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May 8, 1996

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MAY - 8 1996

FEDERAL BUREAU OF INVESTIGATION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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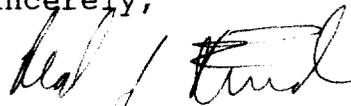
Re: RM-8775

Dear Mr. Caton:

Transmitted herewith on behalf of Third Planet Publishing, Inc. and FreeTel Communications, Inc. are an original and four (4) copies of their Joint Comments in the above-referenced proceeding.

Should you or the staff have any questions, kindly contact the undersigned.

Sincerely,



Neal J. Friedman

Enclosures

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

RECEIVED  
MAY - 8 1996  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
The Provision of Interstate and International ) RM-8775  
Interexchange Telecommunications Service Via the )  
"Internet" by Non-Tariffed, Uncertified Entities )

TO: The Commission

JOINT COMMENTS OF THIRD PLANET PUBLISHING, INC.  
AND FREETEL COMMUNICATIONS, INC.

Third Planet Publishing, Inc. ("Third Planet") and Freetel Communications, Inc. ("Freetel") (collectively "Commenters")<sup>1</sup>, by their attorney and pursuant to the *Public Notice*, DA 96-414 (released March 25, 1996) and Section 1.405 of the Rules of the Commission, hereby submit their Joint Comments in opposition to the above-captioned "Petition for Declaratory Ruling, Special Relief and Institution of Rule Making" ("Petition") filed on March 4, 1996 by America's Carriers Telecommunication Association ("ACTA" or "Petitioner")

1. ACTA's Petition correctly describes the technology marketed by Commenters and others. It then launches into a distorted and inaccurate recitation of the law, misstates the authority of the Commission to regulate the software industry and seeks to turn back the clock to the days of excessive and heavy-handed government regulation of the communications industry to protect monopolists. Whatever may have been left of that outdated government policy, disappeared with the enactment of the Telecommunications Act of 1996, Pub. L. No 104-105, 110 Stat 56 (1996) ("the 1996 Act"). ACTA's members are unable or unwilling to adjust to this new reality.

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<sup>1</sup> Commenters are competing developers and distributors of software that enables users to conduct voice communication over global computer networks such as the Internet. They are filing these Comments jointly for the sole purpose of conserving the Commission's scarce resources. They have no business connection whatsoever and are not engaged in any other joint efforts.

2. Commenters are among approximately a dozen companies that have found a way to take advantage of global computer networks<sup>2</sup> to greatly reduce the cost of long distance telephone service without demonstrably increasing the costs of those who maintain the global networks or burdening the users of such networks. The technology is in its infancy and requires some dexterity on the part of users. A computer equipped with a modem, microphone, headset or speakers, sound card and the software is required. The computer must be turned on to receive a telephone call and, in some cases, users must have the same software.

3. ACTA's argument that the Internet should come under Commission regulation is seriously flawed and flies in the face of the expressed intent of Congress in enacting the 1996 Act. Moreover, it asks the Commission to turn its back on more than two decades of past practice in which the Commission has failed to regulate global computer networks.<sup>3</sup> ACTA attempts to stretch the language of the 1996 Act to bring Internet service providers, commercial online services and software developers such as Commenters within the ambit of Commission regulation. ACTA provides no evidence for support of its claim that Commenters are "telecommunications carriers" within the meaning of 47 U.S.C. 153. Commenters neither own nor lease any telecommunications facilities other than for their own use. They provide no telecommunications services to anyone. They merely provide

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<sup>2</sup> The term "global computer networks" is used herein to encompass what is commonly known as the Internet as well as online services such as America Online, CompuServe, Microsoft Network and others that enable users to exchange information in various forms through interconnected computer networks.

