be responsible before its customers for the service provided its customers.

Four. The company **FLASH10 FIBRE OPTICS NET, S.A.** is recorded in the Special Register of Holders of General Authorisations as holder of a Type C General Authorisation, in accordance with the resolution adopted by the Council of the Telecommunications Market Commission on 27 April 2000, and is currently providing, according to said Register, the services grouped under the name Internet Service Provider. Said company is also included in the Special Register of Holders of Individual Licences, as holder of a Type B1 Individual Licence, within the framework of the Autonomous Community of Catalonia, granted by resolution of the Council of the Telecommunications Market Commission of 22 June 2000.

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II.- BASES IN LAW

One. The General Telecommunications Act 11/1998, of 24 April, establishes, in Article 10 thereto, that a General Authorisation shall be required for the provision of telecommunications services and for the establishment and operation of telecommunications networks which do not require the granting of an individual licence.

Two. The Ministerial Order of 22 September 1998, which established the regime applicable to general authorisations for telecommunications services and networks and the conditions to be complied with by the holders thereof, states, in Article 4 thereto, that, to be entitled to provide a service or establish or operate a network for which a General Authorisation is required, the interested parties must provide the Telecommunications Market Commission notice of the fact.

Three. According to the provisions of Article 3.3 of the aforementioned Ministerial Order of 22 September, Type C General Authorisations permit holders to provide data transmission services to the public.

Four. Article 4.3 of the Ministerial Order of 22 September on General Authorisations establishes that the Telecommunications Market Commission shall carry out, ex officio, the recording of the details of the interested party and the service or network in the Special Register of Holders of General Authorisations, in accordance with the provisions of Article 8 of the General Telecommunications Act.

Five. The General Telecommunications Act defines the concept of telecommunications services as “*all transmission, emission, or reception of signs, signals, text, images, sound or information of any kind, by wire, radio-electricity, optical media or other electromagnetic systems*”.

Six. According to the General Telecommunications Act 11/1998, of 24 April, and its developing regulations, those services consisting in the hosting or storage of information, of whatever kind, which is transferred to users employing services provided by different operators under the terms of the empowering authorisations granted them may not be considered telecommunications services.

Seven. By virtue of the provisions of Article 1.Two 2.b of the Telecommunications Liberalisation Act 12/1997, of 24 April, this Telecommunications Market Commission has the power to grant empowering authorisations for the provision of telecommunications services. Consequently, it also has the power to determine, for such purposes, whether or not a service is a telecommunications service.

Eight. In view of the aforementioned regulations, and having studied the technical documentation submitted by the applicant company, a preliminary analysis must be made, in accordance with said provisions, as to which services are considered telecommunications services, in accordance with the definition included in the Annex to the General Telecommunications Act and which can thus be provided under a Type C General Authorisation, and which are considered not to be telecommunications services, but rather other services, such as information services, or services which the applicant company provides its customers:

a) Firstly, analysing in detail the description provided by the applicant company, it is considered that:

- “**On-demand audio-visual**”, “**quasi on-demand audio-visual**” and “**a la carte audio-visual**” services are interactive, personalised services which are provided

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by means of dedicated peer-to-peer channels, whereby users choose a specific programme via the network, which is executed by a remote server and seen at home in real time, which may be provided under a Type C General Authorisation under the generic name of “**transmission of information, text, images and sound by means of fixed public networks**”.

- Similarly, the **videoconferencing** service is a service supplied using digital technology, which transforms images and sound into data and, consequently, can also be provided under a Type C General Authorisation.
- The **messaging** service is considered to be a provision of e-mail which permits users who are connected at the same time to send or receive a message almost in real time, and thus need not be included in the requested broadening of the authorisation, since the applicant company is already providing this service under the generic title of “Internet Service Provider”.
- As far as the “**audio-visual broadcasting**” service is concerned, it should be noted that the Sixth Transitional Disposition of the General Telecommunications Act establishes that Articles 25 and 26 of the Telecommunications Regulation Act, relating to radio sound and television broadcasting services, shall remain in force until specific regulations governing said services are approved. Similarly, the sole derogatory disposition of the same Act repeals the Satellite Telecommunications Act 37/1995 and the Cable Telecommunications Act 42/1995, with the exception of the provisions on the regime governing television broadcasting services.

