

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

QWEST COMMUNICATIONS
INTERNATIONAL INC.

Sharon J. Devine
Robert B. McKenna
Kristin Smith
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
303.672.2861

Its Attorneys

February 14, 2003

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. PULVER’S SERVICE DOES NOT ENTAIL OFFERING TELECOMMUNICATIONS TO THE PUBLIC FOR A FEE -- THUS IT IS NOT A TELECOMMUNICATIONS SERVICE	3
A. A decision on the pulver petition must be made on the specific facts presented in that petition	3
B. Pulver’s service is not a “Telecommunications Service”	5
C. Pulver’s request that its service be declared outside the definition of “Telecommunications” under the Act is not meritorious.....	8
III. THE COMMISSION MUST DEVELOP A TECHNOLOGY-NEUTRAL REGULATORY STRUCTURE FOR DEALING WITH IP VOICE APPLICATIONS	9
IV. CONCLUSION	10

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Pursuant to the Federal Communications Commission’s (“Commission”) *Public Notice*,¹ Qwest Communications International Inc. (“Qwest”) files these comments in response to a Petition for Declaratory Ruling (“petition”) filed by pulver.com (“pulver”).

I. INTRODUCTION AND SUMMARY

Pulver seeks a declaratory ruling to the effect that a service that enables subscribers to establish voice connections over the Internet to a limited group of subscribers without charge is neither a “telecommunications service” nor “telecommunications” as those terms are defined in the Communications Act of 1934, as amended by the 1996 Telecommunications Act. Based on the specific facts of the service described by pulver, Qwest agrees it does not constitute a “telecommunications service,” because it is not an offering of telecommunications directly to the public for a fee. On that account, the pulver service does not meet the definition of “telecommunications service” in the Act. Moreover, the classification of pulver’s service can be determined without taking into account the fact that pulver’s service may traverse the public Internet. The pulver service, however, does involve “telecommunications” combined with an

¹ *Public Notice, Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling*, WC Docket No. 03-45, DA 02-439, rel. Feb. 14, 2003.

“information service,” and it would be inappropriate for the Commission to rule that there was not a telecommunications component in the pulver offering.²

The pulver petition highlights the continuing need for the Commission to take immediate steps to address the regulatory issues created by Internet protocol (or “IP”) telephony services. In doing so, the Commission must avoid a structure in which comparable and competing services are subject to differing rules and regulations based solely on the technology employed to deliver those services. Like the pending AT&T Petition requesting that all voice services utilizing the public Internet or IP technology as a transmission vehicle be declared to be information services,³ the Commission can resolve the pulver petition with straightforward reliance on its existing rules and definitions. The larger issues raised by voice services using IP technology and/or the public Internet need not and should not be decided in the context of this proceeding.⁴ Broader IP issues can be avoided in this proceeding largely because neither the pulver service nor the communications between the pulver subscribers use local exchange switching facilities,

² As is noted below, there is an important statutory distinction between telecommunications, which forms a component of both telecommunications services and information services. Telecommunications services and information services are mutually exclusive categories of service. Both rely on telecommunications.

³ AT&T has filed a Petition seeking to have all voice telecommunications services that utilize the Internet protocol in any fashion declared to be “information services” entitled to a variety of discriminatory regulatory preferences, most significantly in the area of charges for utilization of local exchange switching facilities. *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, filed Oct. 18, 2002 (“AT&T Petition”). As discussed in Qwest’s opposition to that Petition and herein, technological neutrality in regulation is an absolutely vital precept in determining how to regulate telecommunications services in today’s evolving marketplace. Comments of Qwest Communications International Inc., WC Docket No. 02-361, filed Dec. 18, 2002.

⁴ Use of the Internet protocol to support voice transmissions can arise in a number of different factual contexts. A number of variations of IP voice transmissions were described in the Universal Service Report to Congress, *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501 (1998). It can be expected that regulatory issues raised by IP voice transmissions will not diminish with time.

thereby avoiding most of the major IP telephony controversies. But any such avoidance is strictly temporary. It is vital that the Commission step up to the issues raised by IP technology and voice issues and address them in a principled manner. In devising a regulatory structure to address IP voice issues, the overarching principle must be that regulatory rights, burdens and obligations must be the same regardless of the technology utilized to provide services that are functionally equivalent in the marketplace.

