

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Technology Transitions)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers)	RM-11358
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
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AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
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PETITION FOR CLARIFICATION OF U.S. TELEPACIFIC CORP.

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U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) petitions the Federal Communications Commission (“Commission” or “FCC”) for Clarification of its *Technology Transitions* Report and Order.¹ In particular, TelePacific asks that the Commission resolve an apparent unintended consequence of its reform of the copper retirement notice process. Specifically TelePacific seeks clarification regarding the interplay between the Section 251(b) retirement process and the Section 214(a) discontinuance process in the event that an ILEC’s copper loop retirement leads to a CLEC having to discontinue provision of service to a community or part of a community.

¹ *Technology Transitions et al.*, GN Docket No. 13-5 et al., Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) (“*Technology Transitions Order*”).

I. Introduction and Summary

TelePacific relies in part on last mile access to offer an average of 20 Mbps competitive broadband service to its small and medium business, school, health care, and community anchor institution customers. It shares the Commission's goal of ensuring minimal disruption to its customers' broadband services.² For example, of the 96 schools, libraries and Rural Health Care ("RHC") clinics TelePacific currently serves under the federal e-rate and RHC programs, 63 have no fiber-based broadband alternative. Should the ILEC retire any portion of the copper route TelePacific uses to provide Ethernet over Copper ("EoC"), it is likely that TelePacific would no longer be able to offer those customers a competitive broadband service at reasonably comparable rates. Although 32 schools/libraries/RHC clinics have a fiber based alternative near-net, the costs of a third-party Ethernet provider building to the customer likely would make continued competitive broadband service uneconomical. Although TelePacific would prefer to find a means to offer its customers continued competitive broadband services, in the event that is not possible following announcement of a copper retirement, TelePacific seeks clarification about the interplay between the deadlines for copper retirement and service discontinuance.

Although the Commission intends for incumbent LECs to provide competing carriers "information necessary ...to accommodate the copper retirement with minimal impact on their end user customers,"³ the *Technology Transitions Order* recognized that accomodat[ing] planned copper retirements ...could require costly and disruptive changes to the interconnecting carrier's network ... to allow it to continue serving its end user customers."⁴ To allow competing carriers

² *Id.* at 9384 ¶ 17 (revising existing copper retirement procedures to "allow interconnecting entities to work more closely with their customers to ensure minimal disruption to service as a result of any planned copper retirements").

³ *Id.* at 9385 ¶ 20.

⁴ *Id.* at 9387-88 ¶ 25.

to adequately accommodate a planned copper retirement, the *Technology Transitions Order* requires ILECs retiring copper to provide 180 days' notice to impacted parties, including interconnected carriers and retail customers.⁵

Consistent with the objective of protecting customers from interference with their choice of supplier for telecommunications services, the *Technology Transitions Order* also requires ILECs that are discontinuing TDM-based services to a community (or part of a community) to seek Commission approval for such discontinuance and as a condition of approval to provide competitors using TDM-based wholesale service with reasonably comparable rates, terms and conditions for IP-based wholesale service. The Commission determined that this policy was necessary to “facilitate continued availability of existing competing options.”⁶ The *Technology Transitions Order* thus recognized that the reasonably comparable access requirement helps guard against situations where a competitive carrier’s “end user customers could potentially face higher communications costs and less competitive choice.”⁷ The Commission reasonably aspired to “avoid the situation where a [C]LEC may irrevocably lose business as a result of the technology transitions and loss of wholesale inputs.”⁸

Taken together these two provisions of the *Technology Transitions Order* provide a competitive safety net as ILECs transition their networks from copper-based TDM and IP services to fiber-based IP services. TelePacific advocated for such a safety net and applauds the Commission’s efforts. Because the safety net may have an unintended defect as explained herein, however, TelePacific requests clarification about the interplay between the deadlines for copper

⁵ The notice period is shorter when there are no companies using the copper to serve existing customers.

⁶ *Technology Transitions Order*, 30 FCC Rcd at 9443 ¶ 131.

⁷ *Id.* at 9446 ¶ 135.

⁸ *Id.*

retirement and service discontinuance.

II. Argument

The measures established in the *Technology Transitions Order* do not appear to address circumstances where the ILEC retires copper but does not discontinue TDM services in the relevant community. Where a CLEC provides broadband service via EoC and the ILEC announces the retirement of those copper loops or feeder, it is possible that even while the CLEC is working to complete its Section 214 discontinuance and transition customers to alternative service providers, the CLEC could be forced to discontinue retail broadband service before Commission approval if the ILEC retires its copper.

