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Federal Communications Commission
Office of Secretary

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

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

RM No. 8775

**REPLY COMMENTS OF THE INFORMATION
TECHNOLOGY ASSOCIATION OF AMERICA**

The Information Technology Association of America ("ITAA"), by its attorneys, hereby replies to the comments that were submitted in response to the America's Carriers Telecommunication Association's ("ACTA's") petition concerning Internet telephone software.

I. THE COMMENTS DEMONSTRATE THAT THE COMMISSION DOES NOT HAVE THE AUTHORITY TO REGULATE INTERNET TELEPHONE SOFTWARE VENDORS UNDER TITLE II

The overwhelming majority of the parties filing comments -- including user groups, individual users, local exchange carriers, interexchange carriers, computer software vendors, Internet service providers, and, most notably, the Administration -- vigorously opposed ACTA's suggestion that Internet telephone software vendors should be regulated under Title II of the Communications Act.¹ Although the commenters advanced a wide variety of well-founded

¹ Comments of Southwestern Bell at 2-4 [hereinafter "SWB Comments"]; Comments of Pacific & Nevada Bell at 4 [hereinafter "Pacific Bell Comments"]; Comments of AT&T at 2 [hereinafter "AT&T Comments"]; Comments of Sprint at 3 [hereinafter "Sprint

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objections to ACTA's petition, many focused specifically on ACTA's claim that Internet telephone software vendors are "telecommunications carriers." As the National Telecommunications and Information Administration explained:

[Computer software vendors] provide their customers with goods, not services At no time do . . . [computer software vendors] engage in the 'transmission' of information, which according to the Telecommunications Act of 1996, is the sine qua non of both a telecommunications service and a telecommunications carrier.²

Other commenters raised similar objections. The Information Technology Industry Council ("ITI"), for example, reasoned that "Internet software publishers and Internet service providers are not telecommunications carriers because they do not offer telecommunications services. Instead, Internet software publishers sell software . . . that enables computers with Internet access to use data packets to carry voice transmissions."³ Likewise, the Business Software Alliance explained that software vendors are not telecommunications carriers

¹(...continued)

Comments"]; Comments of LDDS Worldcom at 4 [hereinafter "Worldcom Comments"]; Comments of the National Telephone Cooperative Association at 2 [hereinafter "NTCA Comments"]; Joint Opposition of VocalTec Ltd. and Quarterdeck Corporation at 15 [hereinafter "Vocaltec Comments"]; Comments of Microsoft Corporation at 6 [hereinafter "Microsoft Comments"]; Comments of the Information Technology Industry Council at 4 [hereinafter "ITI Comments"]; Comments of the Business Software Alliance at 3, 7 [hereinafter "Business Software Comments"]; Comments of the Software Industry Coalition at 1 [hereinafter "Software Industry Comments"]; Comments of Netscape at 11 [hereinafter "Netscape Comments"]; Comments of BBN Corporation at 5 [hereinafter "BBN Comments"]; Comments of the Commercial Internet eXchange Association at 6 [hereinafter "CIX Comments"]; Comments of CompuServe, Inc. at 6 [hereinafter "CompuServe Comments"]; Comments of Millin Publishing Group, Inc. at 4 [hereinafter "Millin Comments"]; U.S. Department of Commerce Comments at 1 [hereinafter "NTIA Comments"]; Comments of the VON Coalition at 14 [hereinafter "VON Comments"].

² NTIA Comments at 1, 2.

³ ITI Comments at 5.

"because, very simply, they do not engage in the transmission of information between or among points specified by the user."⁴ AT&T reached the same conclusion. It simply stated that Title II regulation only applies "to carriers, a category that plainly does not apply to computer software vendors."⁵

In its initial comments, ITAA highlighted this same fundamental flaw in ACTA's petition.⁶ Like many of the other commenters, however, ITAA pointed out additional sound reasons why the Commission should not regulate computer software vendors under Title II of the Act.⁷ It noted that, for purposes of defining the scope of the Commission's Title II jurisdiction, computer "software is very much like hardware."⁸ Several parties, including Pacific Bell, the Commercial Internet eXchange Association ("CIX"), ITI, and Vocaltec, also

⁴ Business Software Comments at 7.