II. PULVER'S SERVICE DOES NOT ENTAIL OFFERING TELECOMMUNICATIONS TO THE PUBLIC FOR A FEE -- THUS IT IS NOT A TELECOMMUNICATIONS SERVICE

A. A decision on the pulver petition must be made on the specific facts presented in that petition

Until such time as the Commission decides to examine the full range of issues raised by use of the Internet protocol in delivering voice telecommunications, it is important that the Commission focus on the specific facts of individual petitions brought before it. The pulver facts present an opportunity to address only very limited issues, and the petition should be decided solely on the basis of those facts.

The pulver service (called "Free World Dialup," or "FWD"), as Qwest understands it, facilitates, but is not part of, the voice communications between two pulver subscribers that is transmitted in the Internet protocol. To be a pulver subscriber, the user must first establish a broadband connection and have a Session Initiation Protocol ("SIP") endpoint, and also either a SIP telephone or the appropriate computer software and hardware. A pulver subscriber dials the prearranged five-digit number signifying that the subscriber wishes to establish a communications path to the subscriber referenced by that number. A SIP invite with that

information is transmitted in the Internet protocol to the pulver server.⁵ The pulver server checks to see if the SIP endpoint associated with that five-digit number is available for voice transmission by sending a signal to the IP address of the SIP endpoint itself. If the SIP endpoint is available, the pulver server relays a message back to the originating SIP endpoint with the Internet address of the receiving endpoint. The two SIP endpoints then can exchange IP packets containing voice traffic via their own Internet service providers (“ISP”). Pulver’s FWD has no further involvement in the call once it relays the IP address of the called party to the calling party.⁶

Thus, FWD as described by pulver is very similar to two other Internet-based services -- Instant messaging and DNS Translation service -- that facilitate two endpoints communicating with each other on a peer-to-peer basis.⁷ The pulver server provides facilitation service to subscribers seeking to contact other subscribers on the pre-arranged list of subscribers. As thus configured, the service combines telecommunications and information to provide information to its subscribers permitting them to establish the means to exchange voice packets using the connectivity provided by their own ISPs. The communications between the two subscribers are established independent of the pulver service.

⁵ This communication utilizes what is generally known as the “public Internet.” Because of the nature of IP transmission, the term “public Internet” is probably a misnomer, because a single IP communication could traverse both the “public Internet” and the private network facilities of the ISP serving the subscriber.

⁶ The pulver petition can be read as implying that the pulver FWD service is actually part of the endpoint to endpoint communications between the two subscribers. Petition at 3. The facts presented by pulver, however, make it clear that this is not the case.

⁷ Attached hereto are diagrams outlining the manner in which the pulver service, instant messaging and DNS translation function. The pulver service is attached as Exhibit 1, instant messaging as Exhibit 2, and DNS translation as Exhibit 3.

B. Pulver's service is not a "Telecommunications Service"

The Act defines telecommunications service as follows:

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.⁸

Telecommunications is defined separately:

The term "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.⁹

A review of the pulver service indicates that it is not a telecommunications service under the Act.

First, the service is not offered for a fee. Pulver describes its service as free to any subscriber. Thus, it does not fit within the "for a fee" language of the Act. In fact, carriage "for hire" has long been the hallmark of common carriage, and carriage that does not entail payment does not constitute common carriage under the Communications Act.¹⁰

Second, and perhaps more importantly, the FWD pulver service does not appear to be an offering of "telecommunications" directly or indirectly to the public. Pulver instead is using telecommunications to provide an information service to the public. Pulver's server provides and processes information identifying the called endpoint address and its availability via telecommunications links with both the sending and receiving subscribers. In this capacity, pulver retrieves, transforms and makes available certain information on behalf of its subscribers. This information permits those subscribers to send traffic between each other using Internet

⁸ 47 U.S.C. § 153(46).

⁹ 47 U.S.C. § 153(43).