Although all carriers must “consider carefully” whether copper retirement “will be accompanied by or be the cause of” service discontinuance,⁹ there is no explicit requirement that an ILEC file a Section 214 discontinuance application when its copper retirement results in a CLEC discontinuance of service. Under such a scenario a CLEC using copper loops to provide EoC would be deprived of the ability to use UNE copper loops to continue providing the retail broadband service after the date of retirement. TelePacific recognizes that theoretically there are other transmission technologies that support the provision of broadband to small and medium sized business customers. But it is unlikely that such replacement technologies would be available or if available would be affordable. For example, purchasing TDM-based UNE DS1s, DS1 special access circuits, or wholesale Ethernet from the ILEC (if available) likely would not be a practical replacement for the retired copper loops.

The average TelePacific EoC customer orders 20 Mbps of Ethernet.¹⁰ There are technical

⁹ *Id.* at 9382-83 ¶ 14.

¹⁰ Written Ex Parte Letter from Tamar Finn, Counsel to U.S. TelePacific Corp. d/b/a TelePacific Communications to Marlene Dortch, FCC at 2 (filed July 30, 2015).

impediments when bonding DS1 service that limit the bandwidth available to no more than 12 Mbps.¹¹ As a result of this, the typical TelePacific customer that obtains a 20 Mbps Ethernet circuit would have to be willing to accept less bandwidth due to the retirement of copper. Without access to bare copper to provide EoC, TelePacific would require a DS3 to provide 20 Mbps of bandwidth. But the \$1950 price of an ILEC-provided DS3 (if available)¹² far outstrips the revenue available for providing 20-50 Mbps of Ethernet to a medium or small business and even exceeds the \$1800 revenue available for a 100 Mbps Ethernet service (which would require more than two DS3s).¹³ Most customers are unlikely to accept downgraded service (1.54 Mbps, or up to 12 Mbps by bonding DS1s) or the same service at multiples of what they pay now.

Nor is purchasing the 20 Mbps or higher Ethernet service at wholesale from the ILEC an attractive option. Instead of making purchases easier, the forbearance granted by the Commission regarding ILEC provided dedicated Ethernet service has led to more complex contracts, more byzantine pricing and discount structures on top of higher prices overall.¹⁴ As the Commission observed in the *Technology Transitions Order*, “replacement of DS1 service with a 2 Mbps Ethernet service in Kings Point, Florida would result in an 800 percent input price increase.”¹⁵

Rather than using an ILEC wholesale input as a copper loop replacement, TelePacific

¹¹ *Technology Transitions Order*, 30 FCC Rcd at 9465 ¶ 165.

¹² All ILECs in California provide DS3 circuits using fiber; but when the ILEC retires copper, it is possible that the ILEC would replace with a proprietary network (such as Verizon FiOS) which the ILEC claims lacks the capability for provisioning DS3 circuits.

¹³ Average price of \$310 for 10 Mbps EoC; \$1800 for 100 Mbps Ethernet; \$295 for DS1 (1.54 Mbps); and \$1950 for DS3 (45 Mbps) (source: www.shopforethernet.com visited Nov. 11, 2015).

¹⁴ Notice of Ex Parte Communication from Tamar Finn, Counsel to U.S. TelePacific Corp. d/b/a TelePacific Communications to Marlene Dortch, FCC at 2 (filed Feb. 27, 2015).

¹⁵ *Technology Transitions Order*, 30 FCC Rcd at 9446-47 ¶ 135 & n. 465 citing Windstream Comments, at p. 20 (discussing cost differential between special access DS1 service and 2 Mbps Ethernet service).

could deploy its own fiber or look for third-party fiber. But in the locations where TelePacific uses EoC with UNE copper loops it has already determined that an investment in fiber is not economic due to the high cost of fiber deployment and limited revenue opportunities available in a particular location. This is not surprising since TelePacific has determined that fiber facilities from its third party vendors (including ILECs) are only available at 11% of the locations where TelePacific serves customers. This data indicates that it is also unlikely that TelePacific would be able to replace retired copper loops with fiber-based arrangements from third parties.