<sup>3</sup> The Internet and similar global networks were first developed more than twenty years ago as a means of connecting university research centers and others in the defense community for the purpose of sharing information. The Internet was designed to be resistant to disruption in the event of an enemy attack. It is only within the past three to five years that the commercial uses of global networks have been recognized and exploited. The federal government, which formerly subsidized the communications backbone that supported the Internet, has now withdrawn in favor of private entities.

software to others who may or may not be users of telecommunications services offered by various communications common carriers. If the Commission were to accept ACTA's flawed logic, every Internet service provider, every college and university offering Internet services for its students and faculty and every commercial online service would need to come under the Commission's aegis under the theory that they were "telecommunications carriers" within the meaning of Section 153 of the 1996 Act. For two decades, the Commission has declined to regulate these services. ACTA provides no compelling reasons, other than its own self-interest, for the Commission to change its policy.

4. Even if the Commission were to consider regulating Commenters and others in the software industry, it would immediately run into the fact that it has no authority to do so under the Communications Act of 1934, as amended ("the Act"). ACTA cites *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) in support of its argument that the Commission should regulate Commenters and others similarly situated. ACTA correctly notes that the cable television industry, which was at issue in *Southwestern Cable*, was a new technology not discussed in the Act. But ACTA's attempt to put its members in the same position as that of over-the-air television broadcasters is erroneous.

5. The *Southwestern Cable* Court, as ACTA concedes at p. 8, sought to protect local broadcasters from cable operators who retransmitted their signals without compensation. The Court and the Commission were concerned that if cable systems were permitted to import distant signals, local broadcasters, particularly UHF and educational broadcasters, would suffer significant economic loss.

6. To compare the set of facts presented in *Southwestern Cable* with the facts of the instant proceeding, as ACTA suggests, is absurd. There is simply no relationship between the disservice to

the public interest that would have resulted from the destruction or degradation of local broadcast services the cable industry presented and the services provided by ACTA. The Commission has recognized the unique aspects of broadcasting and has imposed certain public interest obligations on broadcasters that it does not impose on other communications services; e.g., programming responsive to community needs, lowest unit charge for political broadcasting, reasonable access for candidates for federal office, children's television requirements for television broadcasters, etc. Neither communications common carriers, such as ACTA's members, nor software developers, such as Commenters, are subject to the public interest obligations imposed on broadcasters. Moreover, broadcasting operates in a finite portion of the radio spectrum, unique circumstances that have been held to justify the special regulation applied only to broadcasting. *National Broadcasting Company v. United States*, 319 US 190 (1943).

7. ACTA attempts to put Commenters into the same box as communications common carriers for the simple reason that it views these and other firms, who are engaged in the business of developing and selling software, as competitors who are able to offer the same service at a lower price. ACTA does not even bother to mask its private interest:

The *unfair competition* created by the current unregulated bypass of the traditional means by which long distance services are sold could, *if left unchecked*, eventually create *serious economic hardship* on all existing participants in the long distance marketplace and the public which is served by these participants.

Petition at p. 8 (emphasis added).

8. The more relevant inquiry, which ACTA has failed to address, is whether the services Commenters provide are "basic" or "enhanced" as defined in the Commission's *Computer II Inquiry*, 77 FCC 2d 384 (1980), *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982, *cert.*

*denied*, 461 U.S. 938 (1983). In *Computer II* the Commission defined “basic” services as those that provide a “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information.” Basic services are subject to regulation

9. “Enhanced” services, on the other hand, provide more than a basic voice transmission offering. The Commission defines an enhanced service as an *unregulated* service that employs computer processing applications that: (1) act on the format, content, code, protocol or similar aspects of a subscriber's transmitted information; (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information phone service; and (4) do not alter the fundamental character of telephone service. *See North American Telecommunications Association, Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premise Equipment*, 101 FCC 2d 349, 360-361 (1985) (*NATA/Centrex Order*); *modified on recon.* 3 FCC Rcd 4385 (1986).

10. In *Computer II* the Commission indicated that its stated purpose in adopting the basic/enhanced dichotomy was to “remove the threat of regulation from markets which were unheard of in 1934 [when the Communications Act was enacted] and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency.” *Computer II, supra* at 423. The Commission’s rationale is no less valid today than it was in 1980. Thus, there can be no legal basis for regulation of the enhanced services made possible through the use of software developed and marketed by Commenters

11. ACTA goes on to worry about “unregulated operations” that will create a “difficult to control” network that will be “detrimental to the health of the nation’s telecommunications industry and maintenance of the nation’s telecommunications infrastructure.” ACTA is clearly living in the

past, when the heavy hand of government regulation was viewed as positive telecommunications policy.