¹⁰ *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order*, 60 FCC 2d 261, 274-75 ¶¶ 23-24 (1976), *on recon.*, *Memorandum Opinion and Order*, 62 FCC 2d 588, 601-02 ¶¶ 23-24 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2nd Cir.), *cert. denied*, 439 U.S. 875 (1978).

protocol and their own ISPs. However, pulver neither offers telecommunications to either its subscriber or the public, nor does it provide or offer to provide the actual telecommunications capacity whereby its subscribers communicate with each other. In this capacity, pulver provides an information service, not a telecommunications service.

Information services always combine telecommunications with information to provide the finished information service package. The combined offering is an information service. Accordingly, an information service uses telecommunications in the delivery of information, but is not a telecommunications service. The Act defines “information service” as follows:

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .¹¹

The pulver service as described by pulver in its petition -- retrieving, processing, transforming and provisioning of information on behalf of its subscribers -- clearly meets this definition.

A service cannot be classified as both an “information service” and a “telecommunications service.”¹² Therefore, by definition, pulver cannot be offering a telecommunications service. This classification has nothing to do with the fact that the communications between the two pulver subscribers utilize the Internet protocol or that the communications used by pulver to provide its own information service to its subscribers use the Internet protocol. Pulver’s service is classified based on the nature of its offering to the public or to its subscribers, not by the nature of the underlying network technology.

¹¹ 47 U.S.C. § 153(20). The definition specifically excludes “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

¹² See notes 8 and 11 *supra*.

The Commission has repeatedly recognized this fundamental premise. For example, in its *Order on Remand in the Non-Accounting Safeguards* proceeding,¹³ the Commission observed:

In making its determination that information service providers are not telecommunications carriers, the Commission examined whether under the Act information service providers also provide a “telecommunications service,” and concluded, as the Commission consistently has found in the past, that they do not. In examining the relationship between telecommunications services and information services, the Commission affirmed its prior findings that the categories of “telecommunications service” and “information service” are mutually exclusive. In recognizing this distinction, however, the Commission could not deny that information services by definition are provided “via telecommunications” and that telecommunications could therefore be a component of an information service. (Footnotes omitted.)

In the proceeding involving classification of cable modem service, the Commission was equally explicit, rejecting the notion that the telecommunications component of an information service should be classified separately as a telecommunications service:

Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service is inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above “via telecommunications.” That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.¹⁴ (Footnotes omitted.)

When an ISP combines telecommunications and information service the offering is an information service.

¹³ *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, Order on Remand*, 16 FCC Rcd. 9751, 9770 ¶ 36 (2001).

¹⁴ *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4823 ¶ 39 (2002), *appeal pending sub. nom.* No. 02-70518 (9th Cir.).

As Qwest pointed out in its comments in the Commission’s recent rulemaking proceeding involving the classification of broadband services,¹⁵ this fundamental principle applies to facilities-based carriers when they offer an information service. When a carrier combines information with telecommunications supplied by its own facilities, the offering is an information service, even when the underlying telecommunications facilities are otherwise used by the carrier to provide telecommunications services.¹⁶ Under the Act and the Commission’s interpretations of the Act, a telecommunications carrier providing information services that incorporate its own telecommunications is not providing a telecommunications service, any more than pulver is providing a telecommunications service.

C. Pulver’s request that its service be declared outside the definition of “Telecommunications” under the Act is not meritorious

Pulver’s petition makes the strange request that the Commission determine that its service “is not ‘telecommunications’ as that term is defined in [the Act].”¹⁷ Pulver defends this request on the basis that it is not “providing” telecommunications to its subscribers.¹⁸ This argument misses the point of the distinction that the Commission has made between “telecommunications” and “telecommunications services.” When pulver provides the information service described in its petition, it utilizes telecommunications as the delivery vehicle. While the information service that pulver offers to its subscribers is not a telecommunications service, this does not mean that pulver’s service does not include telecommunications.

¹⁵ Comments of Qwest Communications International Inc., CC Docket Nos. 02-33, 95-20 and 98-10, filed May 3, 2002.

¹⁶ *Id.* at 7-8.

¹⁷ Petition at 7.

¹⁸ *Id.*

Indeed, as the Act's definition of "information service" includes telecommunications, grant of the pulver petition on this point would directly contradict the Act itself. This conclusion does not mean that the pulver information service is subject to the Commission's Title II jurisdiction -- as currently configured, it is not. It simply means that telecommunications is a necessary component of an information service. Eliminating the telecommunications component from pulver's service is not a viable legal option. In fact, eliminating the telecommunications component of the pulver service would make it impossible for pulver's subscribers to obtain information from the pulver server. The subscriber-to-subscriber communications facilitated by the pulver service rely on telecommunications.

