Tina Davis
Senior Vice President & Deputy General Counsel

tw telecom inc.
10475 Park Meadows Drive
Littleton, CO 80124
T 303 566 1279

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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Comments on Release No. 33-9046; 34-60089; IC-28765; File No. S-7-10-09

Dear Ms. Murphy:

We are pleased to submit the following comments with respect to the proposals of the Securities and Exchange Commission (the "Commission") to amend the federal proxy rules published in the Commission's Release Nos. 33-9046; 34-60089; IC-28765 (the "Release").

I. Introduction

tw telecom inc., headquartered in Littleton, Colo., provides managed network services, specializing in Ethernet and data networking, Internet access, local and long distance voice, VPN, VoIP and network security, to enterprise organizations and communications services companies throughout the U.S including our global locations. We have approximately 2,800 employees, our common stock is listed on the Nasdaq Stock Market under the symbol TWTC and we are a large accelerated filer. We have a high-functioning six member board of directors, including five independent directors, that has worked together in its present composition since April 2007. Our Board prioritizes good corporate governance, considers governance matters very carefully and strives to stay current with ever-changing governance philosophies. In addition, we have a very active investor relations program and solicit investor feedback at every opportunity. We believe that our dedication to open and frequent dialogue between our Chairman, CEO and President and our investors on all topics is evidenced by our extensive quarterly conference calls that include lengthy question and answer sessions and frequent meetings with investors throughout the year.

II. The 60-day comment period had not been adequate for a proposal of such breadth and complexity.

The proxy access rules, if adopted in some form, will result in a sea change in the process of electing corporate directors. The Commission's 250 page release proposed wide ranging changes and solicited responses to almost 500 different questions, with only a 60 day comment period. The debate over proxy access has been

intense. We, like others,[1] are very concerned that the 60 day comment period did not provide sufficient time for interested parties to make their views known on the complex and critical questions presented. We also note that the Commission itself was not unanimous in proposing these rules. Therefore, we urge the Commission not to rush to adopt rules with such far-reaching impact without further opportunity for stakeholder input and adequate consideration of alternatives, including a more incremental approach, and a full consideration of the implications and likely unintended consequences of a matter so fundamental to the governance of public companies.

The present proposal leaves many questions unanswered and is rife with workability and implementation issues. (See the comments of Michael R. McAlevey, Vice President and Chief Corporate, Securities and Finance Counsel, General Electric Company.) Even if the Commission considers it appropriate to continue exploring the merits of increased stockholder access to companies' proxy statements for proposals and nominations, we do not believe it would be reasonable to attempt to issue such a fundamental rulemaking in time to have it apply for the 2010 proxy season, given the scope and complexity of the issues raised and the dramatic impact this will have on public corporations and the national economy. We especially believe that greater consideration should be given to the issues of federalism raised by potential federal encroachment on areas of corporate governance that are better left to the states, the federal court challenges that will inevitably result and the significant negative impacts of adopting a one-size-fits-all approach.

III. **Federally mandated proxy access is not needed to increase accountability of companies to their shareholders and adoption would risk serious harm to companies, investors and the economy.**

We concur with the excellent comments of Wachtell, Lipton, Rosen & Katz to the effect that the current financial crisis does not suggest a need for increased shareholder access to proxy statements because of widespread shareholder activism and the concentration of shareholder power and the serious potential for harm posed by the proposed rules from management distraction[2], board politicization[3] and increased

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[1] *See, e.g.* Comments of Andrew Bonzani, Vice President, Assistant General Counsel and Secretary, International Business Machines Corporation

[2] We believe that this is a particularly poor time to increase costs, create board disharmony and distract management when all available resources are better directed toward navigating the current financial crisis and boards need to act expeditiously to keep businesses afloat. Our recent experience with our first stockholder proposal in our 2009 proxy statement bears out concerns of significant distraction, cost and resource consumption. If we use that experience as a proxy for the absolute minimum amount to time and expense that would be consumed in a contested election, we believe the cost both in time and money to issuers would be vastly out of proportion to the questionable potential benefit in the facilitation of this type of activity.

