

**Before the
Federal Communications Commission
Washington, D. C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that)	
pulver.com's Free World Dialup)	WC Docket No. 03-45
is neither Telecommunications nor a)	
Telecommunications Service)	

COMMENTS

BellSouth Corporation, on behalf of itself and its wholly-owned subsidiaries (“BellSouth”), submits these comments in response to the *Public Notice* released by the Wireline Competition Bureau on February 14, 2003.¹

BellSouth urges the Commission to resist establishing rules of general applicability on the circumstances presented in the instant petition. It is far from clear whether the petitioner has made a legitimate procedural case for the Commission to exercise its discretionary authority to issue a declaratory ruling. But even if it did, this is only the latest in a series of proceedings initiated both here and before state Commissions that implicate critical pending public policy issues that the Commission needs to resolve before addressing piecemeal supplications for special treatment.

Far and away the most critical competition policy issues implicated by the instant petition are the continued integrity of the Commission's universal service and access charge regimes. The Commission should defer action on the instant petition, if it acts at all, until after it establishes a unified approach to intercarrier compensation and the appropriate role of all service

¹ Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling, WC Docket No. 03-45, *Public Notice*, DA 03-439 (rel. Feb. 14, 2003).

providers that use any portion of the public switched telephone network (“PSTN”) in the provision of their service, regardless of that service’s regulatory status, in funding the universal service mandate.

I. THE COMMISSION SHOULD DECLINE TO EXERCISE ITS DISCRETION TO ISSUE A DECLARATORY RULING ON THE INSTANT PETITION.

Part 1.2 of the Commission’s rules provides that the Commission may, on motion or on its own motion, and in accordance with the Administrative Procedure Act, issue a declaratory ruling terminating a controversy or removing uncertainty.² Petitioner’s sole reason for requesting a declaratory ruling from this Commission falls far short of establishing the existence of any controversy or uncertainty. The petitioner states that it has “begun receiving inquiries from international carriers.”³ It does not state the nature of those inquiries, or describe how those inquiries reflect any current controversy or uncertainty that requires Commission resolution. Although the petition states that the requested declaratory ruling would “remove uncertainty regarding the regulatory status of its interactive FWD and concomitant regulatory responsibilities,”⁴ it utterly fails to explain how it is in the public interest for it to be free of any “concomitant regulatory responsibilities.”⁵

It appears that petitioner is seeking, at best, an advisory opinion from the FCC on the regulatory status of a particular service offering, or, at the other extreme, the publicity attendant

² 47 C.F.R. § 1.2.

³ pulver.com Petition at 1.

⁴ *Id.*

⁵ BellSouth takes no position on the regulatory classification of petitioner’s FWD service, or whether it is in the public interest for petitioner to be free from certain regulatory burdens. BellSouth believes that the Commission must clearly articulate the public interest in a fairly funded universal service program and pro-competitive, deregulatory unified intercarrier compensation regime before it can resolve petitions like this on a piecemeal basis.

upon the filing of the instant petition and its resolution.⁶ The FCC should decline to exercise its discretion under these circumstances. While a “case or controversy in the judicial sense is not required”⁷ for the Commission to exercise its “broad and discretionary powers” to issue a declaratory ruling,⁸ the petitioner has made no showing that “a genuine controversy or uncertainty requires clarification.”⁹

The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists.¹⁰ The Commission has required petitioners to adduce “specific” and “concrete evidence” in the form of “clearly developed facts” before concluding whether a declaratory ruling is “necessary or desirable.”¹¹ It appears that what few facts that have been

⁶ Ted Hearn, *Firm Seeks FCC Ruling on Free VOIP*, MultiChannel News, Feb. 24, 2003, at 26. This article describes the petitioner as a firm that “conducts conferences to promote broadband applications such as IP telephony.”

⁷ *In the Matter of Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission, Memorandum Opinion and Order*, 93 F.C.C. 2d 1287, 1290, ¶ 9 (1983).

⁸ *In the Matter of Telerent Leasing Corp. et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-Furnished Equipment to the Nationwide Switched Public Telephone Network*, Docket No. 19808, *Memorandum Opinion and Order*, 45 F.C.C. 2d 204, 213, ¶ 21 (1974).

⁹ *In the Matter of BellSouth’s Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Build Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises, Memorandum Opinion and Order*, 6 FCC Rcd 3336, 3342-43, ¶ 27 (1991).

