FCC MAIL SECTION

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

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. 03-45

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 2004 **Released: February 19, 2004**

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioner Adelstein concurring in part, dissenting in part, and issuing a separate statement; and Commissioner Copps dissenting and issuing a separate statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we declare pulver.com's (Pulver) Free World Dialup (FWD) offering to be an unregulated information service subject to the Commission's jurisdiction. In so doing, we remove any regulatory uncertainty that has surrounded Internet applications such as FWD. We formalize the Commission's policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels. This action is designed to bring a measure of regulatory stability to the marketplace and therefore remove barriers to investment and deployment of Internet applications and services. Offerings such as FWD promise significant consumer benefits in the form of lower prices, new pricing models and enhanced functionality. Accordingly, our action is part of a number of initiatives that are designed to bring the benefits of Internet protocol-based (IP-based) services to American consumers.

II. BACKGROUND

2. On February 5, 2003, Pulver filed a petition for declaratory ruling requesting that the Commission declare FWD to be neither a "telecommunications service" nor "telecommunications" as those terms are defined in the Communications Act of 1934, as

amended (Act).[1] Through FWD, Pulver offers users of broadband Internet access services the opportunity to join other such users in becoming members of the FWD community in order to communicate directly with one another over the Internet.[2] For reasons provided below, we grant Pulver's petition and also declare FWD to be an unregulated information service that is subject to Commission jurisdiction.[3]

3. The Act defines "telecommunications" as "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."[4] "Telecommunications service" is defined as "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."[5] "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."[6]

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[1] Pulver Petition at 1. The Commission requested and received comment on Pulver's petition. *See* 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). *See* Appendix for a list of commenters.

[2] Pulver Petition at 2-3. Throughout this Order, we use the term "members" to refer to those Internet users that have joined the FWD community by: registering with FWD; obtaining an FWD identifying number; acquiring and configuring customer premises equipment (CPE) to enable peer-to-peer communications via broadband Internet access; and making such communications entirely over the Internet to other users that have similarly joined FWD, facilitated by information obtained from FWD in order to do so.

[3] We reach our holdings in this Order based on FWD as described by Pulver in its petition and subsequent *ex partes*. We thus limit the determinations in this Order to Pulver's present FWD offering (only to the extent expressly described below), without regard to any possible future plans Pulver may have. *See, e.g.*, BellSouth Comments at 4 & n.13 (quoting a Pulver press statement about eventually charging a fee); USTA Reply at 4 (citing SBC Comments at 2 that FWD may eventually enable calls to users outside the FWD community). Furthermore, this declaratory ruling addresses FWD only to the extent it facilitates free communications over the Internet between one on-line FWD member using a broadband connection and other on-line FWD members using a broadband connection. Therefore, we specifically decline to extend our classification holdings to the legal status of FWD to the extent it is involved in any way in communications that originate or terminate on the public switched telephone network, or that may be made via dial-up access. *See* Letter from Susan M. Hafeli, Counsel, pulver.com, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45, at 1 (filed Dec. 11, 2003) (Pulver Dec. 11 *Ex Parte* Letter) (acknowledging that "third parties can provide FWD subscribers with connectivity to the public switched telephone network" without Pulver's permission). Rather, we will address the legal status of those communications in our companion IP-Enabled Services rulemaking.

[4] 47 U.S.C. § 153(43).

[5] 47 U.S.C. § 153(46).

[6] 47 U.S.C. § 153(20).

4. FWD is an Internet application. The Internet is a distributed packet-switched network of interconnected computers enabling people around the world to communicate with one another, invoke multiple Internet services simultaneously and access information with no knowledge of the physical location of the server where that information resides.[7] The Internet represents a paradigmatic shift in network technology: intelligence in the system no longer resides, as it did in the legacy circuit-switched network, primarily in the network itself, but has instead migrated to the edge of a vastly different type of network – to the end user's CPE. FWD is an example of this migration because, as explained below, Pulver's service bears no geographic correlation to any particular underlying physical transmission facilities. FWD depends on whether a user can establish a presence on the network at some point, not whether the user can access the network from a specific geographically defined end point. Internet applications like FWD thus separate the user from geography and the application enabling voice or other types of communication from the network over which the communication occurs.

5. As described by Pulver, FWD offers users of broadband Internet access the opportunity to join other such users worldwide in talking with one another directly over the Internet as well as communicating directly via video or text.[8] FWD facilitates this interactive communication capability by offering such users the ability to become FWD members through an initial registration process followed by the new member complying with other requirements specified by FWD that are necessary to enable communications to be made.[9] Specifically, members must have an existing broadband Internet access service as Pulver does not offer any transmission service or transmission capability.[10] In addition, members must acquire and appropriately configure Session Initiation Protocol (SIP) phones or download software that enables their personal computers to function as "soft phones."[11] Once these criteria are met, anyone anywhere in the world can obtain a Pulver-assigned five- or six-digit FWD number (not a North American Numbering Plan (NANP) number)[12] to facilitate using the member's broadband

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[7] *See, e.g., GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22468, para. 5 (1998) (*GTE ADSL Order*).

[8] Pulver Petition at 3; Pulver Reply at 2-3 & n.2.

[9] *Id.* Pulver indicates it does not verify the identifying information members submit on the FWD registration screen such as name, address, state or country. *See* Letter from Susan M. Hafeli, Counsel, pulver.com, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45, at 1 (filed Dec. 16, 2003) (Pulver Dec. 16 *Ex Parte* Letter).

[10] Pulver Petition at 3. According to Pulver, its service operates with any type of broadband connection (*e.g.*, cable modem, digital subscriber line, satellite, or wireless). *Id.* As noted above, we do not address FWD to the extent it may be usable via dial-up access. *See supra* note 3.

[11] Pulver Petition at 3-4. Session Initiation Protocol is an application-layer control (signaling) protocol for creating, modifying, and terminating sessions with one or more participants. These sessions include Internet telephone calls, multimedia distribution, and multimedia conferences. *See* J. Rosenberg et al, "SIP: Session Initiation Protocol" RFC 3261, June 2002; *see also* Letter from A. Renee Callahan, Counsel, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45, at n.5 (filed Dec. 12, 2003) (MCI Dec. 12 *Ex Parte* Letter).

[12] Pulver Petition at 3; Pulver Dec. 11 *Ex Parte* Letter at 2-3.

service to make free voice over Internet Protocol (VoIP) or other types of peer-to-peer communications to other FWD members.[13] According to Pulver, it neither knows nor needs to know where its members are geographically located in order for its members to use FWD.[14] In addition, Pulver indicates it can not determine its members' geographic location.[15] Once an FWD member obtains its FWD number, that number is completely portable to any broadband-accessible location to which that member may go.[16] Moreover, FWD members may not even know where other members are physically located during any given communication session with another member as FWD enables members to register up to 25 different locations for potential receipt of communications from other members, any one of which locations may end up being the Internet address from where the communication is actually answered.[17]

6. According to Pulver, FWD acts as a directory or translation service, informing its members when other members are online or "present," thus available to receive a call, as well as informing them of the Internet address necessary to reach other members during their on-line presence.[18] Moreover, Pulver indicates that FWD: offers voice mail capabilities to those members who opt-in to this function; offers conference bridging capabilities to members; and performs limited Internet address repair for its members.[19] Although FWD facilitates VoIP or other types of communications over the Internet between its members, Pulver indicates that FWD is merely an Internet application that provides its members information that those members use to communicate with other members.[20] Pulver states that it is the members' end-user devices, not Pulver, that establish the actual connections and manage the calls.[21]

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[13] "Peer-to-peer" is a communications model in which each party has the same capabilities and either party can initiate a communication session. In recent usage, peer-to-peer has come to describe applications in which users can use the Internet to, for example, exchange files with each other directly or through a mediating server. *See* http://searchnetworking.techtarget.com/sDefinition/0,sid7_gci212769,00.html.

