

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

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

Before the Wireline Competition Bureau

**COMMENTS OF THE DEPARTMENT OF JUSTICE AND
FEDERAL BUREAU OF INVESTIGATION**

The Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") hereby file their comments in the above-referenced public notice proceeding¹ initiated by the Commission's Wireline Competition Bureau (the "Bureau") in response to the February 5, 2003 Petition for Declaratory Ruling of pulver.com (the "pulver.com Petition"). The DOJ and FBI are interested parties in this proceeding based on their authority to implement the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.*

I. INTRODUCTION

The convergence of telecommunications and computer technologies has spawned a wide variety of new communications services. Every service provider in these new markets would presumably like to be regulated under the classification most favorable to its own business needs. Each would surely want the certainty of knowing its regulatory classification as soon as possible.

In order to address the enormously complex issues involved in the regulation of these new services in a consistent and comprehensive way, the Commission has launched two rule

¹ Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling in WC Docket No. 03-45, DA 03-439, released February 14, 2003.

making proceedings: the Wireline Broadband NPRM² and the Cable Broadband NPRM³ (collectively, the “Broadband Proceedings”). The Broadband Proceedings are building a comprehensive factual record about broadband service offerings with input from a wide variety of industry participants.

One new communication service provider, pulver.com, now seeks to jump ahead of these on-going rule-making proceedings, proceedings that will necessarily address issues that are also central to pulver.com’s Petition. pulver.com offers Free World Dialup (“FWD”), a point-to-point broadband Internet protocol (“IP”) voice communications service.⁴ Notwithstanding the on-going Broadband Proceedings, pulver.com seeks a declaratory ruling that its particular service should be completely beyond the reach of the FCC’s regulatory authority.⁵

To name just a few of the issues being considered in the Broadband Proceedings that are also raised by the pulver.com Petition, the Commission has explicitly requested comments in the Broadband Proceedings on:

- (1) whether commenters expect voice traffic to migrate to broadband Internet platforms,
 - (2) the potential impact of such a migration on issues such as universal service,
 - (3) whether migration will lower or raise the cost of providing service in different areas,
- and

² In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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, Notice of Proposed Rule Making in CC Docket Nos. 02-33, 95-20 and 98-10, 17 FCC Rcd 3019 (2002).

³ In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rule Making in GN Docket No. 00-185 and CS Docket No. 02-52, 17 FCC Rcd 4798 (2002).

⁴ pulver.com Petition at 1.

(4) the potential impact of the classification of broadband services on carriers' CALEA obligations.

Wireline Broadband NPRM at 55, 82. The DOJ and FBI filed comments in the Broadband Proceedings to discuss the potential impact of the regulatory classifications being considered in the Broadband Proceedings on CALEA.⁶

The DOJ and FBI believe the Commission should complete the task of the Broadband Proceedings, which is to provide a consistent regulatory scheme for broadband Internet services generally, before addressing the regulatory status of specific broadband Internet services such as pulver.com's broadband voice service. For this reason, the DOJ and FBI request the Bureau to dismiss the pulver.com Petition without prejudice, or in the alternative, hold it in abeyance pending the outcome of the Broadband Proceedings.

II. THE PULVER.COM PETITION SHOULD BE DISMISSED OR HELD IN ABEYANCE PENDING THE OUTCOME OF THE BROADBAND PROCEEDINGS

Section 1.2 of the Commission's Rules states that the Commission may, on the motion of a party or on its own motion, issue a declaratory ruling terminating a controversy or eliminating uncertainty.⁷ However, where a party files a petition for declaratory ruling on a matter already under consideration in an on-going rule making proceeding, the Commission's policy, as a matter of both procedure and administrative efficiency, is to dismiss the petition without prejudice and resolve the matter in the context of the existing rule making proceeding.⁸

⁵ Id. at 2.

⁶ See April 15, 2002 Comment of the Department of Justice and Federal Bureau of Investigation in the Wireline Broadband NPRM; June 17, 2002 Comment of the Department of Justice and Federal Bureau of Investigation in the Cable Broadband NPRM.

⁷ 47 C.F.R. § 1.2.

⁸ See *e.g.* Petition for Declaratory Ruling that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier

Pursuant to this policy, the Bureau has dismissed a petition for declaratory ruling without prejudice where there was “a more appropriate proceeding” in which to address the issue.⁹ The Bureau has similarly exercised its discretion not to issue a declaratory ruling to interpret its regulatory classifications where such action would be “premature.”¹⁰ In the specific context of the Broadband Proceedings, the Commission’s Media Bureau has dismissed a petition against a cable modem service provider for fear of “prejudging the very matters under review in the pending rule making.”¹¹

The pulver.com Petition threatens just the kind of harm to the Broadband Proceedings that the above-described policy of Rule Section 1.2 was intended to avoid. In particular, the Broadband Proceedings are already considering in a comprehensive way the issues of whether and how the Commission may regulate various broadband Internet services. As the Commission itself has said repeatedly, these are highly complex and controversial questions with far-reaching implications for the future of the nation’s telecommunications and information services industries. As a matter of procedure and administrative efficiency, the Bureau should not allow a single broadband Internet service provider to cut to the front of the line and win for itself a

Regulation, Order, 11 FCC Rcd 9051 (1996) (dismissing a petition for declaratory ruling on whether petitioner was required to comply with certain competitive carrier separation requirements to provide interstate, interexchange service on a nondominant basis where such separation requirements were already subject to several pending rule making proceedings).