III. THE COMMISSION MUST DEVELOP A TECHNOLOGY-NEUTRAL REGULATORY STRUCTURE FOR DEALING WITH IP VOICE APPLICATIONS

It is vital that the Commission develop a non-discriminatory and coherent policy to deal with IP-based voice services, and that it not allow a system to develop that favors particular technologies, including IP technology, over others. Functionally comparable services that compete in the same marketplace cannot be subject to different rules based purely upon technology. As an example of where such discrimination could lead, AT&T's Petition¹⁹ seeks a declaration that all telephony services using Internet protocol be free to access local exchange switching facilities at discriminatory rates. Parties in that proceeding have claimed that all voice services utilizing the Internet protocol should be exempt from paying for use of local exchange switching facilities at the same rate as other competitors.²⁰ These commenters also claim an exemption from other regulatory rules that apply to voice services using traditional voice

¹⁹ See note 3 *supra*.

²⁰ See, e.g., various comments filed in WC Docket No. 02-361 on Dec. 18, 2002, Joint Comments of Association for Communications Enterprises, *et al.* at 11-13; Level 3 Communications, LLC at 12-13; Net2Phone, Inc. at 3-4; Time Warner at 4-5.

technologies, such as universal service contributions.²¹ Such a discriminatory approach would be inconsistent with existing Commission rules, which must be technology neutral. Adoption of the AT&T approach, or anything resembling it, would create an artificial regulatory cost advantage for one particular technology. AT&T's Petition provides a graphic example of what the Commission must avoid in fashioning appropriate rules treating voice services using IP technology.

How the Commission applies its regulatory structure to telephony services that use the public Internet or IP technology must be addressed in a coherent and comprehensive manner. The pulver petition itself, however, can be decided based on a consistent application of the Commission's existing rules. For example, neither the subscribers using the pulver service, nor their ISPs, pay carriers' carrier charges to local exchange carriers. Local exchange switching facilities are not used as part of the communications between subscribers and the pulver server, or as part of the ultimate communications between the two pulver subscribers. Thus, there is no reason for such fees to be assessed. However, and this is crucial, should IP voice telephony services originate or terminate in a manner that does use local exchange switching facilities, entirely different legal and policy implications would arise. Payment for use of local exchange switching facilities should be based on use, not regulatory classification.

IV. CONCLUSION

Qwest agrees with the petition in that the service offered by pulver is not a telecommunications service. The pulver service is properly classified as an information service under the Act and the Commission's rules implementing and interpreting the Act. The fact that the public Internet is used in the provision of the pulver service and for the establishment of the

²¹ See, e.g., Joint Comments of the American Internet Service Providers Association, *et al.* at 32-33; Joint Comments of Association for Communications Enterprises, *et al.* at 2.

communications established with the assistance of the pulver service has nothing to do with this classification. Even though a provider of an information service (including telecommunications carriers) incorporates telecommunications into its provision of an information service, the entire product remains an information service under the Act.

However, Qwest urges the Commission to reject pulver's request that the Commission declare that pulver's service does not include telecommunications. Telecommunications is an essential component of any information service, including pulver's.

Finally, although the pulver petition does not present a reasonable opportunity to address other issues, voice services using the Internet protocol do raise vital issues that the Commission must address on a timely basis. However, the limited facts presented in pulver's petition do not present a good vehicle for addressing these issues. In ultimately doing so, the Commission must establish a regulatory structure that does not discriminate in favor of one class of providers of voice service solely on account of the technology employed.