[14] *See* Pulver Dec. 16 *Ex Parte* Letter at 1-2.

[15] *Id.* In fact, the record shows that it is impractical or impossible for Pulver to obtain member location information (*i.e.*, the originating and terminating points) for any given communication between its members. According to Pulver, since it "manages only the signaling component of the call," it has access only to the application layer of the network and, thus, the information available to it is "inadequate to determine the actual physical location of an underlying IP address." *Id.*

[16] *Id; see also* Letter from Scott Blake Harris, Counsel, Cisco, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45, at 3-4 (filed Dec. 11, 2003) (Cisco Dec. 11 *Ex Parte* Letter).

[17] *See* Letter from Glenn S. Richards, Counsel, pulver.com, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45, at 1 (filed Jan. 20, 2004) (Pulver Jan. 20 *Ex Parte* Letter).

[18] Pulver Dec. 11 *Ex Parte* Letter at 2.

[19] Pulver Dec. 11 *Ex Parte* Letter at 2; Pulver Jan. 15 *Ex Parte* Letter.

[20] Pulver Dec. 11 *Ex Parte* Letter at 2.

[21] Pulver Dec. 11 *Ex Parte* Letter at 2-3 (noting with support Electronic Frontier Foundation's statement that "FWD simply allows FWD subscribers to use telephone-like 5- or 6-digit numbers to locate and call other FWD (continued....)

7. According to Pulver, its FWD service is not "telecommunications" because Pulver provides no transmission capabilities to its members and is not a "telecommunications service" because Pulver neither provides "telecommunications" nor charges any fee for its FWD service.[22] Finally, in its petition and in an *ex parte* filing, Pulver has argued that FWD cannot be an "information service," as that term is defined in the Act, because FWD provides no "data transport" with its computing capabilities.[23] In determining the regulatory classification of FWD, we examine only the specific functions FWD provides its members as described above.

III. DISCUSSION

8. For the reasons discussed below, we declare that FWD is neither "telecommunications" nor "telecommunications service" as defined in the Act and as interpreted by the Commission. Moreover, we declare that FWD is an unregulated information service subject to federal jurisdiction.[24]

(Continued from previous page)
subscribers, much as DNS translation allows Internet users to use http://www.eff.org instead of http://209.237.229.14.").

[22] Pulver Petition at 7.

[23] Pulver Petition at n.9; Pulver Dec. 11 *Ex Parte* Letter at 3-4 .

[24] We reject the argument that Pulver has failed to demonstrate that there is a controversy or uncertainty surrounding its offering that warrants a declaratory ruling. *See, e.g.,* BellSouth Comments at 2-4, 6; Global Crossing Comments at 1; SBC Comments at 1-3; AT&T Reply at 2. Based on the record in this proceeding and in accordance with our rules, it is evident that there is sufficient uncertainty about the classification of Pulver's service offering to warrant a declaratory ruling. We also determine that, given the discrete nature of Pulver's offering, it is unnecessary to forgo ruling on the petition until after completion of a general IP-enabled rulemaking. *See, e.g.*, BellSouth Comments at 4, 6-7; Global Crossing Comments at 2; Verizon Comments at 1-2; USTA Comments at 4-6; Minnesota Dept. of Commerce Reply at 2-3. We acknowledge the concerns of local governments that we not prejudge in this Order any questions regarding public safety, consumer welfare, and the role of local government – all of which are presented in the IP-Enabled Services rulemaking, in which we will examine them in detail. *See* Letter from Matthew C. Ames, Counsel for National League of Cities et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-361, 03-45, 03-211 & 03-251 (filed Jan. 16, 2004). The Department of Justice has informed the Commission that it plans to file a petition for rulemaking asking the Commission to initiate a comprehensive rulemaking to address law enforcement's needs relative to CALEA. The Commission recognizes the importance of ensuring that law enforcement's requirements are fully addressed. The Commission takes seriously the issues raised by law enforcement agencies concerning lawfully authorized wiretaps. Accordingly, the Commission plans to initiate a rulemaking proceeding in the near future to address the matters we anticipate will be raised by law enforcement, including the scope of services that are covered, who bears responsibility for compliance, the wiretap capabilities required by law enforcement, and acceptable compliance standards. Our decision in this Order does not prejudice the outcome of our proceeding on CALEA. *See* Letter from John G. Malcolm, Deputy Assistant Attorney General, Department of Justice, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 02-33, 95-20, & 98-10; CS Docket No. 02-52; WC Docket Nos. 03-45, 03-211, & 02-361 (filed Feb. 6, 2004); *see also* Letter from Patrick W. Kelley, Deputy General Counsel, FBI, to John Rogovin, General Counsel, Federal Communications Commission, CC Docket Nos. 97-213, 02-33, 95-20, & 98-10; CS Docket No. 02-52; WC Docket Nos. 02-361, 03-45, 03-211, 03-251 & 03-266 (filed Jan. 28, 2004); DOJ/FBI Comments at 2-3.

A. Classification of FWD

9. First, we conclude that FWD is not "telecommunications."[25] Under the statute, the heart of "telecommunications" is transmission.[26] As explained above, Pulver neither offers nor provides transmission to its members. Rather, FWD members "bring their own broadband" transmission to interact with the FWD server.[27] At least one commenter has argued that FWD is telecommunications because FWD does not change the form or content of the information as sent and received.[28] We disagree. FWD acts as a type of directory service, informing its members when fellow members are online or "present."[29] Thus, even if FWD were providing transmission (which it is not), the information that FWD provides is not "information of the user's choosing, without change in the form or content of the information as sent and received."[30] Instead, FWD provides new information: whether other FWD members are present; at what IP address a member may be reached; or, in some cases, a voicemail or an email response.[31] Finally, the fact that Pulver's server is connected to the Internet via some form of transmission is not in and of itself, as some commenters argue, relevant to the definition of telecommunications.[32] Pulver may "use" some telecommunications to provide its FWD directory service but that does not make FWD itself telecommunications.

10. We also conclude that FWD is not a "telecommunications service."[33] Section 153(46), the definition of telecommunications service, refers to an "offering of telecommunications." As discussed above, however, FWD does not offer "telecommunications." Therefore, it cannot be a "telecommunications service." In addition, as its name suggests, FWD is free of charge to users and, in order to be a telecommunications service, the service provider

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[25] We note that most commenters agree with this conclusion. *See, e.g.*, Cisco Comments at 1; Global Crossing Comments at 2; VON Coalition Comments at 1; Electronic Frontier Foundation Reply at 1. *But see* Qwest Comments at 8-9 (arguing that Pulver "utilizes" telecommunications as the "delivery vehicle" when it provides the information service described in its petition).

[26] *See supra* para. 3.

[27] Pulver Petition at 7.

[28] *See* Verizon Comments at 2-3.

[29] Electronic Frontier Foundation Reply at 2; Pulver Dec. 11 *Ex Parte* Letter at 2.

[30] *See* 47 U.S.C. § 153(43) (definition of "telecommunications"); *see also* Pulver Reply at 3 (explaining that FWD does not transmit information of the user's choosing without change in the form or content of the information as sent and received).

