

# LATHAM & WATKINS<sup>LLP</sup>

January 15, 2004

## BY ELECTRONIC FILING

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

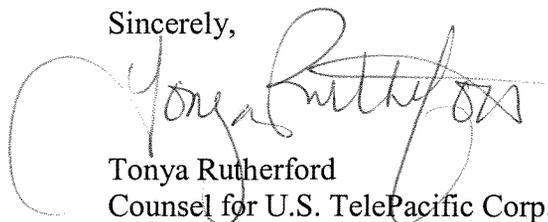
Re: *Ex Parte* Presentation in CC Docket No. 01-92 and CC Docket No. 96-262

Dear Ms. Dortch:

On January 13, 14, and 15, 2004, Karen Brinkmann and I met on behalf of U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) with Commissioner Martin and his Legal Advisor, Dan Gonzalez; Commissioner Adelstein and his Legal Advisor, Lisa Zaina; Debra Weiner, Jeffrey Dygert, and Paula Silberthau, all of the Office of General Counsel; and William Maher, Tamara Preiss, Steve Morris, and Victoria Schlesinger, all of the Wireline Competition Bureau concerning the provision of exchange access services by competitive local exchange carriers (“CLECs”). TelePacific urged the Commission to reject arguments that paragraph 58 of the *CLEC Access Charge Order* requires a CLEC to actually serve the end-user in order to charge access for that particular call. The attached briefing sheet, which TelePacific distributed during the meeting, summarizes the points TelePacific made during the meeting.

In accordance with Commission rules, this letter is being filed in the aforementioned dockets. If you have any questions, please contact me at (202) 637-1023.

Sincerely,



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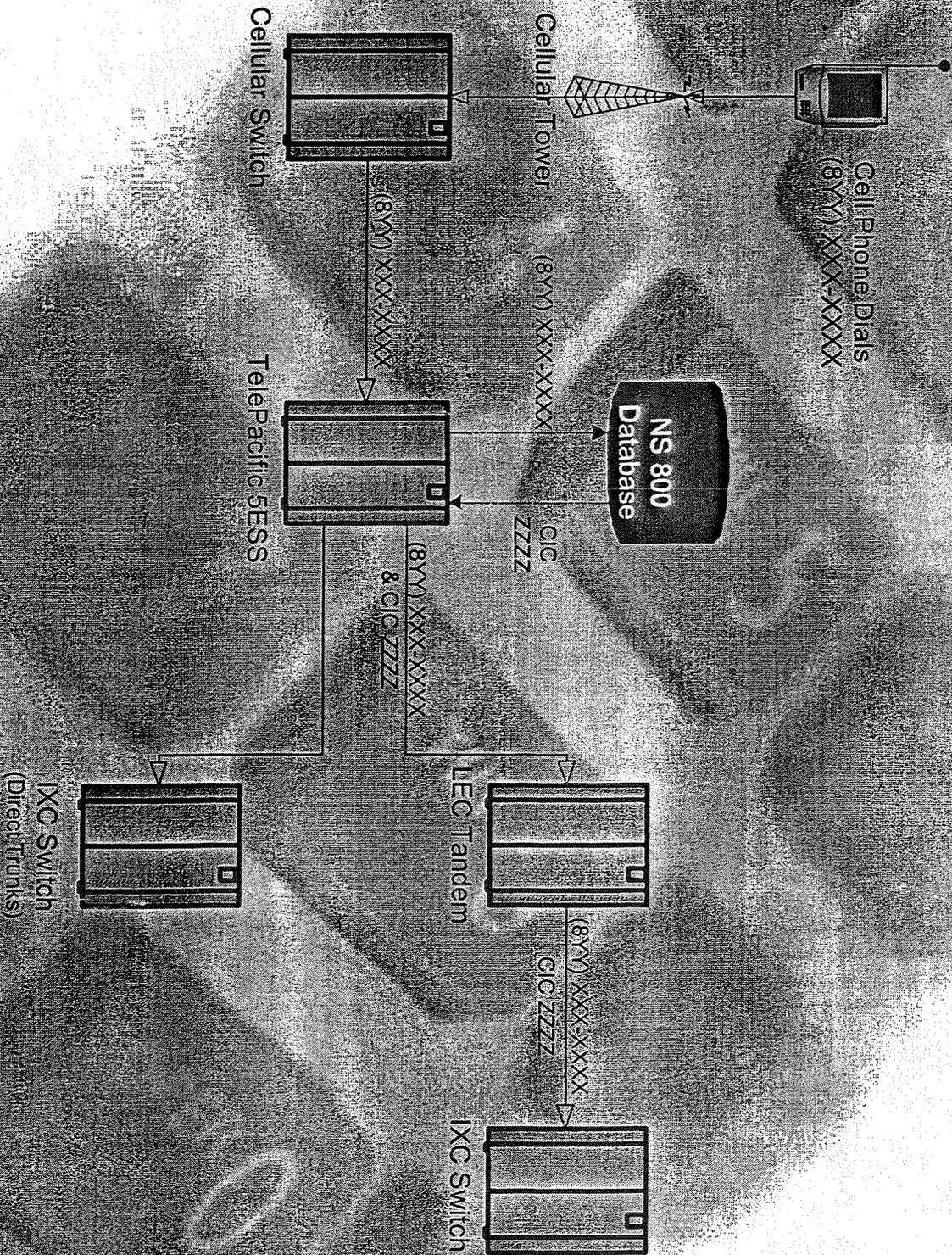
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**Briefing Sheet on CLEC-CMRS Jointly-Provided Access Service**