⁵ AT&T Comments at 2. Many of the commenting parties also noted that Internet telephone software vendors fall within the Telecommunications Act's definition of "access software providers" and therefore are not "telecommunications carriers" within the meaning of the Act. See, e.g., ITI Comments at 5; Vocaltec Comments at 11, 12; Business Software Comments at 8; NetScape Comments at 20.

⁶ See Comments of the Information Technology Association of America at 3-5 [hereinafter "ITAA Comments"].

⁷ For example, ITAA emphasized that ACTA's apparent desire to "maintain the status quo" would discourage innovation. Another party observed that 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." Third Planet Publishing and Freetel Communications Comments at 7. [hereinafter "Third Planet Comments"].

⁸ ITAA Comments at 5

reasoned that computer software is analogous to customer-premises equipment ("CPE").⁹ These parties, like ITAA, urged the Commission to continue to treat computer software in the same pro-competitive and deregulatory manner as CPE.

Still other commenters emphasized the negative consequences likely to flow from unnecessarily imposing regulatory burdens on the dynamic and fiercely competitive computer software industry.¹⁰ In this regard, Microsoft warned that "[g]overnment intervention at a time when no need for that intervention has been demonstrated may undermine a principal goal of the information revolution - more choice."¹¹ With this in mind, Southwestern Bell concluded that the "public interest is best served by encouraging software developers and vendors to offer creative and innovative products, unhampered by any regulatory limitations."¹² In view of this strong opposition, the Commission should dismiss ACTA's proposal to regulate Internet telephone software vendors under Title II of the Act.

II. THE COMMENTING PARTIES AGREE THAT THE COMMISSION SHOULD NOT ASSERT JURISDICTION OVER THE INTERNET

The commenting parties offered equally strong opposition to ACTA's suggestion that the Commission should assert jurisdiction over the Internet and limit the types of services that it may be used to provide. Like ITAA, many of the commenters noted that ACTA's call

⁹ See, e.g., Vocaltec Comments at 18; Pacific Bell Comments at 5, 6; CIX Comments at 8; ITI Comments at 7, 8; NTCA Comments at 2.

¹⁰ See, e.g., Business Software Comments at 4; Netscape Comments at 4; CompuServe Comments at 14, 15.

¹¹ Microsoft Comments at 4.

¹² SWB Comments at 4.

for regulation of the Internet is directly at odds with the thrust of the "pro-competitive, de-regulatory national policy framework"¹³ established by the Telecommunications Act of 1996 (the "1996 Act").¹⁴ Even more specifically, Southwestern Bell, Microsoft, CompuServe, Netscape and others pointed out that such regulation would directly contravene Section 509 of the 1996 Act,¹⁵ which unequivocally states that "[i]t 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."¹⁶

Other commenters, including Sprint, Millin Publishing Group, and Microsoft, raised a somewhat different objection. They explained that, from a technical standpoint, it would be infeasible to limit voice communications sent over the Internet.¹⁷ According to Third Planet Publishing and Freetel Communications ("Third Planet and Freetel"), a data packet sent over the Internet "carrying a telephone call appears no different from a packet carrying text or graphics." As a result, there is no way to "differentiate between packets carrying voice from those carrying unregulated data."¹⁸ For this reason, BBN Corporation surmised that "[g]ranting

¹³ See H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 113 (1996).

¹⁴ See, e.g., ITI Comments at 3; Microsoft Comments at 3; Business Software Comments at 5; Netscape Comments at 28; CIX Comments at 3.

¹⁵ See, e.g., SWB Comments at 4; LDDS Comments at 11; Microsoft Comments at 7; ITI Comments at 2; Business Software Comments at 10; Third Planet Comments at 6; Netscape Comments at 15, 34; CIX Comments at 5; CompuServe Comments at 7, 8.