¹⁰ *In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission’s Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment. Petition for Declaratory Ruling on Question of Federal Preemption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies*. CC Docket No. 79-105, RM-3017, *Memorandum Opinion and Order*, 92 F.C.C. 2d 864, 879, ¶ 43 (1982).

¹¹ *In the Matter of Competitive Telecommunications Association; Petition for Declaratory Ruling and Cease and Desist Order concerning Blocking of Interim 800 Service Interexchange Access*, File No. ENT-89-04, *Memorandum Opinion and Order*, 4 FCC Rcd 5364, 5365, ¶ 7 (1989) (“CompTel”). See also *In the Matter of Cascade Utilities, Inc., American Telephone and Telegraph, Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 8 FCC Rcd 781, 782, ¶ 11 (1993) (noting that declaratory relief is not generally granted where all relevant facts are not clearly developed and essentially undisputed).

adduced are subject to change, making a generalized declaratory ruling particularly dangerous. For instance, petitioner argues that “because FWD is available free of charge,” it is not a telecommunications service.¹² However, petitioner has stated publicly its intention to charge for the service in the future.¹³ This alone significantly undercuts the value of any declaratory ruling predicated on the facts presented in the instant petition, since it appears the service will change. Not only would any declaratory ruling no longer be applicable to the petitioner’s modified service arrangements, but it could be invoked by petitioners and others in the future in order to avoid or evade legitimate regulatory responsibilities in the absence of any clear direction from the Commission on those issues.

Because “the issues raised” in the instant petition at least implicate important public policy issues that “are currently being considered in the context of several ongoing rulemakings,” the Commission should find that, “as a matter of both procedure and administrative efficiency,” the issues raised in the instant petition “should be resolved in the context of the Commission’s existing rulemaking proceedings addressing these issues.”¹⁴

¹² Petition at 7.

¹³ “What I am hoping for is that we can get a sizable enough number of people registered so that when I figure out what value-added service *people will eventually pay for*, I have a captive community *to sell to*,” Pulver said.” Hearn, *Firm Seeks FCC Ruling on Free VoIP*, MultiChannel News, Feb. 24, 2003, at 26 (emphasis added).

¹⁴ *In the Matter of Petition for Declaratory Ruling that Any Interstate Non-Access Service provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation*, Order, 11 FCC Rcd 9051, 9052, ¶ 4 (1996).

II. THE COMMISSION MUST RESOLVE ACCESS CHARGE, UNIVERSAL SERVICE AND OTHER REGULATORY IMPLICATIONS OF IP TELEPHONY IN CURRENT RULEMAKING PROCEEDINGS.

While petitioner refers vaguely to “concomitant regulatory responsibilities,” other regulatory supplicants are more transparent in their desire to avoid properly compensating local exchange carriers for the use of their networks.¹⁵ However, as AT&T itself has pointed out, the regulatory inequities between carriers using IP technology in the transmission of a phone-to-phone voice call and carriers transmitting the same call entirely over the circuit switched network are untenable:

Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol (“IP”) technology in their long-haul networks Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission’s commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this loophole. . . . Any Commission failure to enforce USF funding obligations (and access charge assessments) on telecommunications services that are provided over new technology backbones skews the market by making providers of comparable services subject to vastly different payment obligations.¹⁶

The instant petition is vague at best as to how the current and future versions of the service will utilize existing local exchange networks, if at all. It appears to at least implicitly request that the Commission change the current access charge system to enable petitioner to

¹⁵ See *In the Matter of Petition for Declaratory Ruling Declaring That AT&T Phone-to-Phone Internet Protocol (“IP”) Telephone Services are Exempt from Access Charges*, BellSouth Opposition to AT&T’s Petition for Declaratory Ruling (filed Dec. 18, 2002) *passim*. See also *In re Petition of CNM Network, Inc. for Declaratory Statement Regarding Florida Public Service Commission Jurisdiction*, Fla. Pub. Serv. Comm’n Docket No. 021061-TP (filed Oct. 18, 2002) (seeking a declaratory statement determining that phone-to-phone Internet protocol (“IP”) telephony is not telecommunications under Florida law and that petitioner is not a telecommunications company subject to FPSC certification and tariffing requirements).

