

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

In the Matter of)		
)		
Petition for Declaratory Ruling that)	WC Docket No. 03-45	
Pulver.com' Free World Dialup is)		
Neither Telecommunications Nor)		
a Telecommunications Service)		
_____)		

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),¹ through the undersigned and pursuant to the Public Notice released herein on February 14, 2003,² hereby files its comments concerning the Petition for Declaratory Ruling (Petition) of pulver.com (Petitioner). Petitioner asks the Federal Communications Commission (FCC) to declare “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.”³ USTA opposes determinative action on the Petition at this time. As discussed below, before any action is taken by the FCC to define the regulatory classification of offerings such as Free World Dialup, there are necessary conditions precedent, including completing pending rulemaking proceedings concerning the appropriate regulatory classification for services and facilities used to provide broadband access

¹ USTA is the Nation’s oldest trade organization for the local exchange carrier industry. USTA’s carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² Public Notice, WC Docket No. 03-45, DA 03-439 (rel. Feb. 14, 2003).

³ Petition at 1.

to the Internet⁴ and affirming, rejecting or modifying the tentative conclusions reached in its 1998 *Report to Congress*,⁵ that must be addressed. Accordingly, the Petition should be dismissed without prejudice to it being filed again once the FCC has rendered final conclusions with respect to the unresolved, fundamental regulatory classification questions concerning broadband and Voice over Internet Protocol (VoIP) services and has also addressed how those conclusions will allow for the preservation of specific, predictable and sufficient universal service support mechanisms.

DISCUSSION

Since the Telecommunications Act of 1996 took effect, the Internet has steadily increased in significance and impact with respect to commerce generally and the telecommunications industry specifically. Consumer and business use of the Internet as a medium for posting information, exchanging information, research, advertising, marketing and sales has grown nationally (and internationally) to the point where it is now, for some individuals and businesses, a substitute for mail, fax, telephone, and in-person communications and transactions. Use of the Internet is far-reaching and prolific. It has even provoked a re-examination of the reach of principles such as free speech, privacy and intellectual property. New law is emerging concerning the management of “digital rights.”

⁴ See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking (*Wireline Broadband NPRM*) (rel. Feb. 15, 2002); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Notice of Proposed Rulemaking (*Cable Broadband NPRM*) (rel. Mar. 15, 2002).

⁵ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*).

In 1998, the FCC issued its *Report to Congress* that focused on the potential impacts of the Internet and Internet usage on the public switched telephone network (PSTN).⁶ Specifically and in recognition of the development of VoIP, the FCC's *Report to Congress* addressed itself, in part, to the question of whether VoIP should contribute to universal service support programs pursuant to Section 254 of the Communications Act.⁷ In addressing the question, the FCC examined the VoIP offerings known at that time and discussed how the definitions found in the Communications Act⁸ might apply and determine the regulatory classification of these offerings.⁹ The analysis offered by the FCC in its *Report to Congress* has been cited by AT&T Corp. (AT&T) as support for its recent VoIP petition for declaratory ruling.¹⁰ The AT&T PFDR asks the FCC to exempt AT&T from paying interstate access charges for its interstate circuit switched interexchange services that employ Internet protocol (IP) but still use the PSTN for the origination or termination of those services. USTA has opposed the AT&T PFDR.¹¹ Here, Petitioner also cites to the FCC's *Report to Congress* as support for its Petition. Petitioner asks the FCC to find that its Free World Dialup offering "is neither 'telecommunications' nor a 'telecommunications service' as these terms are defined in Section 153(a) of the Telecommunications Act of 1996."¹² Petitioner also contends that its Free World Dialup offering is not an information service.¹³

⁶ *Id.*

⁷ 47 U.S.C. § 254.

⁸ 47 U.S.C. § 151 *et seq.*

⁹ *See Report to Congress* at ¶¶ 83-93.

¹⁰ *See* Petition For Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges, filed October 18, 2002, WC Docket No. 02-361 (AT&T PFDR).

¹¹ *See* Comments of the United States Telecom Association filed in WC Docket No. 02-361 on December 18, 2002, and Reply Comments of the United States Telecom Association filed on January 23, 2003.