Respectfully submitted,

By: Robert B. McKenna
Sharon J. Devine
Robert B. McKenna
Kristin Smith
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
303.672.2861

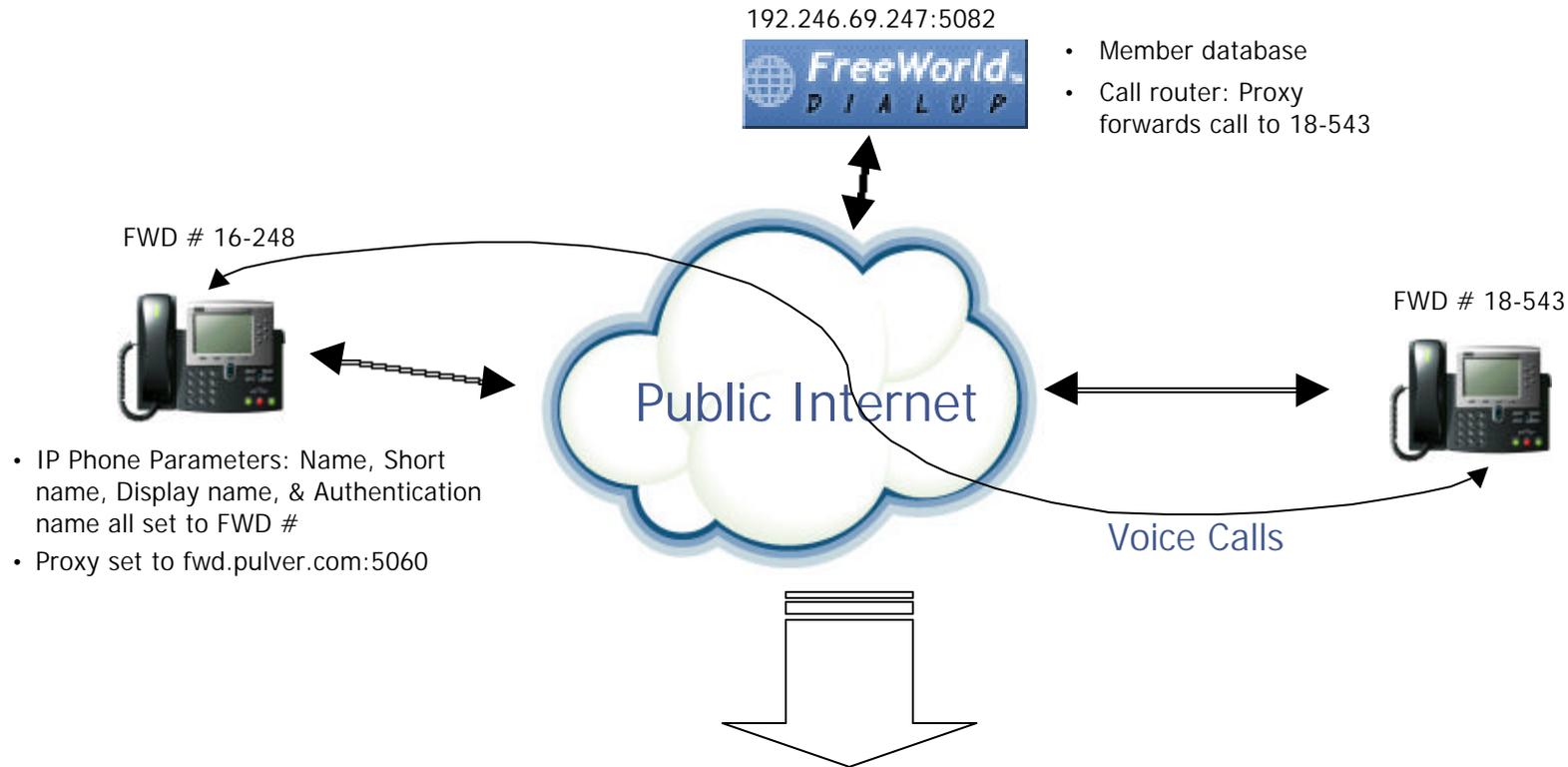
Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

February 14, 2003

SIP Phone to SIP Phone Scenario (Pulver.com)