[31] *See* Pulver Dec. 11 *Ex Parte* Letter at 2; Letter from Glenn S. Richards, Counsel, pulver.com, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45, Attach. at 16 (filed Jan. 15, 2004) (Pulver Jan. 15 *Ex Parte* Letter).

[32] *See* SBC Comments at 3.

[33] We note that commenters agree with this conclusion. *See, e.g.*, Cisco Comments at 1; Global Crossing Comments at 2; Qwest Comments at 1; Verizon Comments at 3; VON Coalition Comments at 1; AT&T Reply at 3.

must assess a fee for its service.[34] Accordingly, because we determine that FWD is not a "telecommunications service," the common carriage obligations applicable to the provision of such service as set forth in Title II do not apply.[35]

11. We conclude that FWD is an information service because FWD offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[36] Through its server accessible over the Internet, FWD makes available to its members information that enables them to determine whether other members are available to talk; information on how to contact other members; and an optional voicemail capability that enables members to leave messages for unavailable members who have chosen this feature.[37] Specifically, FWD offers its members a number of "computing capabilities."[38] First, FWD enables its members to "acquire" information about other members' online presence at any particular time (similar to an instant messaging service).[39] Second, FWD "stores" both member information (*e.g.*, assigned numbers) and, if a member opts-in, voicemail messages on its server, that are accessible to other members.[40] Third, Pulver provides members with certain information (*i.e.*, identifying numbers and passwords) that they "utilize" first to register for the FWD service and then to contact other members who are online.[41] Fourth, the FWD service "processes" the "SIP invite" (*i.e.*, the information an initiating member sends to the FWD server indicating it wishes to communicate with a recipient member) by determining both the recipient member's Internet addresses and online availability.[42] Once FWD determines that the recipient member is available online, it "makes available" the SIP invite to that recipient member.[43] Making available the Internet addresses of the intended recipient

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[34] *See* 47 U.S.C. § 153(46) (definition of "telecommunications service").

[35] *See generally* 47 U.S.C. §§ 201 *et seq.*

[36] *See* 47 U.S.C. § 153(20). Commenters agree that FWD is an "information service." *See, e.g.*, Qwest Comments at 1-2, 6-9; MCI Dec. 12 *Ex Parte* Letter at 2.

[37] *See* Pulver Petition at 4; Pulver Dec. 11 *Ex Parte* Letter at 2. We note that the Commission has previously determined that voicemail is an information service and has exerted ancillary Title I jurisdiction over the provision of such an information service. *See, e.g.*, *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6457, paras. 97-98 (1999) (*Section 255 Order*).

[38] Pulver Dec. 11 *Ex Parte* Letter at 4.

[39] Pulver Petition at 4.

[40] Pulver Dec. 11 *Ex Parte* Letter at 2.

[41] Pulver Petition at 3.

[42] Electronic Frontier Foundation Reply at 2-3; *see also* Pulver Dec. 11 *Ex Parte* Letter at 2 (stating that Electronic Frontier Foundation's Reply "accurately describe[s] FWD as it is currently available").

member enables the initiating member to "retrieve" this information.[44] Finally, if a member's equipment generates a private Internet address that interferes with the ability of the user's CPE to determine public Internet addresses, FWD will "transform" or repair the addressing information and will relay the "signaling and media stream via a protocol conversion solution to facilitate delivery."[45]

12. In the case of each of these specific functions, Pulver is offering FWD members the capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information in a way contemplated by the Act to qualify as an information service. We also acknowledge that after performing these specific functions, Pulver no longer plays a role in the exchange of information between its members (except for relaying a "SIP bye" message generated by one of the users when the communication is terminated) – it merely facilitates peer-to-peer communication. The fact that the information service Pulver is offering happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service. To find otherwise would not only ignore the fact that Pulver does not provide telecommunications, as explained above, but also ignore the capabilities described above that FWD makes available to its members.

13. At least one commenter has suggested that FWD is not an "information service" because it falls within the definition's exception for the "management, control or operation of a telecommunications system or the management of a telecommunications service."[46] We disagree. Examining the plain language of the definition dictates a finding that the exception could not apply to Pulver because Pulver is not managing a telecommunications system or telecommunications service. Examining the history of the text and Commission precedent supports the same result. The telecommunications management exception was initially included in the definition of "information service" contained in the Modification of Final Judgment.[47] That definition explained what services the BOCs were not permitted to offer while recognizing

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[43] Electronic Frontier Foundation Reply at 2-3. Similarly, if the recipient member is not online, FWD "makes available" that information to the initiating member as well. Pulver Dec. 11 *Ex Parte* Letter at 2.

[44] Qwest Comments at 4; Electronic Frontier Foundation Reply at 7.

[45] Pulver Dec. 11 *Ex Parte* Letter at 2.

[46] *See* Letter from Kathleen M. Grillo, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-45 & 03-211 at 5 (filed Feb. 5, 2004) (Verizon Feb. 5 *Ex Parte* Letter); *see also supra* para. 3 and n.6. In the *Non-Accounting Safeguards Order*, the Commission recognized that certain capabilities previously treated as basic services when provided by a carrier fell within the telecommunications management exception: adjunct-to-basic services and "no net" protocol processing. *Implementation of the Non-Accounting Safeguards of Sections 27 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21957-58, paras. 106-07 (1996) (*Non-Accounting Safeguards Order*), clarified in Order on Reconsideration, 12 FCC Rcd 2297, 2298-99, para. 2 (1997).

[47] *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982) (subsequent history omitted); Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) at 114.

that certain computer processing capabilities were permitted within the provision of their regulated services. Thus, the telecommunications management exception permitted the BOCs to improve their telecommunications networks without running afoul of the restriction on providing information services.[48] Prior to the MFJ and divestiture, the Commission had permitted certain computing capabilities to be incorporated into AT&T's telecommunications network to facilitate and modernize the provision and use of basic telephone service.[49] This does not mean that when Pulver or another information services provider offers these capabilities on a stand-alone basis that they are transformed into telecommunications services.[50]

14. We reject Pulver's reading of the definition of "information service." Pulver argues that FWD cannot be an "information service" as that term is defined in the Act because Pulver does not offer transmission to its members.[51] However, the statutory definition of an information service speaks only to the *offering* of various types of computing capabilities *via* telecommunications, not the *offering* of telecommunications itself. The fact that FWD's computing capabilities, as described above, are available to its members via "telecommunications" – *i.e.*, the telecommunications underlying its members' Internet connectivity; the telecommunications connecting Pulver's FWD server to the Internet; and the telecommunications underlying the Internet backbone itself – is sufficient to meet the statutory definition of "information service."[52] In explaining the difference between "enhanced services" and "information services," the Commission previously noted that the former are "limited to

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[48] *See American Tel. & Tel.*, 552 F. Supp. at 227, 229.

[49] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 419-428 (1980) (*Computer II Final Decision*) (noting those computer processing capabilities directly related to the provision of the basic service that telephone companies were able to provide as part of their tariffed basic service (later termed "adjunct-to basic" services, *see North American Telecommunications Association Petition For Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, Memorandum Opinion And Order, 101 FCC 2d 349, 358-61 (1985) (*NATA Centrex*)); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Memorandum Opinion And Order, 84 FCC 2d 50, 60-61 (1980) (*Computer II Reconsideration Order*) (recognizing certain protocol conversion capabilities may occur internal to a carrier's network); *Computer II Final Decision*, 77 FCC 2d at 421; *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Gen. Docket No. 80-756, 95 FCC 2d 584, para. 29 (1983) (*Protocols Order*).