Consequently, audio-visual broadcasting services cannot be granted under the terms of the General Telecommunications Act, but rather in compliance with the regulations declared in force.

Similarly, as this Commission has indicated in different resolutions (for example, the resolution of 24 May 2001, replying to a query formulated by Baena Town Council) in respect of cable television broadcasting services, it can be stated that there are two elements which characterise radio and television broadcasting services and which distinguish them from other services which can, generically, be described as audio-visual:

- That the images and sound broadcast constitute programming pre-determined by the broadcaster.
- That the services are aimed simultaneously at a variety of users without the possibility of interacting with the service.

Any audio-visual activity which does not comply with the above conditions must be deemed to be covered by one of the sections contained in the General Telecommunications Act.

- b) As far as the **tele-banking, tele-medicine, tele-processing, tele-shopping, tele-booking, tele-work, tele-security, tele-domotics**, etc., services are concerned, in view of the provisions of the aforementioned regulations, it is considered that they cannot be deemed telecommunication services. Basically, they can be defined as the provision of information or facilities which are transferred to users employing the services provided by different operators, or by itself, under the terms of the empowering authorisations they have been granted and, consequently, their

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provision does not require one of the specific empowering authorisations contemplated in the General Telecommunications Act.

Nonetheless, in the case under review, given that the applicant company supplies the means via which the services reach users, it is considered that it is supplying the telecommunications service of “**supply of data switching by packets or circuits**”.

In view of the above, this Telecommunications Market Commission, exercising the powers granted it in Article 1.Two 2.b) and 2.n) of the Telecommunications Liberalisation Act 12/1997, of 24 April, Article 1 of Royal Decree 1652/1998, of 24 July, regulating the Special Register of Holders of General Authorisations and Article 4.3 the Ministerial Order of 22 September 1998, which establishes the regime applicable to general authorisations for telecommunications services and networks and the conditions to be complied with by the holders thereof

RESOLVES: That recording shall be made, in the Special Register of Holders of General Authorisations, of the modification by broadening of the **TYPE C GENERAL AUTHORISATION** already held by the company **FLASH10 FIBRE OPTICS NET, S.A.**, by Resolution of the Council of the Telecommunications Market Commission of 27 April 2000, to include the provision of the following services:

- ✓ **Videoconferencing**
- ✓ **Transmission of information, text, images and sound by means of fixed public networks** for “on-demand audio-visual”, “quasi on-demand audio-visual” and “a la carte audio-visual” services.
- ✓ **“The supply of data switching by packets or circuits”:**

This Type C General Authorisation does not cover the provision of the service defined by the applicant company as an “**audio-visual broadcasting**” service, as it is considered a broadcasting service which cannot be provided under a General Authorisation.

The interested party may commence provision of the services covered by this General Authorisation from the time of notification of this Resolution (Art. 4.4 of the Ministerial Order of 22 September, on General Authorisations).

Conditions

- ✓ Under no circumstances may the holder of a Type C General Authorisation provide telephone services over data networks on an interoperative basis with the service available to the public. To provide these services, it must request one of the provisional authorisations established by Chapter III of the General Telecommunications Act.
- ✓ The holder of this Type C General Authorisation must comply with the conditions established in the Ministerial Order of 22 September and applicable current regulations.
- ✓ The holder of this Authorisation may not support these services on networks installed by itself, or by other entities, unless these are covered by the relevant empowering authorisations.

Modification of registered information

- ✓ The holder of this Type C General Authorisation may provide other data transmission services which might be covered by said authorisation, by providing prior notification thereof to the Telecommunications Market Commission under the terms established in the Ministerial Order of 22 September.
The case opened as a result of this new notification will be processed as a modification by broadening of the Type C General Authorisation of which the interested party is already holder.