[3] In our Proxy Statement we state in connection with director qualifications: "We also believe that it is important for the Board to operate in a cooperative and collegial atmosphere and the Nominating and Governance Committee will consider whether candidates will promote that value." We cannot over-emphasize this point. We believe that shareholder nominated directors may prove to be an impediment to the functioning of boards and lead to delays and inefficiencies, especially when a director is nominated by

difficulty in recruiting qualified directors. We agree most fundamentally that increased proxy access is not needed to increase the accountability of U.S. companies to shareholders. We believe that it is more likely that shareholder-nominated directors will be beholden to and focused on the narrow interests of the nominating shareholder than on improving the overall quality of corporate governance. This is especially true in light of the recently approved amendment of NYSE Rule 452 eliminating broker authority to vote street name shares in uncontested director elections, which will doubtless magnify the already considerable influence of institutional investors.

IV. A modified version of proposed Rule 14a-8(i)(8) would enable adoption of proxy access bylaws under appropriate circumstances that are better tailored to individual companies than the one-size-fits-all approach reflected in proposed Rule 14a-11.

We also agree with the view of Commissioner Paredes that if the Commission decides, despite widespread opposition and concern, to pursue shareholder access, it should adopt amendments to Rule 14a-8 to facilitate private ordering, *i.e.*, corporate flexibility to determine the most efficient allocation of shareholder rights, and not adopt Rule 14a-11, which would preempt private ordering. This would represent an incremental first step, which if followed by reassessment of the impact and refinement at a later date, would be preferable to the sweeping changes that the adoption of proposed Rule 14a-11 would represent. However, we believe that several changes to Rule 14a-8(i)(8) as proposed should be made:

1. The ownership threshold required under Rule 14a-8(i)(8) for a shareholder to submit such a proposal should be significantly higher (at least 5%) than that currently proposed to prevent misuse of the process by special interest groups and shareholders focused on the short term;
2. The holding period required to qualify for the rule should be increased to at least three years;
3. There should be a requirement that the proposing shareholders agree to retain their qualifying shares for at least 2-3 years rather than just through the annual meeting date. We do not believe that an investor intending to exit its investment soon after the annual meeting has a sufficient long term interest in the company to propose, and use the issuer's proxy to advocate, a change as significant as a shareholder nomination by-law.

If, as we and many others advocate, the Commission decides to move in the direction of adopting 14a-8(i)(8) without Rule14a-11, it should commence a new comment process to fully consider the details of such adoption and its implications. It appears that because of the level of controversy surrounding proposed Rule 14a-11 and

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an investor that has a short-term versus long term view of its investment in the company.

the shortness of time, most commenters have prioritized and focused their energies on Rule 14a-11 comments at the expense of full analysis of proposed Rule 14a-8(i)(8).

V. **If, despite widespread opposition and concern, the Commission decides to adopt a form of proxy access, there are many elements of proposed Rule 14a-11 that should be modified to minimize the negative impacts of the current proposal.**

We have carefully reviewed the proposed rules and the Commission's rationale. We have numerous concerns about proposed Rule 14a-11 and respectfully submit that that adoption of the rule is not in the interests of either companies or most investors. As stated above, we believe that the rule would be burdensome, expensive and distracting to issuers. As a result we believe that if a proxy access rule is adopted, the bar must be raised significantly for a shareholder or group to avail itself of the right to access an issuer's proxy statement. To that end, we urge the following changes be adopted if the Commission is determined to adopt Rule 14a-11:

- Eligibility Triggers. As in previous proposals, the right of access should be triggered only in a situation where it appears that the current board may be lacking in oversight, such as the imposition of regulatory sanctions on the company, multiple financial statement restatements or being delisted by a securities exchange. This would appropriately allow well performing and well managed companies to maintain the status quo.

- Ownership Thresholds: We do not believe that the proposed 1% ownership threshold[4] for companies with a market capitalization greater than $700 million represents a sufficient financial interest to justify requiring an issuer to include the investor's nominee in its proxy statement. The proposed low bar gives activist and special interest holders an extremely low-cost avenue to disrupt board composition and corporate strategy. We propose at least a verified 5% interest as of the meeting date, which corresponds to the threshold for beneficial ownership reporting, as a threshold to justify the use of corporate funds to nominate a candidate. The qualifying position should be a net long position to assure that the proposing shareholder has a sufficient economic interest in the company.