12. Congress has taken another view, consistent with the dynamic nature of the telecommunications industry as the 20th Century draws to a close. The 1996 Act notes that “the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.” It further states that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services *unfettered by Federal or State regulation.*” Section 509 of the 1996 Act to be codified as 47 U.S.C. 230(b)(2) (emphasis added).

13. The Commission itself has recognized and consistently promoted the new telecommunications environment where competition is viewed as the preferred alternative to regulation. Chairman Reed Hundt has suggested that the FCC change its name to the Federal Competition in Communications Commission. *See Speech to National Cable Television Association, May 9, 1995, 1995 FCC LEXIS 3158.* The Commission has established a Competition Division within the Office of General Counsel to promote competition in the telecommunications industry. The FCC’s Common Carrier Bureau has renamed its Tariff Division to become the Competitive Pricing Division. Bureau Chief Regina M. Keeney said: “The Commission will need pricing policies that look beyond traditional tariffing in order to promote a competitive telecommunications environment.” Report No. 96-12, released April 26, 1996. The Common Carrier Bureau page on the Commission’s World Wide Web site states as its mission:

The Common Carrier Bureau (CCB) regulates interstate wireline ‘common carrier’ services such as telephone and telegraph companies. The objective of regulation is to provide customers with rapid, efficient, nationwide and worldwide services at reasonable rates. As technology and the marketplace change, competition now often

fulfills this objective. Accordingly, CCB seeks to eliminate unnecessary burdens on carriers and consumers. The Bureau's Enforcement Division monitors and investigates complaints about common carriers.

URL: <http://www.fcc.gov/ccb.html>

14. The Commission has taken recent steps to further deregulate telephone service. It proposes to relieve non-dominant long distance carriers of the requirement to file tariffs. *Notice of Proposed Rule Making*, FCC 96-123, released March 25, 1996. The *Notice* came just three days after the Commission released its report on Fourth Quarter, 1995 long distance market shares showing that total toll revenues earned by long distance carriers have increased consistently since the 1984 deregulation of the telephone industry. AT&T's share of the long distance market fell from nearly 90 percent to 55 percent. MCI and Sprint showed significant gains, but the greatest increases were among small carriers, such as ACTA represents, whose market share grew from 4 percent in 1984 to 18 percent at the end of 1995. *Long Distance Market Shares, Fourth Quarter 1995*, Common Carrier Bureau, Federal Communications Commission, March 1996.

15. ACTA's members, unable or unwilling to adapt to the new realities of the telecommunications marketplace, seek to hold back the clock and stop the development of new technology while it beseeches the government for protection from competition. A century ago candle makers and buggy whip manufacturers asked the government to stop the development of electric lights and the automobile industry to protect them from technological advances. Wisely, the government did not accede to these foolish requests any more than it should accede to ACTA's equally foolish request.

16. The simple, inescapable, fact is that the Commission has no authority over software developers, such as Commenters. The Act grants the Commission broad authority over "communication by wire and radio." 47 U.S.C 151. But Commenters are engaged in neither. Their

business is the development and sale of *software* that enables *users* of communications networks the FCC and the states may regulate to engage in voice communication over the Internet and other global networks. Putting aside the substantial First Amendment issues that such regulation would provoke,<sup>4</sup> there is no precedent or other legal basis for the Commission to regulate software and certainly no authority to stop the sale of such software.

17. There is also a very practical problem. Voice communication on the global networks is digital. Data travels in packets. A packet carrying a telephone call appears no different than a packet carrying text or graphics. ACTA fails to suggest how the Commission, even if it chose to, could differentiate between packets carrying voice from those carrying unregulated data. For a government agency to undertake to examine each packet of data traveling across global networks would be an impossible, not to mention illegal, task. It might be possible to “tag” voice data for easy identification, but this would still require a huge enforcement bureaucracy that would need to keep up with the rapid changes in technology and operating systems. In short, there is just no feasible method to make ACTA’s impossible dream come true.