¹⁶ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, AT&T Comments on Report to Congress, at 12 (filed Jan. 26, 1998) (footnotes omitted).

evade current charges. From a technical standpoint, interconnecting the current FWD service with the PSTN appears straightforward. It is therefore unknown as to whether a ruling on this petition would impact the current intercarrier compensation structure, and it is clearly foreseeable that a Commission ruling on this petition could be interpreted as a change to the current access charge system. At a minimum, the Commission needs to develop the necessary factual record and to consider the implications of such a change should it choose to rule on this petition. The fact that such implications may exist is further justification for the Commission to decline to rule on this petition at this time. Procedurally, the Commission should not entertain any such request outside the Intercarrier Compensation rulemaking proceeding that has been pending for nearly two years.¹⁷ Indeed the Commission should now rule in that proceeding and adopt the specific bill and keep system advocated by BellSouth in order to eliminate the types of issues raised by pending piecemeal petitions.¹⁸ Moving to bill and keep would eliminate most carrier-to-carrier payments and require carriers to recover their costs directly from end users.

No less an important public policy issue implicated by the instant petition, from a public interest standpoint, is universal service funding. The 1996 Act makes clear that one of the principles of universal service is to provide access to advanced telecommunications and information services in all regions of the nation.¹⁹ In its currently pending universal service proceeding, the Commission will consider whether all Internet service providers should

¹⁷ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

¹⁸ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, BellSouth Comments (Aug. 21, 2001), BellSouth Reply Comments (Nov. 5, 2001).

¹⁹ 47 U.S.C. § 254(b)(2).

contribute to the Universal Service Fund regardless of the broadband platform that they use.²⁰ Unless and until the Commission issues a final action in this rulemaking, it would be inappropriate for it to establish a loophole to USF funding obligations, whether intentionally or inadvertently, in the context of piecemeal petitions for declaratory rulings, particularly where, as here, a ruling on the instant petition is neither “necessary” nor “desirable,”²¹ let alone warranted. Indeed, the fact that the petitioner holds itself out as offering “telephone communications” and “phone lines”²² raises the issue as to whether petitioner’s services are more responsible for supporting USF than Internet services in general (based on the presumption that Congress intended for universal service to be subsidized by all users of telephony without regard to whether a user was served by a certificated carrier or not).

Other regulatory issues implicating the public interest, no less important than USF, are also raised by the instant petition. Specifically, will the instant petitioner and similar service providers, as a result of the requested declaratory ruling, be exempt from complying with E911 requirements, with North American Numbering Plan requirements, and with Communications Assistance for Law Enforcement (“CALEA”) requirements? Are these the unspecified “concomitant regulatory responsibilities” petitioner seeks to avoid? And if so, how and why does this comport with the public interest, and how would such a determination affect overall competitive neutrality and regulatory parity?

²⁰ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *et al.*, BellSouth Comments at 29-32 (filed May 3, 2002).

²¹ *CompTel*, 4 FCC Rcd at 5365, ¶ 7.

²² www.freeworldialup.com, Mar. 10, 2003. It is interesting to note the various references to “telephony” on the petitioner’s own web site: service users can “begin enjoying telephone communications,” and “the free SIP based community *telephone service*.” Perhaps petitioner should be required to explain what factors led it to self-describe and market FWD as a “telephone service” to the general public.

CONCLUSION

BellSouth strongly believes that minimal regulation will enhance the deployment of advanced services and the development of robust, facilities-based competition. However, a comprehensive regulatory framework predicated on regulatory parity, competitive neutrality and a unified bill-and-keep-based method of intercarrier compensation must be clearly articulated by this Commission before it grants special treatment to special classes of users of some or all of the public switched telephone network. The petitioner has not made a case for the Commission to exercise its broad discretion to act through a declaratory ruling, and the Commission should be reluctant to establish any rules of general applicability on the basis of a vague and procedurally deficient petition. The petitioner has, however, provided further evidence of the need for the Commission to act quickly to resolve its pending intercarrier compensation and universal service rulemaking proceedings in order to provide certainty to the market and to stem the flow of filings seeking what are effectively policy statements based on individual circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 14th day of March 2003 served the following parties to this action with a copy of the foregoing COMMENTS by electronic filing, electronic mail and/or by placing a copy of the same in the United States mail, addressed to the parties listed below.

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