



August 8, 2008

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Via email

Russell G. Golden
Technical Director
Financial Accounting Standards Board
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LETTER OF COMMENT NO. 133

File Reference No. 1600-100

Dear Mr. Golden:

tw telecom inc. appreciates the opportunity to respond to the Financial Accounting Standards Board regarding the Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R) (the "Exposure Draft"). **tw telecom inc.** is a leading national provider of managed network services, specializing in Ethernet and transport data networking, Internet access, local and long distance voice, voice over Internet protocol and network security services to enterprise organizations and communications services companies throughout the U.S. We are a publicly traded company listed on the Nasdaq Global Select Stock Market under the symbol TWTC.

In addition to litigation incidental to our business, we are subject to significant government regulation, some of which is uncertain due to legal challenges of existing rules. Such regulation is subject to different interpretations and inconsistent application, and has historically given rise to disputes with other carriers and municipalities regarding the classification of traffic, rights-of-way, rates and minutes of use, among other items. Under the currently effective standards, we estimate and reserve for the risk associated with regulatory and other contingencies.

We have considerable concerns regarding the Exposure Draft and do not support the draft in its current form. We support the comments on the Exposure Draft made by the Chicago Bar Association (the "CBA") and the Association of Corporate Counsel. While many of concerns expressed by these parties may be directed at litigation related contingencies, we also believe these concerns pertain to all loss contingencies including regulatory related contingencies.

Under existing rules, a loss contingency is recorded only when considered probable and generally, in order to make that assessment, significant information is available to the company and its counsel. Under the proposed rules, disclosure is required when the

likelihood of a loss is more than remote. We believe that the lower threshold for disclosure will be problematic because there are relatively few cases or claims where counsel could conclude that the likelihood of loss is remote. The reason is that the outcome of litigation, threatened claims and disputes is inherently unpredictable. In the litigation context, juries have been known to render rogue verdicts in cases where all indications are against liability, as outlined in greater detail in the Association of Corporate Counsel letter. In the case of regulatory and other non-litigation claims, the judgment regarding the likelihood of loss will likely come down to a guess as to whether a threatened claim or regulatory issue will be pursued, among other factors. The result will be the imposition of an increased disclosure burden, together with the other detriments discussed below, with respect to litigation and claims that are “less than likely” to result in a loss.

Second, we do not agree with the assertion in the Exposure Draft that there will be “rare instances” in which disclosure of information would be prejudicial because the nature of the information required to be disclosed will almost always undermine defense strategies and create a risk of a finding of attorney-client privilege waiver or loss of attorney work product immunity. Even the reduced disclosures that would apply under the prejudice exemption are likely to harm negotiations and hamper defenses, increasing the possibility of negative outcomes, which is contrary to the interests of investors. Such disclosures will provide a disadvantage to companies in a negotiating or settlement position while providing a great advantage to the other party. Since the required disclosures are primarily based on estimates of matters that are inherently difficult to estimate, the additional disclosures would be of questionable value to investors, when balanced against the potential harm to litigation and negotiation positions.

Third, the requirement to disclose unasserted claims if it is probable that a claim will be asserted, and if asserted, the likelihood of a loss is more than remote, is an open invitation for consultants and lawyers to seek recovery opportunities at the detriment of the company and its investors. Furthermore, disclosing a contingency with a remote likelihood of loss if it is expected to occur within one year of the date of the financial statements would be misleading and add to confusion, not more transparency. The rules as they exist today adequately disclose contingent losses only when they are probable, a better measure of the ultimate outcome of the matter.

In addition, we believe that smaller companies, or companies with fewer litigation or other matters may be disadvantaged by these expanded disclosure requirements due to their inability to aggregate losses for purposes of disclosure, which may be available to larger, more mature companies that deal with many contingencies at any point in time.

In summary, we believe that the proposed statement will not result in meaningful additional disclosure and that the detrimental effect on the outcome of litigation and other claims far outweighs any potential benefit to financial statement users of the additional disclosures. In addition to our substantive concerns, we are concerned that the timeline provided for comments may not allow for some public companies to comment within the comment period from June 5 to August 8 because their resources will be devoted to their SEC reporting and earnings release cycles during that time. We urge the FASB to extend the comment period to allow adequate time for all interested companies to respond.

Additionally, if, despite the considerable opposition that has already been expressed, the proposed statement is implemented in some form, we do not believe that it is practicable for entities to implement the proposed statement for fiscal years ending after December 15, 2008. The Board expects a final document to be issued during the fourth quarter which does not allow for adequate time to fully deliberate the issues. Additionally, it will take companies considerable time to prepare the proposed disclosures. Companies are already burdened with preparing for other new standards that will become effective in 2009, such as Financial Staff Position APB 14-1, *Accounting for Convertible Debt Instruments that May be Settled in Cash upon Conversion*, and SFAS 161, *Disclosures about Derivative Instruments and Hedging Activities*. For these reasons, we urge the FASB to consider delaying an effective date.

We have responded to several of the specific questions posed in the Exposure Draft in the attached Appendix which further delineate our concerns.

Thank you for your consideration.

Sincerely,

/s/ Jill R. Stuart

Jill R. Stuart

Senior Vice President,

Accounting and Finance and Chief Accounting Officer

/s/ Tina Davis

Tina Davis

Senior Vice President and Deputy General Counsel

APPENDIX

Responses to specific questions in the Exposure Draft

Question 1. Will the proposed Statement meet the project's objective of providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs?

We do not believe any perceived benefits would justify the incremental costs. We would incur additional costs as this type of disclosure most likely will require consultation with outside counsel. However, the greater cost goes beyond disclosure preparation. We believe the real cost resulting from the enhanced disclosure requirements of the Exposure Draft would be in increased liability for claims and litigation and other negative outcomes to claims and litigation.