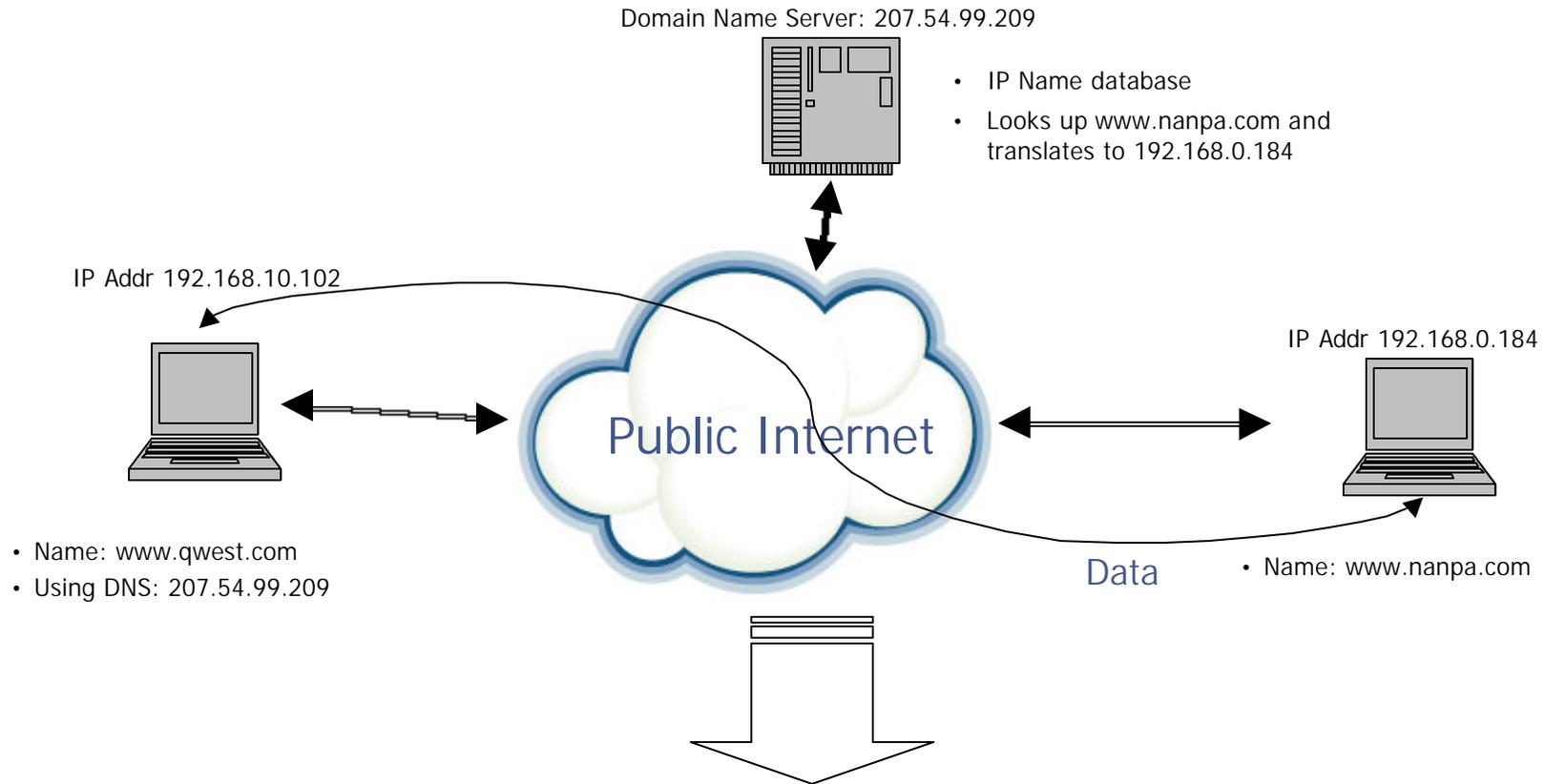
- ◆ Using SIP phone for Pulver's FreeWorld Dialup means the phone can only be used for FWD – cannot make calls to the PSTN



Pulver.com service is analogous to DNS translation & Instant Messenger service: calls are routed based on information from the FWD server