⁹ In the Matter of Petition for Declaratory Ruling Regarding AT&T’s Network Interconnection Policy, DA 98-1182, Released June 19, 1998, at ¶ 4 (dismissing a petition for declaratory ruling on the terms and conditions of an interconnection arrangement where the same issues arose in a formal complaint).

¹⁰ Petition of Nevadacom for Expedited Declaratory Ruling That Telegraphic Money Order Service is an Information (Enhanced) Service and not Subject to State Regulation, Order in CC Docket No. 00-21, DA 00-939, released April 27, 2000, at ¶ 2 (dismissing a petition for declaratory ruling on whether a telegraphic money order constitutes an “information service” and is therefore beyond the scope of state jurisdiction where no state had yet asserted such jurisdiction).

uniquely favorable regulatory status in an *ad hoc* proceeding while the rest of the industry must await the outcome of the more thorough rule-making proceedings.¹²

Furthermore, if the Bureau were to grant pulver.com's request to declare that its broadband Internet offering is an unregulated service, such action could seriously constrain the Commission's range of options in determining the appropriate regulatory status of other broadband services in the Broadband Proceedings. For this reason alone, the Bureau should join the Media Bureau in preserving the integrity of the Broadband Proceedings, rather than pursue the *ad hoc* approach sought by pulver.com. Specifically, the Bureau should dismiss the premature pulver.com Petition without prejudice, permit the Commission to finish its work in the more appropriate Broadband Proceedings, and only then turn to any residual questions pulver.com's specific service may raise.

An *ad hoc* ruling on the pulver.com Petition could also limit any future Commission consideration of the appropriate regulatory status of different voice-over-packet services. Just within the subset of voice-over-packet services known as "IP telephony," the Commission has tentatively distinguished between "phone-to-phone" IP telephony and "computer-to-computer" IP telephony.¹³ It is unclear how that distinction or any other the Commission might deem relevant might apply to pulver.com's FWD service. Indeed, a grant of *ad hoc* relief to

¹¹ Letter Decision of W. Kenneth Ferree, Chief, Media Bureau, to Robert H. Jackson, Reed Smith L.L.P., DA 03-616, MB-ILR 03-02, released March 4, 2003.

¹² Internet voice communications could be delivered via wireline facilities, wireless networks, or cable plant. Wireline Broadband NPRM at ¶¶ 10-12. Thus, a premature decision on any one entity's broadband voice service would undercut both the Wireline Broadband NPRM and the Cable Modem NPRM. Although pulver.com claims not to provide the "access" element of its FWD Internet voice service, it nevertheless provides key elements needed to facilitate such service, and therefore the issue of pulver.com's regulatory status is inextricably woven into the Broadband Proceedings.

¹³ Stevens Report, In the Matter of Federal-State Joint Board on Universal Service, Report to Congress in CC Docket No. 96-45, 13 FCC Rcd 11501 (1998) at ¶¶ 83-93.

pulver.com's particular service might prove discriminatory if it gives that entity an unfair competitive advantage over other packet-based voice service providers. Given the Commission's justifiable concern that it not unnecessarily favor one technology over another through disparate regulatory treatment, the *ad hoc* approach pulver.com seeks to force is particularly ill-suited for the Commission's first consideration of the regulatory status of voice-over-packet services.

Adding to this regulatory complexity is the fact that CALEA's definition of "telecommunications carrier" differs from the definition of that term in the 1996 Act.¹⁴ The DOJ and FBI are concerned that if certain broadband telecommunications carriers fail to comply with CALEA due to a misunderstanding of their regulatory status, criminals may exploit the opportunity to evade lawful electronic surveillance.

If the Bureau does not dismiss the pulver.com Petition, the DOJ and FBI alternatively request that the Bureau instead hold the petition in abeyance pending the outcome of the Broadband Proceedings. Such action would do no harm to pulver.com's rights and would still preserve the integrity of the rule making proceedings.

¹⁴ In the Matter of Communications Assistance for Law Enforcement Act, Second Report and Order in CC Docket No. 97-213, 15 FCC Rcd 7105 (1999) at ¶ 8.

III. CONCLUSION

The Bureau should place the public interest in administrative efficiency over the private interest of a single service provider. It should first establish the basic regulatory framework for broadband Internet services and then address any residual regulatory issues that may arise. Giving special treatment to any one broadband service provider would unfairly prejudice the pending rule making proceedings, potentially discriminate against other broadband providers, and possibly create more confusion than it resolves.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine C. White, Executive Assistant with the Electronic Surveillance Technology Section of the Federal Bureau of Investigation, hereby certify that on this 14th day of March, 2003, a copy of the foregoing Comments of the Department of Justice and the Federal Bureau of Investigation was delivered by first class U.S. Mail to the following:

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