[50] Indeed, in discussing various types of signaling that occurs within a basic service, the Commission noted that certain protocol processing network functions intrinsic therein "may be properly associated with basic service without changing its nature, or with an enhanced service without changing the classification of the latter as unregulated under Title II of the Act." *Protocols Order*, 95 FCC 2d at para. 15. We note that FWD is different from signaling networks. While FWD does provide information that members use to initiate communications among themselves, FWD does not manage the resulting disintermediated communication. That is managed by the members themselves. In addition, FWD provides many features not offered by signaling networks (*e.g.*, directory look-up, voice mail, emailed responses, conferencing capabilities, and address repair).

[51] Pulver Dec. 11 *Ex Parte* Letter at 3-4 (arguing that an "information service" provider must offer data transport).

[52] *See* Pulver Dec. 11 *Ex Parte* Letter at 3 (acknowledging that there is "some transmission involved in the provision of FWD").

services 'offered over common carrier transmission facilities used in interstate communications,' whereas 'information services' may be provided, more broadly, 'via telecommunications.'"[53] The Commission has never required or even suggested that the information service provider must be the entity that provides or offers the telecommunications over which the information service is made available to its members.[54] As described above, FWD members must separately acquire broadband service, as Pulver does not offer transmission to its members.

B. Commission Jurisdiction over FWD

15. Having directly addressed the issues raised by Pulver's petition, we believe it is necessary to clarify the extent and nature of the Commission's jurisdiction over FWD, an Internet application, which, among other things, facilitates consumers' ability to make VoIP calls, but does not directly offer such VoIP services to subscribers. We answer the statutory questions raised by the petition to establish the Commission's jurisdiction in this area and to avoid speculation as to the nature of Commission policy in this area. Thus, while we plan to examine jurisdictional questions more broadly in our IP-Enabled Services Notice of Proposed Rulemaking, we best serve the public by being clear as to the nature of our authority over the specific service at issue in this petition. We determine, consistent with our precedent regarding information services, that FWD is an unregulated information service and any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation.[55]

16. As discussed more fully below, two separate lines of reasoning compel this determination. First, federal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation.[56] In reaching this conclusion, we note that the Commission's traditional test for determining the boundaries of interstate versus intrastate jurisdiction – the end-to-end analysis – is inapplicable in the context of

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[53] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, para. 103.

[54] While we do not rely on the framework outlined by the Commission in its 1998 Report to Congress, we note that the conclusion we reach here that FWD is an information service is consistent with the framework discussed by the Commission in that report for two reasons: (1) to the extent FWD service is carried out entirely over the Internet using computer-based software, this resembles what that report characterized as computer-to-computer VoIP and, as contemplated therein, would be considered an information service; and (2) FWD fails the four-prong test for determining whether it is a phone-to-phone service, specifically, because it does not use NANP numbers and does not use the same CPE as may be used for circuit-switched calls (rather it uses dedicated SIP phones or soft phones). *See Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11520, para. 39 (1998) (*Stevens Report).*

[55] We note that this conclusion is confined to the FWD service as described in this Order. *See supra* note 3.

[56] *See* 47 U.S.C. § 230; *see also infra* para. 18. In section 230(e)(2) Congress defines "interactive computer service" as "any *information service*, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(e)(2) (emphasis added).

FWD and, even if it were applicable, would not support a finding of intrastate jurisdiction.[57] Second, state-by-state regulation of a wholly Internet-based service is inconsistent with the controlling federal role over interstate commerce required by the Constitution.[58]

17. Asserting federal jurisdiction over FWD is consistent with – and supported by – the states' already-limited role with regard to information services. The Commission has, on prior occasions, determined that certain state regulations of information services would conflict with the national policy of nonregulation.[59] Several decades ago, the Commission recognized in its *Computer Inquiry* proceeding[60] that enhanced services would continue to develop best in an unregulated environment and, given the competitive nature of the market, regulation of enhanced services was thus unwarranted.[61] For example, in adopting non-structural requirements for the

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[57] *See* 47 U.S.C. § 153(22) (defining "interstate communication"). In section 2(a) of the Act, Congress has given the Commission exclusive jurisdiction over interstate communications. 47 U.S.C. § 152(a). Section 2(b) of the Act reserves to the states jurisdiction over intrastate services. *See* 47 U.S.C. § 152(b); *see infra* note 81.

[58] *See infra* paras. 23-25 (discussing the applicability of the Commerce Clause).

[59] *California v FCC*, 39 F.3d 919, 931 (9th Cir. 1994) (When state regulations would negate national policy, the Commission may preempt state regulations.).

[60] The Commission launched its *Computer Inquiry* proceedings more than 30 years ago. *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I NOI*); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Computer II Tentative Decision*); *Computer II Final Decision*, 77 FCC 2d 384 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*) (subsequent cites omitted) (collectively the *Computer Inquiry*). In its *Second Computer Inquiry* proceeding, the Commission "adopted a regulatory scheme that distinguished between the common carriage offering of basic transmission services and the offering of enhanced services." *Computer II Final Decision*, 77 FCC 2d at 387; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040, 6064, para. 38 (1998). The former services are regulated under Title II and the latter services are not. *See Computer II Final Decision*, 77 FCC 2d at 428-30, 432-43 (indicating it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation under Title II because, among other things, the enhanced services market was "truly competitive"). Although the 1996 Act uses different terminology (*i.e.*, "telecommunications services" and "information services") than used by the Commission in its *Computer Inquiry* proceeding, the Commission has determined that "enhanced services" and "information services" should be interpreted to extend to the same functions, although the definition in 1996 Act is even broader. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56, para. 102 (explaining that all enhanced services are information services, but information services are broader and may not be enhanced services).

[61] *Computer II Final Decision*, 77 FCC 2d at 433, paras. 127-28 ("[W]e believe the market for these [enhanced] services will continue to burgeon and flourish best in the existing competitive environment") (further citations omitted); *see Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 88 FCC 2d 512, 541, para. 83 n.34 (*Computer II Further Reconsideration Order*) ("we have determined that the provision of enhanced services is not a common carrier public utility offering and that the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these (continued....)

Bell operating company provision of enhanced services, the Commission recognized that certain state requirements affecting the intrastate portion of jurisdictionally mixed enhanced services would thwart Commission objectives and thus were not permitted.[62] Indeed, in those instances where the states have attempted to assert jurisdiction, this Commission has been affirmed in asserting its national policy of nonregulation.[63] Consequently, states have generally played a very limited role with regard to information services. We see no reason to depart from this precedent here.

18. Passage of the 1996 Act increases substantially the likelihood that any state attempt to impose economic regulation of FWD would conflict with federal policy.[64] In section 230 of the 1996 Act, Congress expressed its clear preference for a national policy "to preserve

(Continued from previous page)
services are free from public utility-type regulation."). Indeed, the Commission said that states "may not impose common carrier tariff regulation on a carrier's provision of enhanced services," *id.*, and such state "regulation of entry and service terms and conditions (including rates and features availability) ostensibly applied to 'intrastate' enhanced services would have a severe impact" on federal open entry policies. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035, 3070, n.374. (1987) (*Computer III Phase I Recon*). The precise contours of these state limitations were the subject of continued litigation. *See Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 204 (D.C. Cir. 1982) (on appeal of *Computer II* the court explicitly noted the Commission's preemption of any state regulation of enhanced services, affirming *Computer II* in its entirety); *id.* at 205-06 nn. 26-28; *California v. FCC*, 905 F. 2d 1217, 1239-1242 (9th Cir. 1990) (*California I*) (vacating *Computer III* preemption of all state regulation of enhanced services due to Commission's failure to consider the possibility of "purely intrastate enhanced services" and what effect state regulation may have on valid Commission goals); *but see California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (affirming Commission preemption of state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services, and state regulations regarding CPNI and network disclosure rules). The Commission has stated that it has exclusive jurisdiction to regulate enhanced services where it is not possible to separate out the interstate and intrastate components and state regulations would negate valid Commission regulatory goals. *See Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket No. 96-6, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21531, 21553 (1998) (citing *California III*).