¹² Petition at 1.

¹³ *Id.* at 6, fn. 9.

A determination by the FCC that Free World Dialup is neither telecommunications nor a telecommunications service would be far-reaching. But, a determination by the FCC that Free World Dialup is also not an information service could prove disastrous for the future of universal service. Section 254(d) mandates that every telecommunications carrier that provides interstate telecommunications services shall contribute to FCC established universal service support mechanisms.¹⁴ Section 254(d) further provides the FCC with the discretion to require universal service contributions from “any other provider of interstate telecommunications[.]” The definition of “Information Service” found at Section 3(20) of the Communications Act states that the term means the offering of specified capabilities “via telecommunications.” Were the FCC to grant the Petition in its entirety, the FCC would arguable lose its ability to require Free World Dialup to contribute to the support of universal service. USTA submits that it would be inappropriate and contrary to the public interest for the FCC to open the door to such an exemption.

Despite the reliance placed by Petitioner on the *Report to Congress*, it must be recognized that the analysis performed by the FCC was conducted five years ago. Dramatic changes in technology have occurred in those five years, and voice communications capabilities not generally available in 1998 now exist.¹⁵ Further, the classification conclusions offered by the FCC with respect to VoIP in the *Report to Congress* were tentative even then.¹⁶ Before the FCC

¹⁴ 47 U.S.C. § 254(d).

¹⁵ The FCC acknowledged in its *Report to Congress* how quickly technology was changing. “We are mindful of the fact that telecommunications is an industry characterized by extremely rapid changes, as technological advances lead to the introduction of revolutionary services.” “We can only speculate about the technologies and services that will be offered in the future.” *Report to Congress* at ¶ 2.

¹⁶ “We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments.” “The Commission to date has not formally considered the legal status of IP telephony. The record currently before us

can act on the Petition, it must first: update the record to incorporate changes in technology that have occurred over the past five years; revisit its tentative conclusions in the *Report to Congress* and issue final, reviewable conclusions; address how it will ensure the continuation of specific, predictable and sufficient universal service support mechanisms in light of its final conclusions; and complete pending rulemaking proceedings concerning the appropriate regulatory classification for services and facilities used to provide broadband access to the Internet.

The AT&T PFDR and this Petition, when compared, illustrate the difficulty in arriving at a definition of IP telephony or VoIP to which a common classification can be attached. What AT&T and Petitioner self-define as IP telephony or IP voice communications in their respective petitions is vastly different. Consequently, the label IP telephony or VoIP alone cannot determine the regulatory classification of an offering. A more fully developed framework is needed for analyzing communications offerings using the Internet, in whole or in part, that is consistent with all applicable provisions in the Communications Act.

As the FCC continues to establish such a framework, it must remain mindful of its mandate to preserve the availability of universal service support mechanisms that are specific, predictable and sufficient. Providing new service providers with an unwarranted exemption from contributing to universal service support is not in the public interest and is contrary to Section 254 of the Communications Act. As broadband-based communications offerings increase, keeping universal service support specific, predictable and sufficient requires that universal service support be collected from a broader base of service providers in a more

suggests that certain ‘phone-to-phone IP telephony’ services lack the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services.’ We do not believe, however, that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.” *Report to Congress* at ¶ 83.

competitive and technology neutral manner. Petitioner urges the FCC to “be mindful of congressional intent and encourage Internet innovation, investment, and growth by declining to regulate FWD.”¹⁷ The FCC should not be seduced by this entreaty. Rather, as it evaluates new offerings such as Free World Dialup, it should reaffirm its sensitivity to balancing the preservation of universal service along with encouraging Internet innovation, investment and growth. As it stated in its *Report to Congress*:

We must take care to preserve the vibrant growth of these new technologies and services. But we must also remain constant in our commitment to ensuring universal service.¹⁸

CONCLUSION

On the basis of the foregoing, USTA urges that the Petition be denied without prejudice to it being filed again at an appropriate future date.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMEnamin
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300

March 14, 2003

¹⁷ Petition at 8.

¹⁸ *Report to Congress* at ¶ 2.