As a result it is more than likely that a CLEC, faced with the retirement of the copper loops or feeder it uses to provide broadband using EoC, would have little alternative but to exit the market after losing access to such copper, even though the ILEC continues to provide TDM-based service. In such circumstances, the ILEC apparently would not be obligated to provide a reasonably priced wholesale IP-based service, but a CLEC that relied on UNE copper loops would nonetheless lack a reasonably priced alternative to replace its UNE loops. As a result of this gap the CLEC likely would face a situation where it would need to discontinue service to all or part of the community where it was providing retail service.¹⁶

In exiting the market, the CLEC would be obligated to file a Section 214 application. But that Section 214 application occurs independently of the ILEC's retirement of the copper loops or feeder. The CLEC would have no influence over the ILEC's retirement process and the Commission, in its Section 214 process, would not appear to have the ability to require the ILEC to delay the retirement until the CLEC's customers have made arrangements for alternative

¹⁶ This highlights an internal inconsistency in the *Technology Transitions Order*. By allowing ILECs to retire copper loops where customers lack reasonable alternatives other than the ILEC's service, the Commission likely is creating situations where "end user customers could ... face higher communications costs and less competitive choice." *Id.* at 9446 ¶ 135. It would be unfortunate if ILEC copper retirement resulted in a loss of competitive choice for RHC clinics or schools currently using broadband provided via EoC.

service providers.

The Commission's Section 214 discontinuance rules allow for delay in the discontinuance if "an unreasonable degree of customer hardship would result."¹⁷ But it is not clear how the Commission would apply this standard where the facilities at issue were not under the control of the retail provider seeking discontinuance authority. While the Commission has traditionally been reluctant to delay discontinuation where such delay results in hardship for the applicant,¹⁸ it is not clear how this principle would apply where there is also a hardship (delayed copper retirement) imposed on a third party (the ILEC).

Thus it is possible that even while the CLEC is working to complete its discontinuance consistent with the Commission's rules, and transition customers to alternative service providers, the CLEC could be forced to discontinue retail broadband service before Commission approval if the ILEC cuts off access to its copper.

Faced with an apparent Hobson's choice down the road, CLECs would be well-advised to notify customers as soon as a copper loop retirement notice is received and begin preparing for discontinuance. But such a filing then leads to customers cancelling contracts and shifting services to other suppliers without giving the CLEC a reasonable opportunity to make alternative arrangements.

This scenario works to the benefit of ILECs and to the detriment of customer choice and competition. It also conflicts with the policies established in the *Technology Transitions Order*.

¹⁷ *Rhythms Links Inc. Application to Discontinue Domestic Telecommunications Services*, Order, 16 FCC Rcd 17024, 17025-26 ¶ 4 (2001) ("*Rhythms*") quoting *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, 85 FCC 2d 1 at ¶ 146 (1980).

¹⁸ *In The Matter Of AT&T Corporation Application for Authority under Section 214 of the Communications Act, as amended, to Discontinue the Offering of High Seas Service and to Close its Three Radio Coast Stations (KMI, WOM and WOO)*, Memorandum Opinion and Order, 14 FCC Rcd 13225, 13229 ¶ 8 (1999).

Under this scenario “end user customers [would] face higher communications costs and less competitive choice.”¹⁹ Under the rules as written there is no clear way for the Commission to halt the copper retirement until the CLEC discontinuance process has been completed. The Commission should clarify its rules to avoid such a “situation where a [C]LEC may irrevocably lose business as a result of the technology transitions and loss of wholesale inputs.”²⁰

Specifically, the Commission should clarify that where the loss of access to retired copper leads to a discontinuance of retail service, the two processes must be harmonized. The Commission could harmonize the processes by automatically granting a Section 214 application based on copper retirement on the date of retirement, so long as the Section 214 applicant filed no less than 60 days prior to the planned retirement date. Alternatively, the Commission could consider in the Section 214 process whether it should require a delay in the copper retirement until the CLEC’s discontinuance no longer creates “an unreasonable degree of customer hardship.” There may be other means to harmonize the two processes to ensure no existing customer of broadband service has its service interrupted because copper is retired prior to the grant of Section 214 discontinuance approval. TelePacific looks forward to working with the Commission and the industry to ensure customer choice and broadband service are preserved during the technology transition.

III. Conclusion

For the foregoing reasons, the Commission should grant the requested clarification.

Respectfully submitted,

¹⁹ *Technology Transitions Order*, 30 FCC Rcd at 9446 ¶ 135.

²⁰ *Id.*

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