[62] *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7632, paras. 122-24 (*BOC Safeguards Order*) (preempting state requirements for separation of facilities and personnel in the provision of jurisdictionally mixed enhanced services); *see also* note 81 *infra* (discussing the Commission's "mixed use" standard to determine jurisdiction).

[63] *See California III*, 39 F.3d 932; *see also Petition For Emergency Relief And Declaratory Ruling Filed By The BellSouth Corporation*, 7 FCC Rcd 1619, 1620, para. 7 (*BellSouth MemoryCall*) (preempting order of the state public utility commission because of its impact on a BellSouth jurisdictionally mixed information service).

[64] *See* MCI Dec. 12 *Ex Parte* Letter at 3 n.8 (quoting *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377-80 & n.6 (1999) ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.")). As noted previously by the Commission, through its 1996 Act, Congress codified the distinction that the Commission made between "basic services" and "enhanced services" (as "telecommunications services" and "information services"). *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56, para. 102. By not including information services within the ambit of Title II, Congress expressed a preference that information services not be regulated. Although the Commission has clear authority to do so, it has only rarely sought to regulate information services using its Title I ancillary authority. *See Section 255 Order*, 16 FCC Rcd at 6457.

the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" unfettered by Federal or State regulation.[65] Courts have repeatedly recognized this congressional intent and, as a result, have rejected state attempts to regulate such services.[66] In addition, in section 706 of the 1996 Act Congress required the Commission to encourage deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market."[67] We recognize that most states have not acted to produce an outright conflict between federal and state law that justifies Commission preemption,[68] but nevertheless confirm that the Commission does have the authority to act in this area if states promulgate regulations applicable to FWD's service that are inconsistent with its current nonregulated status.

19. We find that granting Pulver's petition and declaring FWD to be an unregulated information service subject to Commission jurisdiction will facilitate the further development of FWD and Internet applications like it and these offerings, in turn, will encourage more consumers to demand broadband service.[69] Ensuring that FWD, as it is currently offered, remains unregulated by the Commission or the states is thus consistent with the requirements of

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[65] *See* 47 U.S.C. § 230(b)(2).

[66] *See, e.g., Vonage Holdings Co. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 997, 1001-02 (D. Minn. 2003); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[67] 47 U.S.C. § 157 nt. Section 706 of the 1996 Act is located in the notes of section 7 and we note that section 7, itself, clearly explains that it is the policy of the United States to encourage the provision of new technologies and services to the public. To implement this mandate, the Commission has considered, among other things, whether its rules promote the delivery of innovative advanced services offerings. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17125-26, para. 242 (2003) *(Triennial Review Order), corrected by* Errata, 18 FCC Rcd 19020 (2003) *(Triennial Review Order Errata), petitions for review pending, United States Telecom Ass'n v FCC,* D.C. Cir. No. 00-1012 *(and consolidated cases).* We find that our actions in this ruling are also consistent with this provision of the Act.

[68] *See* Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211 (filed Sept. 22, 2003).

[69] As noted above, Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II. In so doing, however, Congress has provided the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its other mandates under the Act. We expressly decline to exercise Title I jurisdiction over FWD to impose any economic or entry/exit regulation. Such regulation would not only run counter to our decades old goals and objectives to enable information services to function in a freely competitive, unregulated environment, but would directly contravene Congress's express directives in sections 706 and 230 of the Act that services such as FWD not be subject to such regulation. Moreover, we decline to impose any other type of regulation on Pulver's FWD information service at this time.

the Act.[70] To rule otherwise would effectively apply a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network. Indeed, we would risk eliminating an innovative service offering that, as noted by Pulver, promotes consumer choice, technological development and the growth of the Internet, and universal service objectives.[71] For reasons provided herein, that FWD happens to, among other things, enable members to talk over the Internet, as opposed to play video games, for example, does not affect our conclusion that FWD is most appropriately characterized as an unregulated information service.

20. Unless an information service can be characterized as "purely intrastate,"[72] or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed.[73] FWD clearly can not appropriately be characterized as a purely intrastate information service. FWD's members currently reside in over 170 countries around the world, with less than 33% of those members indicating their country of residence as the United States.[74] Of those members based in the United States, all 50 states are identified as member locations.[75] Because FWD facilitates its members' ability to contact any of its other members worldwide, to communicate with more than one at any given time, and because these members' physical locations can continually change, it is evident that the capabilities FWD provides its members are not purely intrastate capabilities. Moreover, it would be impractical to determine whether there was any intrastate component to FWD given the fact that FWD's information service as provided to its members occurs solely within the confines of the Internet.

21. Indeed, these characteristics of FWD render our normal approach to determining jurisdiction –the end-to-end analysis –unhelpful. Traditionally, the Commission has applied its so-called end-to-end analysis, looking at the end points of a communication, to determine the jurisdictional nature of any given service.[76] Briefly, the Commission considers the "continuous

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[70] Any state attempt to impose economic or other regulations that treat FWD like a telecommunications service would impermissibly interfere with the Commission's valid federal interest in encouraging the further development of Internet applications such as these, unfettered by Federal or state regulation, and thus would be preempted.

[71] Pulver Reply at 6.

[72] *See California v. FCC*, 905 F.2d 1217 (1990). We recognize that states theoretically could have a role in regulating a purely *intrastate* information service, but we doubt that, with the particular service at issue here, any state could claim FWD to be "purely intrastate."

[73] *See supra* para. 17.

[74] *See* Pulver Jan. 15 *Ex Parte* Letter, Attach. at 3-4; Pulver Jan. 20 *Ex Parte* Letter at 1 (indicating there are currently about 141,000 registered FWD members, approximately 45,000 of which identify themselves with an address in the United States).

[75] *See* Pulver Jan. 20 *Ex Parte* Letter at 1.

[76] *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000).

path of communications," beginning with the inception of a call to its completion, and has rejected attempts to divide communications at any intermediate points between providers.[77] While our traditional end-to-end approach to determining a communication's jurisdiction has relevance for a circuit-switched network, it has little or none with regard to FWD. Indeed, in the case of FWD the concept of "end points" has little relevance. What Pulver provides is information on its server located on the Internet.[78] If an FWD member uses that information to set up communications, such as voice, between itself and other members, that communication—the only conceivable "end points" involved here—is transmitted by that member's ISP over the Internet. That does not, however, impute those "end points" to FWD, which remains a server on the Internet. Furthermore, even if the members' locations were somehow relevant to their use of FWD, FWD's portable nature without fixed geographic origination or termination points means that no one but the members themselves know where the end points are.[79] Attempting to require Pulver to locate its members for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose. The Act counsels against it,[80] and we decline to do it. Finally, we are not aware that the Commission has ever applied an end-to-end-analysis for determining the jurisdiction of a particular service where the service provider was not itself providing some aspect of the user's underlying transmission capability.

