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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service	))))	WC Docket No. 03-____

PETITION FOR DECLARATORY RULING THAT PULVER.COM'S FREE WORLD DIALUP IS NEITHER TELECOMMUNICATIONS NOR A TELECOMMUNICATIONS SERVICE

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February 5, 2003

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pulver.com ("pulver.com") respectfully petitions the Federal Communications Commission (the "Commission") for a declaratory ruling that its Free World Dialup ("FWD"), which facilitates point-to-point broadband Internet protocol ("IP") voice communications, is neither "telecommunications" nor a "telecommunications service" as these terms are defined in Section 153(a) of the Telecommunications Act of 1996.

The Administrative Procedure Act and the Commission's rules authorize the Commission to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) and 47 C.F.R. § 1.2. pulver.com, which has begun receiving inquiries from international carriers, seeks the requested declaratory ruling to remove uncertainty regarding the regulatory status of its interactive FWD and concomitant regulatory responsibilities. The requested ruling will establish that FWD is an unregulated service in the United States, thereby sending a strong signal to the international community that it should remain unregulated worldwide.

The proliferation of broadband Internet access services is fostering the creation, adoption, and use of multimedia applications that can meet consumers' communications, entertainment, information, and commercial needs and desires. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings,* Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42 at ¶ 1 (rel. Feb. 15, 2002). In this petition, pulver.com requests that the Commission declare that one specific application available to broadband consumers on a membership-only basis – pulver.com's Free World Dialup – is an unregulated service.

A grant of the requested relief is consistent with Commission precedent, the applicable statutory language, and the pro-competitive, deregulatory policy goals of the Telecommunications Act of 1996(the "1996 Act"). A ruling that FWD is neither telecommunications nor a telecommunications service eliminates investors' perception of regulatory risk and offers assurances to consumers that FWD, which is free, is completely legal. The Commission should affirm that FWD operates outside the Title II framework both to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation," 47 U.S.C. § 230(b)(2), and to provide international leadership with respect to voice over broadband.

Background

Free World Dialup. On November 11, 2002, pulver.com launched its Free World Dialup ("FWD"), a no-cost community service that offers broadband users the opportunity to join other

FWD members worldwide in talking to one another directly over the Internet.[1] FWD is a Session Initiation Protocol ("SIP")-based peer-to-peer service whereby the SIP telephones purchased and owned by registered users establish voice communications directly with each other via Internet protocol ("IP"). Free World Dialup operates with any type of broadband connection: cable, wireline, satellite or wireless.[2] Although a member must pay entities other than pulver.com to purchase equipment and a broadband connection, FWD membership and calls are absolutely free. There are no FWD connection fees, hardware or software fees, monthly subscription fees or per-call charges.

FWD requires little more than registration and configuration before members may use their SIP telephones to make voice-over-IP ("VoIP") Internet phone calls to other FWD members. After selecting and purchasing an FWD-approved SIP device, the prospective member visits http://fwd.pulver.com and obtains an FWD Number and password. Using this number and password, members then register their SIP phones with the FWD network and configures the SIP device to work with the service. Once the phone is successfully configured, members are able to contact any other registered FWD member and establish a two-way conversation, so long as the intended recipient of the call is also on-line. Since callers need only enter the FWD number and press "#" to initiate a call, the configured service is as easy to use as a regular telephone.

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1 Because FWD does not include a transmission component, membership is available only to end-users with at least a 64 kbps connection.

2 By 2004, analysts expect 28.9 percent of households will access the Internet through cable broadband, 21.1 percent through DSL and 5.7 percent through wireless and satellite broadband technologies. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Report, 17 FCC Rcd 2844 at ¶ 63 (2002).

While FWD works with personal computers ("PCs"), pulver.com encourages the use of dedicated IP phones to improve service quality. pulver.com certifies, but does not sell, IP phones for use with FWD.[3] pulver.com encourages vendors of other SIP devices to test their SIP phones with the FWD network.

FWD differs in key respects from both traditional telephone service and phone-to-phone IP telephony service previously described by the Commission.[4] FWD facilitates connectivity only to other FWD members who are on-line when a call is made; FWD does not provide members with access to the public switched telephone network ("PSTN") or cellular networks. Members are not assigned telephone numbers in accordance with the North American Numbering Plan and associated international agreements but are assigned, instead, an "FWD Number." In addition, the member must use customer premise equipment ("CPE") different from the CPE necessary to place an ordinary touch-tone call over the PSTN. Further, FWD provides no transmission capabilities; the member uses his or her own broadband connection, which sends and receives packets of information, some of which may include voice packets. To the extent service issues arise, they are resolved by the FWD community itself via an Internet listserv.[5]

As of early February 2003 – barely two months after the service's launch – more than 8,000 members have joined FWD, despite the absence of any marketing. Approximately 40 percent of those members are based in North America. Pulver.com anticipates significant

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[3] To date pulver.com has certified the Cisco ATA 186, the Cisco 7960, the Mitel 5055 and the SNOM 100. pulver.com also has certified several "softphones" for members that prefer to use PCs, including Windows Messenger, SJphone, Kphone and eStara.

[4] *See Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 at ¶ 88 (1998) (*Report to Congress).*

[5] pulver.com, however, reserves the right to void the registration of any member found to be abusing FWD service (e.g., by selling the service to others).

growth both in North America and worldwide, as members encourage their family and friends to join.