18. At p. 5 ACTA professes to worry about lack of capacity on the Internet and that “misuse of the Internet as a way to bypass the traditional means of obtaining long distance service could result significant reduction of the Internet’s ability to handle the customary types of Internet traffic.” This type of “thinking within the box” logic runs directly against the ethic of global networks. There is no “customary type of Internet traffic” and therein lies the explanation for the explosive growth of online

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<sup>4</sup> In a recently-decided case with potentially far-reaching implications, a Federal District Court Judge has determined that software code is protected speech. *Bernstein v. United States Department of State*, 1996 US Dist LEXIS 5084. The court denied a government motion to dismiss a challenge to regulations prohibiting the export of encryption software. The case will now go forward on the merits.

technologies. Online entrepreneurs think outside the box. Every day brings another innovative use of global networks.

19. Doomsayers have been predicting the collapse of the Internet on a regular basis ever since commercial exploitation began. It has not happened yet and ACTA offers no evidence, beyond unsupported conjecture, that it ever will. MCI, which carries 40 percent of the world's Internet traffic over its private network, recently announced plans to triple capacity to deal with expected growth. *Washington Post*, March 19, 1996, p. C1. Work was expected to be completed by mid-April to upgrade the so-called Internet "backbone" to triple its previous speed. MCI, together with other major telecommunications companies, such as AT&T, Bell Atlantic and others, have announced plans to offer Internet access to consumers and business. *Id.*<sup>5</sup>

20. At p. 9 of its Petition, ACTA raises the red herring of Universal Service. Section 254(c)(1)(B) of the 1996 Act (to be codified as 47 U.S.C. 254(c)(1)(B)) defines Universal Service as a telecommunications service that "through the operations of market choices by customers, been subscribed to by a substantial majority of residential customers." (Emphasis supplied.) The services offered by Commenters, even if they were subject to Commission jurisdiction, are in their infancy and are not anywhere near being "subscribed to by a substantial majority of residential customers." This comports with the historical regulatory trend of exempting or imposing lesser financial obligations on recent market entrants, such as Commenters. *See e.g. Exchange Network Facilities*, FCC2d 440 (1979).

21. ACTA saves its most absurd argument for the end of its Petition. At p. 10 it argues:

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<sup>5</sup> Neither MCI, AT&T nor Sprint, the three largest long distance carriers, are part of ACTA and have stated publicly that they do not support its position. They take the sensible and realistic view that, if consumers demand telephone services on global networks, they will offer it.

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.

Nonsense. Title 18 of the United States Code still exists to prosecute the illegal acts ACTA cites. There is no evidence, beyond ACTA's bare conjecture, that the software Commenters market will unleash the wave of criminality ACTA envisions.

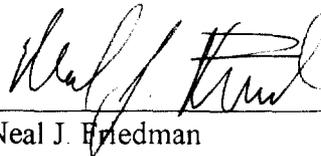
22. The ACTA Petition has no basis in law or in fact. It flies in the face of the expressed policy of Congress and the Commission. It would only serve to protect the private interests of ACTA and is demonstrably against the public interest in competitive telecommunications.

For the forgoing reasons, Commenters respectfully request that the Commission deny the ACTA petition.

Respectfully Submitted,

**THIRD PLANET PUBLISHING, INC.  
FREETEL COMMUNICATIONS, INC.**

By



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Neal J. Friedman

Its Attorney

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May 8, 1996

**CERTIFICATE OF SERVICE**

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing Joint Comments of Third Planet and Freetel Communications, Inc. was served by U.S. mail, first-class postage prepaid on the 8th day of May, 1996, to the following individuals:

\*Hon. Reed E. Hundt  
Federal Communications Commission  
1919 M Street, N.W., ROOM 814  
Washington, DC 20554

\*Hon. James H. Quello  
Federal Communications Commission  
1919 M Street, N.W., ROOM 802  
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\*Hon. Rachelle B. Chong  
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