22. We find that even if some form of an end-to-end analysis were deemed applicable to FWD, FWD would be considered an interstate information service in accordance with our

[77] *See, e.g.*, *BellSouth Memory Call*, 7 FCC Rcd at 1620; *Teleconnect Company v. Bell Telephone Company of Penn.*, 10 FCC Rcd 1626, 1629 (1995); *GTE ADSL Order*, 13 FCC Rcd at 22466, 22475-78, paras. 17-21. In the *GTE ADSL Order*, the Commission disagreed that an end-to-end ADSL communication must be separated into two components – an intrastate telecommunications service (provided in this instance by GTE) and an interstate information service (provided by an ISP). *GTE ADSL Order,* 13 FCC Rcd at 22477-78, para. 20.

[78] In the *GTE ADSL Order*, the Commission identified the practical difficulties of applying its end-to-end analysis to Internet communications by noting that such communications do not necessarily have an identifiable point of "termination," in the traditional sense, for jurisdictional purposes. *GTE ADSL Order,* 13 FCC Rcd at 22479, para. 22. In a more recent context, the Commission similarly found it difficult to pinpoint the origination of a communication arising over the Internet. *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-97, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC 7779, 7784, para. 15 (2002) (Because the first leg of an IP Relay call comes over the Internet, rather than from a telephone, there is no automatic way to determine whether any call is intrastate or interstate. This is because Internet addresses do not have geographic correlates, and there is currently no Internet address identifier that can automatically give the location of the caller.). In the FNPRM in that proceeding, the Commission tentatively proposed to use an end-to-end analysis to define whether an IP Relay call is interstate or intrastate for the limited purpose of determining a statutorily mandated cost allocation. *Id.* at 7792, para. 42; *see also* 47 U.S.C. § 225(d)(3)(B). That proceeding is still pending. Furthermore, unlike the FWD communications addressed in this Order, the IP Relay call does not both begin and end in the Internet.

[79] *See* Pulver Dec. 16 *Ex Parte* Letter at 1-2.

[80] *See supra* para. 18.

"mixed use" doctrine.[81] Where separating interstate traffic from intrastate traffic is impossible or impractical, the Commission has declared such traffic to be interstate in nature.[82] Based on the record in this proceeding, it is evident that it is impossible or impractical to attempt to separate FWD into interstate and intrastate components.[83] This "impossibility" results from the global portability feature of an FWD member's unique identification number, enabling that member to initiate and receive on-line communications from anywhere in the world where it can access the Internet via a broadband connection.[84] Moreover, FWD's technology does not enable Pulver to determine the actual physical location of an underlying IP address.[85] Finally, it is evident that more than a *de minimus* amount of FWD's offering is interstate.[86] Therefore, we would analogize the FWD offering to those previously deemed exclusively interstate by the Commission where it has applied its "mixed use" rule.[87]

23. Finally, our conclusions today also are consistent with the Commerce Clause, which denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[88] The nature of FWD as an Internet application not bound by geography may well render an attempt by a state to regulate any theoretical intrastate FWD component an impermissible extraterritorial reach.[89] In other words, as we have noted above, FWD itself is merely an Internet application available on Pulver's server, which members anywhere reach via the Internet. FWD members reaching Pulver's server to initiate a communication may be located anywhere in the world where an Internet connection is available to them. Because of the way FWD is offered, one state's regulation of FWD may have the practical effect of requiring those same regulations to be applied to FWD service for all users.

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[81] *See MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, n.7 (1989) (*MTS/WATS Market Structure Separations Order*) (the Commission found that "mixed use" special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to the Commission's jurisdiction because traffic on many such lines could not be measured without "significant additional administrative efforts").

[82] *Id.*

[83] *See, e.g.,* MCI Dec. 12 *Ex Parte* Letter at 1; Cisco Dec. 11 *Ex Parte* Letter at 5; Level 3 Dec. 16 *Ex Parte* Letter at 2; Verizon Feb.5 *Ex Parte* Letter at 2.

[84] *See* Pulver Dec. 16 *Ex Parte* Letter at 1-2.

[85] *Id.*

[86] *See supra* para. 20.

[87] *See, e.g.,* Cisco Dec. 11 *Ex Parte* Letter at 4-5; Vonage Dec. 10 *Ex Parte* Letter at 3-4.

[88] U.S. Const. art. 1, § 8, cl. 3; *see also Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

[89] *See Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is *per se* invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.") (citation omitted).

24. Moreover, even where state regulation is not a *per se* violation of the Commerce Clause, courts have inquired whether the burden imposed on interstate commerce by state regulation would be "clearly excessive in relation to the putative local benefits."[90] This may well be the case with respect to FWD. As an initial matter, we cannot envision how state economic regulation of the FWD service described in this proceeding could benefit the public. In contrast, however, the burdens upon interstate commerce would be significant. Even if it were relevant and possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining state jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical. Tracking FWD's packets to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end users. Rather, imposing such compliance costs on providers such as Pulver would be designed simply to comply with legacy distinctions between the federal and state jurisdictions. Here, such distinctions do not appear to serve any legitimate public policy purpose. Investment in such systems would improve neither service nor efficiency. In a dynamic market such as the market for Internet applications like FWD, we find that imposing this substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications.

25. Furthermore, if Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 state and other jurisdictions with more than 50 different certification, tariffing and other regulatory obligations. State regulation of FWD would make FWD unique among Internet applications as the only Internet application to be subject to such state obligations. Indeed, allowing the imposition of state regulation would eliminate any benefit of using the Internet to provide the service: the Internet enables individuals and small providers, such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring Pulver to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of IP-based communication. Certainly, it is this kind of impact Congress considered when it made clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation noted above.[91]

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[90] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Cotto Waxo Co.* at 793 ("[I]f the challenged statute regulates evenhandedly, then it burdens interstate commerce indirectly and is subject to a balancing test. Under the balancing test, a state statute violates the Commerce Clause only if the burdens it imposes on interstate commerce are 'clearly excessive in relation to the putative local benefits.'") (citation omitted).

[91] We note the existence of other "network"-based service examples where, although an intrastate component of such service may exist, this intrastate component must nonetheless yield to exclusive federal jurisdiction in the area of economic or other state regulations affecting entry to advance articulated congressional or federal deregulatory objectives. *See, e.g.*, 49 U.S.C.A. § 14501 (preempting state economic regulation of motor carriers); *Carsten v. United Parcel Service, Inc.*, 1996 WL 335421(E.D.Cal.1996) (holding that section 14501(c)(1) clearly reaffirms Congress's intent to preempt state laws relating to the prices of motor carriers); 47 U.S.C. § 332(c)(A) (preempting state regulation of entry or rates of commercial mobile radio service providers); *New York State Commission v. FCC*, 749 F.2d 804 (1984) (preempting state and local entry regulation of satellite master antenna television.).

IV. CONCLUSION

26. For the reasons set forth above, we declare FWD to be neither "telecommunications" nor a "telecommunications service." Furthermore, we declare FWD to be an unregulated "information service" subject to the Commission's jurisdiction.

V. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 3, 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§, 151, 152, 153, 154(i), 303(r) and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that pulver.com's Petition for Declaratory Ruling IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Commenters in WC Docket No. 03-45

Commenters	Abbreviation
BellSouth Corporation	BellSouth
Cisco Systems, Inc.	Cisco
FBI/Department of Justice	DOJ/FBI
Global Crossing North America, Inc.	Global Crossing
International Softswitch Consortium	ISC
MCI (f/k/a WorldCom, Inc.)	MCI
pulver.com	Pulver
Qwest Communications International Inc.	Qwest
SBC Telecommunications, Inc.	SBC
United States Telecom Association	USTA
Verizon	Verizon
Voice on the Net Coalition	VON Coalition
Vonage	Vonage

Reply Commenters	Abbreviation
AT&T Corp.	AT&T
Cisco Systems, Inc.	Cisco
Electronic Frontier Foundation	EFF
Minnesota Department of Commerce	Minnesota Dept. of Commerce
Michigan Public Service Commission	Michigan PSC
pulver.com	Pulver
United States Telecom Association	USTA

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45

Today we affirm our commitment – and fulfill our statutory obligation – to keep the Internet free from unnecessary government regulation. In today's Order, we declare the Free World Dialup (FWD) offering of Pulver.com to be a service subject to exclusive federal jurisdiction. Like email and instant messaging, FWD builds on consumer acceptance of those services and operates as a free, peer-to-peer application that connects consumers around the corner and across the globe. Our ruling formalizes the Commission's policy of "non-regulation" of the Internet and, in so doing, preserves the Internet as a free and open platform for innovation. Just as important, today's ruling removes barriers to investment and deployment of Internet applications and services by and ensuring that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels.

At the outset, I would like to acknowledge the positive cooperation we have received from the law enforcement community in this and related proceedings. Make no mistake, this item fully addresses law enforcement's legitimate interests in this area. We have worked extensively with law enforcement and established a process to specifically address unique issues associated with implementing the Communications Assistance for Law Enforcement Act (CALEA) – a process that fully satisfies the Department of Justice.

There is another related freedom at work in this proceeding – the freedom of consumers to increasingly choose innovative, personalized Internet applications and services. We know from experience that IP-enabled services such as Pulver.com's FWD offering can spur demand for broadband connections by providing consumers with a feature-rich set of Internet voice applications. We also should be mindful that the largest barriers to progress and the development of this and other services like it, are conflicting sets of economic regulations and onerous taxes. While many states have not acted to produce an outright conflict between federal and state law that justifies Commission preemption, today's Order confirms that the Commission possess significant authority to act in this area if a conflict of law should occur. Whether state or federal in origin, regulation of Internet applications such as FWD is not only inconsistent with the network architecture of the Internet, but also with Congress's directive to ensure the Internet remains free of unwarranted federal or state regulation. Among other provisions, section 230 of the 1996 Telecommunications Act states Congress's unambiguous preference for a national policy "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."[92] Today, we give some substance to this statutory command.

[92] *See* 47 U.S.C. § 230(b)(2).

We should all work to implement Congress's clear preference for a vibrant free market in Internet applications. In this sense, FWD is really only the beginning. As we embark on the next phase of the digital migration, our end goal must remain a world in which consumers choose how they communicate, rather than one in which that choice is dictated to them by a monopoly or the government. Today's Order provides an excellent foundation for a house that is becoming more and more filled with innovative products and greater digital opportunities.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45 (adopted Feb. 12, 2004).

As the companion NPRM we issue today embarks on a broad inquiry into the appropriate future treatment of VOIP services, I am pleased that the Commission is also providing a measure of certainty regarding existing law. The guidance we provide in this declaratory ruling should come as no surprise: There can be no legitimate argument that Free World Dialup constitutes a telecommunications service. Pulver neither provides the transmission functionality that its subscribers use nor charges a fee for its service. It thus falls squarely outside the statutory definition of a telecommunications service.[93] It strikes me as equally clear that what Pulver *does* offer is "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*."[94] Thus, it is an information service.

While this classification and our accompanying assertion of federal jurisdiction simply reaffirm what many assumed to be the case — that Free World Dialup, which makes no use of the public switched telephone network or conventional telephone numbers, is not subject to common-carrier-type regulations — this decision serves a vital function. There is tremendous regulatory uncertainty surrounding the provision of IP-enabled services. Although the Commission necessarily must conduct a full rulemaking before developing a comprehensive *new* framework for such services, we can and should act now to provide clarity regarding *existing* law. Confirming that providers of peer-to-peer services such as Free World Dialup may operate free from the heavy constraints of public-utility regulations is a good first step. The Commission should follow this action with one or more rulings clarifying the extent to which regulatory obligations apply, or do not apply, to other categories of service. In particular, the Commission should resolve outstanding questions about the applicability of our access charge regime to "phone-to-phone" services that use IP in the backbone.

While this ruling confirms that Free World Dialup is not subject to our panoply of common carrier regulations, the accompanying NPRM appropriately asks whether *all* IP-enabled services should be required to meet certain social policy objectives in the future. For example, we will need to resolve whether and how such VOIP services will contribute to universal service. And although the Commission intends to address CALEA-related issues in a separate rulemaking, there is no doubt that an exemption from economic regulations is not a license to flout surveillance requests from law-enforcement agencies. I take comfort from the fact that, even before the Commission has commenced its rulemaking on CALEA, Pulver has committed

[93] 47 U.S.C. § 153(46).

[94] 47 U.S.C. § 153(20) (emphasis added).

to cooperate fully with any warrants seeking to intercept calls placed by Free World Dialup subscribers.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunicaitons Nor a Telecommunications Service, Memorandum Opinion and Order (WC Docket No. 03-45)

In this Order, we leap before we look. The Commission declares that Free World Dialup is an information service but does not address any of the consequences of its decision. This headlong jump into Title I presents stark challenges for law enforcement and has implications for universal service, public safety and state and federal relationships that we have yet to untangle or assess. Under these circumstances I believe it is reckless to proceed and I cannot support this decision at this time.

Two years ago, when the Commission set out to reclassify wireline broadband Internet access, I suggested it was irresponsible to do so without addressing the larger implications of our decision. Shortly thereafter, the Commission proceeded down the identical path in a declaratory ruling reclassifying cable modem service. My objections were the same. We said we were conferring certainty to business, but the decision has been overturned in court, confusion still reigns and the larger questions remain unanswered.

Yet here we go again. Like before, our approach is backwards. With bugles blaring, we pronounce the classification of a service, but leave the hard part—understanding the consequences—for another day and time.

I would dissent to this item purely on law enforcement and national security grounds. The Communications Assistance for Law Enforcement Act (CALEA) expressly exempts entities providing information services from complying with law assistance capability requirements. No assurances from companies, statements from this Commission or last-minute letters from an Executive Branch agency have yet demonstrated a satisfactory solution to this thorny problem. On January 28, the Federal Bureau of Investigation sent a letter clearly requesting that the Commission complete a rulemaking on CALEA "prior to the other related but non-CALEA specific broadband proceedings." Otherwise, the letter pointed out, the outcome of our broadband classification decisions "could serve to prejudice" law enforcement's rights under CALEA. This letter urged us to stop in our tracks. It urged us to resolve national security needs before moving ahead. Even in a more, shall we say forthcoming letter of February 4, the Department of Justice stated that "[w]hile it would obviously be our preference that the FCC decide these issues prior to considering other broadband proceedings, we recognize that this is not practical." Both letters are part of the public record.

I met with both the Federal Bureau of Investigation and the Department of Justice, but I think anyone who reads this correspondence will be left with the indelible impression that law enforcement strongly prefers that the Commission resolve outstanding CALEA matters ***before*** proceeding with any further broadband reclassification efforts. I do not understand why it is not practical to pause and resolve these concerns before proceeding to categorize Free World Dialup

service. The majority apparently prefers to act now and fix law enforcement issues later—along with universal service, public safety, disability access and a host of other policies we are only today beginning to address in a related rule-making on IP-enabled services. This rush to reclassify will, I fear, lead us down a road wherein we are compelled to engage in legal calisthenics and contortion of both CALEA and the 1996 Act in order to meet our statutory obligations.