- Treatment of Groups: There should be better defined standards with respect to group formation to assure that group members have an adequate stake in the company to justify their use of the proxy access process. The proposed rule would allow an unlimited number of shareholders to aggregate their ownership, circumventing the purpose of the thresholds and increasing the potential for significant disruption

[4] Based on filing data, as of March 31, 2009, tw telecom inc. had over 30 shareholders that would have met the 1% threshold.

and waste. We suggest implementing a higher ownership threshold for groups (*i.e.*, 10% for large accelerated filers) and requiring that each group member satisfy an individual threshold of 2% or more with the same holding period and share retention requirement as individual shareholders.

- Holding Period: The proposed one year holding period is too short. Only shareholders that evidence a long term interest in the issuer by having held the requisite interest in a net long position for at least two years, should be eligible for the rule.

- Intent to Hold: The nominating shareholder should be required to represent an intent to hold the qualifying securities for a significant period, *i.e.*, at least three years. We do not see why a shareholder should be allowed to use Rule 14a-11 to propose a nominee and then liquidate its investment immediately following the annual meeting. We also believe that if the nominating shareholder sells its shares earlier than represented, its nominated director should be obligated to tender his or her resignation for consideration by the remaining board members.

- Prioritization: The proposed "first-in" standard is not the best possible basis for prioritizing multiple nominations. Instead, we believe nominations should be prioritized on the basis of the size of the principal nominating shareholder's share ownership.

- Independence and Qualifications: A shareholder nominee should be required to meet the same independence standards, whether stock exchange or company established, as other nominees. The failure to impose this requirement increases the risk of having special interest directors that are not responsive to the interests of all shareholders. Similarly, shareholder nominees should be required to disclose their holdings in competitive companies and any contacts with the company or management within a 12-month period prior to the formation of any plans or proposals with respect to a nomination. We also believe that it is critical that companies be permitted to establish their own reasonable qualification requirements for directors as long as those standards are applied equally to board nominees[5]. To enable the nomination of unqualified persons would run counter to the principals

[5] Concerns that the company might misuse the qualification standards to avoid inclusion of *any* shareholder nominated candidates could be addressed through objective standards such as limits on other board memberships or objectively based experience requirements akin to those established by the Commission for "audit committee financial experts". In addition, the potential for misuse would be mitigation by the Rule's provision that assigns the burden of demonstrating the basis for exclusion to the company.

of accountability and good governance that the Commission seeks to promote.

- Repeat Nominations: A shareholder that has proposed a nominee and has already availed itself access to the company's proxy statement should be barred from subsequent nominations for a significant period, *e.g.*, three years, if the nominee is not successful, to avoid what could become a situation somewhat akin to harassment.

- Takeover Issues: The proposed rule would require a nominating investor to certify that it does not have a current intent to take control of the company, but there is nothing to prevent that investor from changing its intent once its candidates are elected. To prevent the proxy access regime from being abused to support takeover bids, nominators should be required to agree that they will not take any steps towards a takeover for at least two years following the election, and the nominated director should be required to resign if any such steps are taken. For the same reason, shareholders should be limited to one nominee per election and a nominator should be barred from engaging in a proxy contest related to any election in which it has used the proxy access process to nominate a candidate.

VI. Conclusion: Mandated proxy access should not be adopted.

We again caution against undue haste in adopting wide ranging changes (1) based on assumptions regarding the beneficial effects of proxy access that are unsubstantiated, and (2) may be counter to the overarching goals of promoting economic recovery and improving the quality of corporate governance. While we believe that no changes should be made to the proxy rules at this time relative to shareholder access, if changes are deemed necessary, we would prefer the more incremental approach to adopting a modified version of proposed Rule 14a-8(i)(8) to the more drastic and potentially detrimental action of adopting a version of Rule 14a-11. We do believe, however, that with the inclusion of our suggested modifications to the Rule, some of the deleterious effects could be minimized.

Respectfully submitted,

Tina Davis

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Senior Vice President and Deputy General Counsel