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- ✓ After a General Authorisation is first recorded, entries into the relevant Special Register shall be made of whatever modifications are made to the registered data, both as regards the holder and the authorisation. The holder of the authorisation shall have a duty to request recording of all modifications which affect the registered data, unless they arise from a ruling issued by the Ministry of Science and Technology or the Telecommunications Market Commission itself. The request must be submitted within one month of the day upon which the modification arises.

Control and inspection

- ✓ This General Authorisation shall be subject to the provisions of Title VIII of the General Telecommunications Act 11/1998, of 24 April, regarding the inspection of telecommunications services and networks, of the conditions of their provision, and of the telecommunication equipment and systems used, as well as the application of the penalty system.
- ✓ For the purposes of complying with the provisions of Article 11.2 of the General Telecommunications Act and Article 10.2 of the Ministerial Order of 22 September, the holder of the General Authorisation must supply the Telecommunications Market Commission with any information required to verify compliance with the duties imposed, to satisfy statistical needs and to comply with whatever requirements may be imposed by applicable regulations.

Expiration of authorisation

- ✓ When the interested party ceases to provide the service or to operate the network, it must notify the Telecommunications Market Commission of the fact, so that the latter may proceed to remove its entry from the Register. Similarly, ten years after the first recording and every ten years thereafter, it must notify the Telecommunications Market Commission, during the month immediately prior to the expiration of said period, whether it wishes to continue to provide the service or operate the network. Failure to provide notification under these circumstances shall result in removal of its entry from the Register, following the relevant proceedings.
- ✓ In accordance with the provisions of Article 13 of the General Telecommunications Act, when the provider of the service or an entity which establishes or operates a network commits a serious breach, in accordance with the indications of said Article, of any of the conditions established in the Ministerial Order of 22 September on General Authorisations, this Telecommunications Market Commission shall send it notification providing a period of one month in which to rectify said breach. If said rectification does not take place before expiration of said period, it may be removed from the Register, following the relevant removal proceedings.
- ✓ Similarly, removal from the Register shall occur, following the relevant proceedings, when the holder of an authorisation does not adapt itself, within the stipulated period, to a modification of conditions carried out by Ministerial Order, in accordance with the provisions of Article 11.2 of the General Telecommunications Act.

Levies

- ✓ In accordance with the provisions of Article 71 of the General Telecommunications Act and of Royal Decree 1750/1998, of 31 July, all holders of a General Authorisation for the provision of services to third parties shall have a duty to pay over to the Telecommunications Market Commission an annual levy which may not exceed two-thousandths of its gross operating income. The rate leviable shall be established for each year in the Spain's annual General State Budget. The levy shall fall due on an annual basis on 31 December. Within three months of the day following said due date, the holder of this General Authorisation must submit before the Telecommunications Market Commission's Administration and Economic Management Director a gross operating income statement for the due period."

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This certificate is issued under the terms of the provisions of Article 27.5 of Act 30/1992, of 26 November, and Article 23.2 of the Ministerial Order of 9 April 1997, which approves the Regulations of the Internal Regime of the Telecommunications Market Commission, prior to the approval of the Minutes of the relevant meeting.

It is also hereby placed on record that a discretionary appeal for reversal may be lodged against the resolution referred to herein, which brings to an end the administrative process, before this Commission within one month of the day following notification thereof, as may a direct contentious-administrative appeal before the contentious-administrative court of the *Audiencia Nacional*, within two months of the day following notification thereof, in accordance with the provisions of Article 1.eight of the Telecommunications Liberalisation Act 12/1997, of 24 April, Additional Disposition Four, Section 5, of the Contentious-Administrative Jurisdiction Regulation Act 29/1998, of 13 July. and Article 116 of the Legal Regime of Public Administrations and Common Administrative Proceedings Act 30/1992, of 26 November, without prejudice to the provisions of number 2 of Article 58 of the same Act.

APPROVAL OF VICE-CHAIRPERSON

[Signed]

Elisa Robles Fraga

THE SECRETARY

[Signed]

José Giménez Cervantes