Question 3. Should an entity be required to provide disclosures about loss contingencies, regardless of the likelihood of the loss, if the resolution of the contingencies is expected to occur within one year of the date of the financial statements and the loss contingencies could have a severe impact upon the operations of the entity?

The current requirements of FAS 5 of disclosure when there is at least a reasonable possibility that a loss may be incurred are adequate. Disclosure related to loss contingencies with a likelihood that is more than remote is not meaningful and could prove misleading to users of financial statements.

Question 4. Paragraph 10 of Statement 5 requires entities to "give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." One of the financial statement users' most significant concerns about disclosures under Statement 5's requirements is that the disclosures rarely include quantitative information. Rather, entities often state that the possible loss cannot be estimated. The Board decided to require entities to disclose the amount of the claim or assessment against the entity, or if there is not claims or assessment amount, the entity's best estimate of the maximum possible exposure to loss. Additionally, entities would be permitted, but not required, to disclose the possible loss or range of loss if they believe the amount of the claim or assessment is not representative of the entity's actual exposure.

4a. Do you believe this change would result in an improvement in the reporting of quantitative information about loss contingencies?

We do not believe that this would result in an improvement. We believe that there will be too much information that will not be meaningful to users of financial statements.

Since the amounts and outcomes of litigation and claims are inherently unpredictable and often not within the knowledge and control of the reporting company, the quality of the estimates is not likely to be high or to result in meaningful disclosure. Furthermore, we believe it will be detrimental to the outcome of litigation and other claims for plaintiffs or other parties involved in a contingency to have access to management's estimate of management's assessment of the maximum possible exposure for loss.

4b. Do you believe that disclosing the possible loss or range of loss should be required, rather than optional, if an entity believes the amount of the claim or assessment or its best estimate of the maximum possible exposure to loss is not representative of the entity's actual exposure?

We believe this could be misleading to financial statement users and detrimental to a company's ability to defend a claim or negotiate a settlement.

4c. If you disagree with the proposed requirements, what quantitative disclosures do you believe would best fulfill users' needs for quantitative information and at the same time not reveal significant information that may be prejudicial to an entity's position in a dispute?

We believe that the current requirements under SFAS 5 are adequate.

Question 5. If a loss contingency does not have a specific claim amount, will an entity be able to provide a reliable estimate of the maximum exposure to loss that is meaningful to users?

Such an estimate would be highly judgmental and therefore, would not be reliable or useful information to financial statement users. Furthermore, as we have stated, we believe that such disclosures will benefit the plaintiff or the other party to a dispute that results in a contingency.

Question 6. Financial statement users suggested that the Board require disclosure of settlement offers made between counterparties in a dispute. The Board decided not to require that disclosure because of ten those offers expire quickly and many do not reflect the status of negotiations only a short time later. Should disclosure of the amount of settlement offers made by either party be required?

No. We agree with the Board's conclusion stated in the question. Also, the requirement to disclose settlement offers is very likely to have a chilling effect on the settlement process because a settlement offer may be misconstrued as an admission of liability and could attract additional litigation.

Question 7. Will the tabular reconciliation of recognized loss contingencies, provided on an aggregated basis, provide useful information about loss contingencies for assessing future cash flows and understanding changes in the amounts recognized in the financial statements?

While a tabular reconciliation may serve to enhance an understanding of changes in the financial statements, we do not believe that any perceived benefit will outweigh the detrimental effect that such additional disclosures may have in the settlement of litigation or the resolution of disputes with other parties. We do not believe it will provide useful information for assessing future cash flows. We believe that many users of the financial statements will not have the knowledge to comprehend the information and it will only serve to enhance complexity.

Question 8. This proposed Statement includes a limited exemption from disclosing prejudicial information. Do you agree that such an exemption should be provided?

We agree with the notion of an exemption from disclosing prejudicial information but do not agree that it would only apply in "rare instances." Rather we believe that the proposed disclosure requirements would result in disclosure of prejudicial information in most situations. We believe that the disclosures required under the exception are also likely to be detrimental to the defense of litigation and other claims.

Question 11. Do you agree with the description of prejudicial information as information whose "disclosure....could affect, to the entity's detriment, the outcome of the contingency itself"?

We believe the definition as proposed is too narrow. The definition should take into account other possible detriments such as waiver of attorney/client privilege, attorney work product privilege or contractual confidentiality.

Question 12. Do you believe it is operational for entities to disclose all of the proposed requirements for interim and annual reporting periods? Should the tabular reconciliation be required only annually?

We do not agree with the proposed requirements. However, if the Exposure Draft is adopted in its current form we believe the proposed Statement should only apply to annual reporting periods as the existing framework requiring interim information (APB Opinion No. 28, *Interim Financial Reporting* and Regulation S-X, Article 10) results in appropriate interim disclosures.

Question 14. Do you believe it is operational for entities to implement the proposed Statement in fiscal years ending after December 15, 2008?

We do not believe that it is operational for entities to implement the proposed statement if effective for fiscal years ending after December 15, 2008. The Board expects a final document to be issued during the fourth quarter which does not allow for adequate time to deliberate the issues to the full extent. We do not believe there would be sufficient time to gather the necessary information for companies with calendar year ends due to the significant expansion in disclosures proposed in the Exposure Draft. Companies are already burdened with preparing for other standards that will become effective in 2009,

such as Financial Staff Position APB 14-1, *Accounting for Convertible Debt Instruments that May be Settled in Cash upon Conversion*, and SFAS 161, *Disclosures about Derivative Instruments and Hedging Activities*. For these reasons, we urge the FASB to consider delaying an effective date. Furthermore, we believe it would be more appropriate to delay until convergence with IFRS, if adopted at all.