DNS Translation

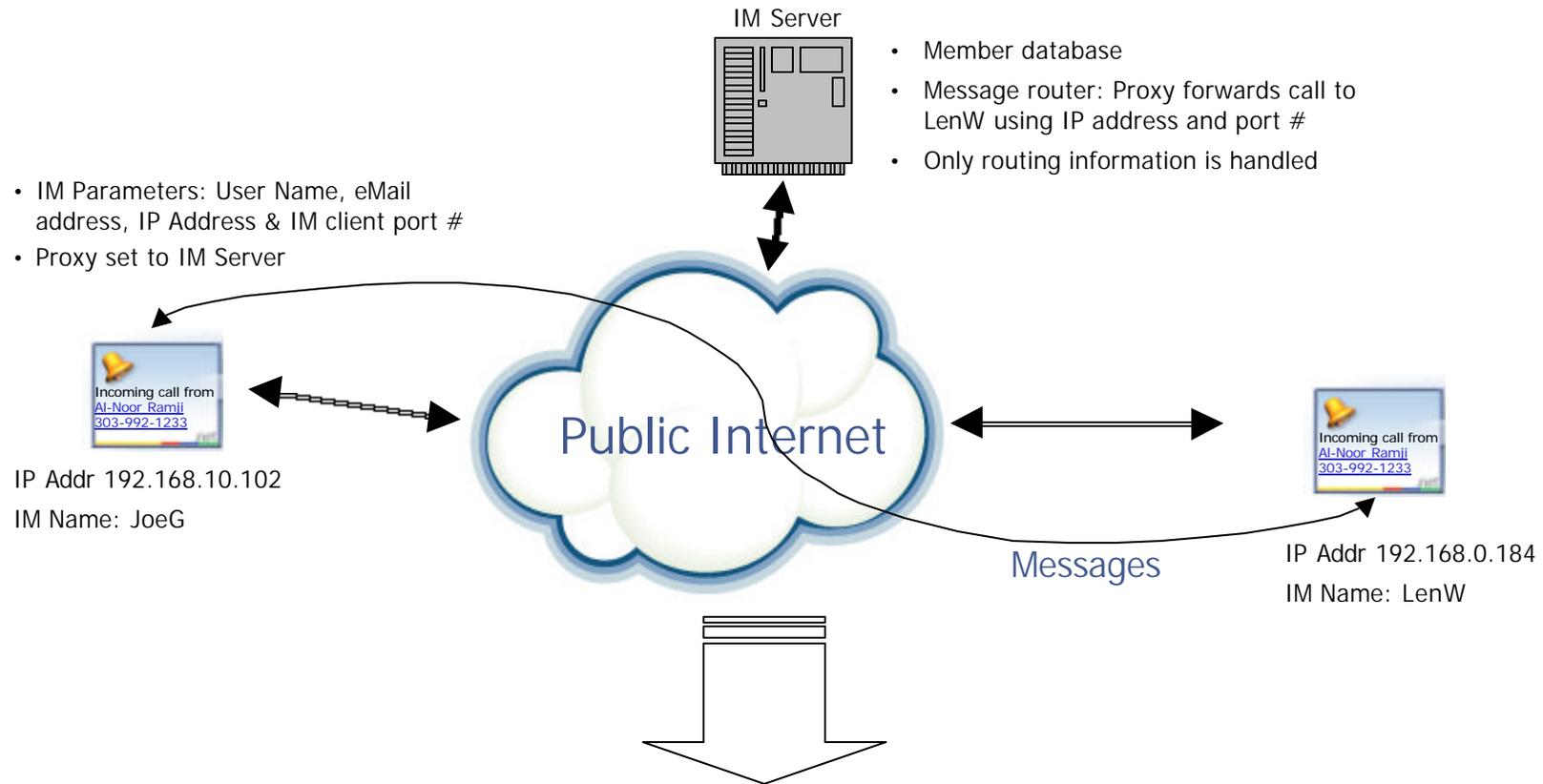
- ◆ Pulver's SIP phone routing is almost identical to how web addresses are translated and routed



DNS translation is handled just like Pulver's Free World Dialup: DNS provides routing table to send data to the correct IP Address

Instant Messaging

- ◆ Server holds connection info & list of contacts with login status
- ◆ Server sends connection info to logged-in contacts



Instant Messaging utilizes proprietary protocols to properly route messages – similar to SIP & Free World Dialup

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System and served on the parties as indicated below.

Richard Grozier
Richard Grozier

March 14, 2003

Janice M. Myles
jmyles@fcc.gov

Qualex International
qualexint@aol.com

Bruce D. Jacobs.....pulver.com
Glenn S. Richards
Susan M. Hafeli
Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1128

First class United States Mail
Postage Prepaid

WC03-45.doc
Updated 03/14/2003