¹⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 60, 138, § 509 (emphasis added).

¹⁷ See Third Planet Comments at 8; Millin Comments at 7; BBN Corporation at 6; Microsoft Comments at 7; Sprint Comments at 3, 4.

¹⁸ Third Planet Comments at 8.

ACTA's petition would require the Internet services industry to deploy electronic 'sniffers' to detect the presence of voice traffic in the trillions of data packets that flow through the Internet. Deploying such devices throughout the Internet would sharply constrict the flow of data, in effect, requiring data packets to line up at regulatory checkpoints before proceeding forward."¹⁹

In addition to being inappropriate as a matter of law and impractical as a matter of technology, regulating the Internet would have harmful public policy consequences. CompuServe cautioned that "an attempt to regulate the Internet will have an adverse affect on the many innovative new service offerings, strategic business partnerships, and pricing reductions which are being introduced practically every day."²⁰ Consistent with these comments, the "Commission should not risk stifling the growth and use of this vibrant technology in order to prevent some undemonstrated harm to long distance service providers."²¹

III. THE COMMISSION SHOULD REJECT REQUESTS TO REGULATE INFORMATION SERVICE PROVIDERS UNDER TITLE II

Of all of the commenting parties, only two -- the American Telegram Corporation ("ATC") and the Telecommunications Resellers Association ("TRA") -- suggested that the Commission should regulate information service providers as "telecommunications carriers."²² ATC claimed that on-line service providers that offer electronic mail services should be subject

¹⁹ BBN Comments at 6.

²⁰ CompuServe Comments at 15.

²¹ NTIA Comments at 2, 3.

²² See Comments of American Telegram Corporation at 4-6 [hereinafter "ATC Comments"]; Comments of the Telecommunications Resellers Association at 5, 6 [hereinafter "TRA Comments"].

to such regulation, while TRA asserted that the Commission should regulate Internet voice service providers. Neither ATC nor TRA even attempted to demonstrate that electronic mail or Internet voice services are basic communications services.²³

Plainly, the Commission should reject these parties' suggestions that information service providers should be regulated under Title II. Like ITAA, BBN Corporation demonstrated in its comments that Title II regulation has historically been limited to the common carrier offering of basic transmission services and "the recently enacted Telecommunications Act does nothing to disturb the definitional boundary between basic and enhanced services."²⁴ Thus, contrary to ATC and TRA's apparent belief, only entities that engage in the common carrier offering of basic telecommunications services are subject to Title II regulation.

To the extent that electronic mail and Internet voice services involve features such as protocol conversion or the storage and retrieval of information, they are not basic telecommunications services. Instead, they fall squarely within the definition of an enhanced²⁵ or, in the language of the 1996 Act, information service.²⁶ As such, these services are not within

²³ To the contrary, both parties conceded that these types of services generally are not basic services. TRA acknowledged that many Internet services include a protocol conversion function and, as a result, are enhanced services. See TRA Comments at 5. Similarly, ATC admitted that the "precise nature" of electronic mail services "prevents these services from being considered 'telecommunications'" ATC Comments at 4.

²⁴ BBN Comments at 5; see also ITAA Comments at 3,4; Netscape Comments at 12.

²⁵ As the Commission's rules explain, "enhanced services shall refer to services . . . which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information . . . or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (emphasis added).

²⁶ The 1996 Act defines an information service as follows: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making (continued...)

the scope of the Commission's Title II jurisdiction. Indeed, the 1996 Act and its legislative history make quite clear that Congress intended to "exclude [] those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services" from the definition of "telecommunications" and "telecommunications service."²⁷ The Commission therefore should reject ATC and TRA's invitation to regulate information service providers under Title II.²⁸

IV. **THE COMMISSION SHOULD REJECT REQUESTS TO SUBJECT ENHANCED SERVICE PROVIDERS TO COMMON CARRIER ACCESS CHARGES**

Although the issue was not directly raised by ACTA, several of the parties urged the Commission to institute a proceeding to reform today's system of access charges and subject enhanced service providers to those charges. One of the commenters, Southwestern Bell, even called for immediate action. It suggested that the Commission should order enhanced service

²⁶(...continued)

available information via telecommunications, and includes electronic publishing" Telecommunications Act, 110 Stat. 59, § 3 (emphasis added).