This petition has been in front of the Commission for over a year. It ***is*** an important decision – but not so important that it cannot wait a little while longer while we conduct an expeditious review of the problems that a too hasty decision could bring.

STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45.

Today, the Commission takes its first important step in bringing the benefits of VoIP closer to all American consumers. By declaring Pulver.com's "peer to peer" offering to be an unregulated information service, we provide a clearer regulatory framework that will not unduly burden these offerings with economic regulation.

I believe that Pulver.com's Free World Dialup (FWD), and other similar offerings are critical in the Commission's efforts to encourage local competition and provide all Americans with greater choices and lower prices for communications services.

As I have stated previously, as VoIP services move toward becoming a substitute for traditional telephony services, we need to carefully consider and address any questions and concerns regarding the obligations to provide traditional public safety services such as 911 and the ability to comply with law enforcement requirements. I thus support today's announcement that the Commission will soon initiate a comprehensive rulemaking to address law enforcement's needs relative to CALEA and that our decision today will not prejudice the outcome of that proceeding.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART AND DISSENTING IN PART

Re: IP-Enabled Services, Notice of Proposed Rulemaking (2004) (Approving in Part, Concurring in Part).

Re: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Memorandum Opinion and Order, WC Docket No. 03-45 (2004) (Concurring in Part and Dissenting in Part).

Today, we consider two items – a comprehensive Notice of Proposed Rulemaking and a declaratory ruling on a specific service – related to Voice over Internet Protocol (VoIP) and Internet Protocol (IP)-enabled services.

NPRM

With this Notice, we examine the extent and legal significance of the telecommunications industry's growing adoption of IP-enabled services. This technological evolution stems from the development of a common digital protocol, the "IP" in "VoIP." It is integral to an explosion of choices for consumers, such as phones in PDAs, voice through Instant Messaging-like services, not to mention lower prices on the services we are accustomed to. I am struck by the wealth of innovation occurring under the banner of "VoIP." As a consumer, I think we all have much to look forward to.

As a Commissioner, I think we take an important and responsible step today by opening a comprehensive Notice of Proposed Rulemaking on the regulatory issues associated with IP-enabled services. VoIP services have matured recently and it is apparent that VoIP providers have their sights set on that most mainstream of telecommunications markets – the residential consumer. VoIP providers point out that their services have the potential to provide a rich and diverse array of complementary non-voice applications that will stir demand. All indications are that IP is becoming the building block for the future of telecommunications.

Questions about what this evolution means for consumers, providers, and this Commission are far from simple. What they present, though, is an opportunity – indeed a necessity – for this Commission to facilitate that evolution. Today's items herald the Commission's role in promoting innovative technologies. At the same time, though, we are charged under the Communications Act with ensuring that the goals set out by Congress are fulfilled. Forging the right regulatory scheme to achieve these goals is our task and it is fundamental that we begin to wrestle with these issues in earnest.

I would like to thank Chairman Powell for his leadership on VoIP. The Chairman convened a forum on these issues in December that I found extremely useful. I have also appreciated his willingness to engage his colleagues in the deliberations over these items. We do not agree on every detail about how to move forward, but I appreciate his willingness to accommodate so many of my concerns as we start this larger rulemaking.

I fully expect that this Notice will allow us to develop a comprehensive record about the development of IP-enabled services. Chief among our tasks is to determine how the adoption of IP-enabled services affects those most fundamental telecommunications policies embodied in the Communications Act. The Act charges us to maintain universal service, which is crucial in delivering communications services to our nation's schools, libraries, low income consumers, and rural communities. We will need to look closely at how IP-enabled services affect our ability to fund and deliver those services. The support that our universal service programs bring to our nation's rural communities is critical, so I am particularly glad that this Notice seeks direct comment on issues of concern to Rural America.

As we go forward, we also must understand how IP-enabled services will affect the provision of 911, E911, and other emergency services; the ability of people with disabilities to access communications services; the application of our consumer protection laws; the ability of our law enforcement officials to rely on CALEA to protect public safety and national security; and other national priorities such as consumer privacy and network reliability. We must understand that our decisions can have disparate impact on particular communities. We raise many issues in today's NPRM, and we will need to reach out to the many and diverse interests of consumers, network providers of all types, hardware and software manufacturers, and federal, state and local policymakers.

I agree with my colleagues that there may be some questions that we need to answer about the regulation of VoIP services sooner rather than later. There are time sensitive issues on the table for us, such as the erosion of the base of support for universal service. This Commission has not hesitated in the past to address issues of regulatory arbitrage, and I think that we will have to look closely and quickly at some of the concerns that have been brought to our attention.

Pulver.com

In approaching these monumental tasks, however, I am concerned that we not get too far ahead of our record. The rapid and dynamic pace of the migration to IP and broadband services counsels for a full consideration of the issues wherever possible.

Many persuasive arguments were made as to why Pulver.com's Free World Dialup (FWD) is not telecommunications or a telecommunications service. I concur that this service is not telecommunications or a telecommunications service and in practice should remain largely unregulated. In particular, the peer-to-peer nature of FWD differs in significant respects from traditional "telecommunications services" that traditional phone companies have offered. However, I cannot fully join today's pulver.com Order because it reaches far beyond the petition filed by pulver.com and, regrettably, speaks prematurely to many of the important questions raised in today's NPRM.

Despite attempts to characterize this Order as limited to the specific facts of pulver.com's FWD, I am concerned that the decision speaks much more expansively. By deciding the statutory classification of pulver.com's service as an interstate information service, the Order

raises a host of questions about the continuing relevance of those most fundamental telecommunications policy objectives that Congress has entrusted to this Commission. At last December's VoIP forum, I talked about these concerns and was struck by how widely-held those concerns seemed to be.

Today's Order does not fully address these widely-acknowledged concerns. One might read this Order as silent on many of these ultimate issues, which strikes me as curiously dismissive given the magnitude of the responsibilities entrusted to us. Parsing more closely, the declarations about jurisdiction and the "unregulated" nature of the service seem to presume the outcome of the very rulemaking we launch today. Pulver.com's petition did not request a ruling on the appropriate jurisdictional classification, and many parties may be unaware that we planned to reach that question in this Order. With both the jurisdictional finding and the unaddressed implications of the statutory classification, I would have preferred that we defer these important policy considerations until the Commission has a more comprehensive record with the benefit of the participation of the many stakeholders who should be part of this debate.

One area where we did have participation was in the critical area of law enforcement. Legitimate concerns were raised by the Federal Bureau of Investigation and the Department of Justice. While the Department of Justice has acquiesced to the desire to open this inquiry, its clearly stated preference was to resolve CALEA matters as soon as possible. While I dissented from today's ruling that FWD is an information service, I am pleased that we commit to opening a CALEA proceeding very soon, and that the Justice Department has not objected to our moving forward in the interim.

For these reasons, I can only concur in part and dissent in part on the pulver.com Order and thus I can only concur in those portions of the NPRM where that item imports this overreaching analysis.

Finally, I would like to thank the Wireline Competition Bureau, and in particular, the Competition Policy Division. Bureau staff members, as well as my own staff, have spent countless hours and long nights working through complex issues. They are truly public servants of the highest caliber.