The Current Regulatory Framework. Since it began consideration of the convergence of communications and computer processing capabilities, the Commission has drawn a line between regulated and unregulated services. As it articulated this framework in its *Computer II Inquiry,* offering of transmission capacity for the movement of information was deemed to be a regulated communications service subject to Title II; enhanced services, defined as those that combined basic service with computer processing applications, were to be unregulated. *Amendment of Part 64.702 of the Commission's Rules and Regulations,* Final Decision, 77 FCC 2d 384 at ¶ 5 (1980).[6]

The Telecommunications Act of 1996 incorporated that framework. *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 at ¶ 45 (1998) (*Report to Congress).*[7] The 1996 Act in large part adopts the regulatory definitions and demarcations established in *Computer II*, but uses the terms "telecommunications," "telecommunications services" and "information services" in lieu of the terms "basic" and "enhanced" services.[8] Under the 1996 Act,

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[6] The Commission defined an enhanced service as one that combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information. *Id.* at ¶ 5.

[7] On November 26, 1997, Congress directed the Commission to report on Commission implementation of certain provisions of the Telecommunications Act of 1996 regarding the universal service system. In response to this mandate, the Commission undertook a "thorough review of the Commission's interpretation of the relevant provisions of the 1996 Act." *Id.* at ¶ 1.

[8] While the statutory definitions correspond to those adopted in *Computer II,* they are not identical. According to the Commission, "information service" is a broader category than "enhanced service," since the former is provided "via telecommunications," while the latter is provided over interstate common carrier facilities. *Implementation of the Non-Accounting*

> *Telecommunications* means "the 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 (43).
>
> *Telecommunications service* is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users a to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153 (46).
>
> *Information service* is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153 (20).

Like the definitions of "basic" and "enhanced" developed in the *Computer II* proceeding, telecommunications and information services are mutually exclusive categories. *Report to Congress, supra,* at ¶¶ 13, 33.

The statutory definitions rest on the functions made available to the end-user, not the particular types of facilities used. *Report to Congress, supra,* at ¶ 59. Thus, "an entity should be deemed to provide telecommunications . . . *only when* the entity provides a transparent transmission path, *and* does not 'change . . . the form and content' of the information." *Report to Congress, supra,* at ¶ 41 (emphasis added).

Discussion

I. FWD is not "telecommunications" or a "telecommunications service"

Although FWD facilitates point-to-point VoIP communications over the Internet, it falls outside the definitions of "telecommunications" and "telecommunications service;" as such, there is no basis for the Commission's exercise of Title II jurisdiction over FWD.[9]

Safeguards of Section 271 and 272 of the Communications Act of 1934, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (1996).

[9] Because FWD does not offer members a combined package of data transport and computing capabilities, it also falls outside the definition of an information service. An entity provides an information service only when that entity "*offers transmission incorporating* the

FWD is not "telecommunications," as that term is defined in 47 U.S.C. § 153 (43), because FWD does not provide members with only a "simple, transparent transmission path." *Report to Congress, supra,* at ¶ 39. As explained above, FWD provides no transmission capabilities; instead, members use the transmission capabilities that they themselves purchase through a third-party provider. Specifically, transmission capabilities are provided by the broadband service providers from which members obtain their broadband connections and the public Internet. Because FWD does not provide members with pure transmission capability, it is not "telecommunications."

By definition, FWD cannot be a "telecommunications service" because it does not provide users with "telecommunications." Moreover, because FWD is available free of charge, the service fails to satisfy the second part of the statutory test of a "telecommunications service" as set forth in 47 U.S.C. § 153 (46): that it be provided "for a fee."

Ultimately, FWD is not a regulated service provided by a carrier but an Internet application riding over the transport capabilities purchased by the consumer. It is only one of the many types of applications made possible by the openness of the Internet and the sharing of a common protocol, as the Commission staff has previously recognized:

> The Internet's success can be attributed to several ingredients, but none are as important as the market forces, investment, and competition that have driven its growth. . . .The most important technical feature of the Internet is its openness, which allows any user to develop new applications and to communicate with virtually any other user. This openness is driven by the sharing of that common communications protocol: IP, the Internet protocol. No one owns the Internet protocol, no one licenses its use, and no one restricts access to it. IP is available for all to use, and the explosion of Internet applications, from online commerce and

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capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." *Report to Congress, supra,* at ¶ 39 (emphasis added). As explained herein, however, FWD contains no transmission component.

> medicine to educational and social tools, demonstrates the wide range of individuals and companies taking advantage of the openness of the Internet.

Oxman, Jason, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, 1999 FCC LEXIS 3370 at *6-7 (July 1999).

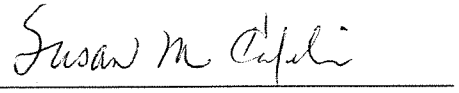
As it has with other interactive Internet services, the Commission should be mindful of congressional intent and encourage Internet innovation, investment, and growth by declining to regulate FWD. A Commission decision not to regulate FWD is most consistent with the statutory scheme and will foster a community service that, today, offers both U.S. citizens and members worldwide the competitive, pro-consumer benefits envisioned from enactment of the 1996 Act. The Commission's affirmative statement that FWD is neither "telecommunications" nor a "telecommunications service" advances national policy goals even as it provides international leadership and guidance to countries addressing the regulatory status of broadband telephony services.

Conclusion

Therefore, based on the foregoing, pulver.com respectfully requests that the Commission issue a declaratory ruling finding that its Free World Dialup ("FWD"), which facilitates point-to-point broadband Internet protocol ("IP") voice communications, is neither "telecommunications" nor a "telecommunications service" as those terms are defined in Section 153(a) of the Telecommunications Act of 1996.

Respectfully submitted,

PULVER.COM



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Dated: February 5, 2003

Certificate of Service

I hereby certify that on this 5th day of February 2003, copies of the foregoing *Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service* were served on the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
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Susan M. Hafeli

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