²⁷ S. Rep. No. 23, 104th Cong., 1st Sess. 17-18 (1995) (emphasis added). As explained in the House Conference Report that accompanied the 1996 Act, Congress endorsed the Senate's definition of "telecommunications," which excluded information services. See H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 116 (1996).

²⁸ Even if Internet access services could be "properly deemed 'telecommunications services,' the Commission" still should not subject them to Title II regulation. See Netscape Comments at 14. Section 401 of the 1996 Act makes clear that the Commission must refrain from regulating any telecommunications carrier or service, where such regulation is not necessary to "protect consumers" or ensure that the "charges, practices, [or] classifications" for a service are "just and reasonable and are not unjustly or unreasonably discriminatory." Telecommunications Act, § 401, 110 Stat. 128. Because the markets Internet services, in general, and Internet voice services, in particular, are competitive, the Commission should forbear from regulating them.

providers to stop providing interstate services unless they pay common carrier access charges.²⁹
The Commission should reject these proposals.³⁰

Like ACTA, the parties that have urged the Commission to subject enhanced service providers to today's carrier-type access charges are "clearly living in" an era "when the heavy hand of government regulation was viewed as positive telecommunications policy."³¹ That era, however, is over and it is now time for these parties "to adapt to the realities of the new telecommunications marketplace."³² With the enactment of the 1996 Act, Congress ushered in a new "pro-competitive, de-regulatory national policy framework" for telecommunications. Consistent with this new regulatory paradigm, the Commission has already taken steps to promote entry and thus competition in local telephone markets. As part of that process, the Commission is considering rules that, if adopted, will require incumbent local exchange carriers to charge rates for interconnection and access to unbundled network elements that are truly cost-based.³³

²⁹ SWB Comments at 8.

³⁰ In their comments, many of these parties mistakenly referred to an access charge "exemption" for enhanced service providers. End users, however, do not pay carrier access charges; they pay end user access charges. See 47 C.F.R. § 69 (1995). Enhanced service providers are end users. Thus, there is no special "exemption" for enhanced service providers. See SWB Comments at 8; Pacific Bell Comments at 8-14; LDDS Comments at 12.

³¹ Third Planet Comments at 7.

³² Id.

³³ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96-182, ¶ 117 (rel. Apr. 19, 1996). The Commission also will institute proceedings to consider access charge reform and to review its jurisdictional separations rules. See id. ¶ 3 & n.7.

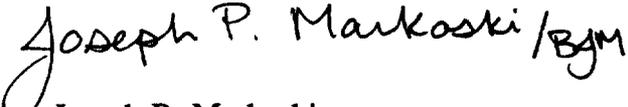
Access charges as we know them today are dead and should be laid to rest by the Commission. To impose these rigid, subsidy-laden charges on unregulated enhanced service providers would be entirely inconsistent with the 1996 Act's pro-competitive and deregulatory goals and the Commission's commitment to competitive markets. Accordingly, rather than veer off the course charted by Congress, the Commission should flatly reject any suggestion that enhanced service providers should be burdened with today's common carrier access charges.

V. CONCLUSION

For all of the reasons set forth above and in its initial comments, ITAA urges the Commission to deny the relief requested by ACTA. Further, the Commission should not extend Title II regulation to information service providers. Nor should the Commission impose common carrier-type access charges on enhanced service providers.

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I, Brian J. McHugh, hereby certify that a true and correct copy of the foregoing Reply Comments of the Information Technology Association of America was sent by first class United States mail, postage prepaid, this tenth day of June, 1996, to the parties appearing on the attached service list.

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