- TelePacific carries originating traffic for certain unaffiliated cellular carriers. Because these carriers often do not generate sufficient traffic warranting direct connections to IXC points of presence, they rely on TelePacific for interconnection of their interexchange traffic to IXCs. TelePacific provides the CMRS carriers individualized customer service and performs many of the access functions that an ILEC otherwise would perform, including switching, transport, and database dips.
- CLECs, such as TelePacific, are entitled to recover access charges from IXCs.
  - The *CLEC Access Charge Order* does not require CLECs to actually serve the end-user in order to charge access for that particular call.
    - Paragraph 58 of the *CLEC Access Charge Order* permits CLECs to charge the benchmark rate for access services in “markets where they have operations that are actually serving end-user customers.”
    - In accordance with paragraph 58, TelePacific has end-users in all of the markets in which it jointly provides access service with a CMRS carrier, and therefore is permitted to charge the benchmark rate.
- A CLEC should not be denied access charges because the IXC refuses to establish a direct connection with the CLEC.
- ILECs are not limited to imposing access charges only when they actually serve the end-user, as MCI advocates for CLECs.
- TelePacific’s presumptively reasonable rates may be imposed by tariff.
  - TelePacific’s rates are at or below the benchmark level, and it therefore is entitled to payment from IXCs.
  - The FCC has concluded that, if a CLEC charges rates at or below the benchmark level for originating and terminating access service, including toll-free 8YY traffic, the CLEC’s rates will be presumed just and reasonable and therefore may be tariffed.
- If the FCC determines that CLECs must actually serve the end-user in order to charge access for that particular call, the FCC may apply such a rule change on a prospective basis only.
- An IXC’s failure to pay a CLEC’s tariffed rate for access service constitutes self-help and violates Section 201 of the Communications Act of 1934, as amended.
  - The FCC has concluded carriers may not withhold payment for tariffed services but should first pay and then seek redress.

# Originating 8YY Call

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COMMUNICATIONS



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# LATHAM & WATKINS LLP

September 25, 2003

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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: *Ex Parte* Presentation in CC Docket No. 01-92 and CC Docket No. 96-262

Dear Ms. Dortch:

On September 17, 2003, Karen Brinkmann and I met on behalf of U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") with Christopher Libertelli, Senior Legal Advisor to Chairman Powell, concerning TelePacific's provision of exchange access services for the delivery of 8YY calls from commercial mobile radio service ("CMRS") carriers to interexchange carriers ("IXCs").

### **I. TELEPACIFIC IS ENTITLED TO COMPENSATION FOR ACCESS FUNCTIONS IT PROVIDES IXCS.**

During the meeting, TelePacific explained that, as a competitive local exchange carrier ("CLEC"), it is entitled to compensation for the access services it provides to IXCs. TelePacific sends traffic to IXCs via either direct connect trunk groups or an incumbent local exchange carrier ("ILEC") tandem. TelePacific has direct connect arrangements with many IXCs. With respect to these direct connects, TelePacific provides the local switching functions (in conjunction with the CMRS carrier), performs the database dips required to identify the IXC to which the traffic should be routed, provides the transport functions necessary to connect customers to their presubscribed IXC, and forwards the ANI call set-up and billing information to the IXC. TelePacific provides this service for all but one of the CMRS carriers in the Los Angeles market. TelePacific pointed out during the meeting that its access rates are at or below the benchmark level established in the *CLEC Access Charge Order*,<sup>1</sup> and therefore it is entitled to payment from IXCs. The Commission has made clear that carriers may not withhold payment

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<sup>1</sup> *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*CLEC Access Charge Order*").

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for tariffed services but, if they object to the charges, they should first pay under protest and then seek redress.<sup>2</sup> No IXC has filed a complaint against TelePacific claiming that its current rates are unreasonable.

In some instances, TelePacific does not have a direct connect arrangement with an IXC because the IXC chooses not to connect with TelePacific directly, despite TelePacific's efforts to negotiate such arrangements. For non-direct connect arrangements, TelePacific provides local switching (in conjunction with the CMRS carrier) and performs the database dips necessary to identify the IXC to which the traffic should be routed, as it does for direct connects. Because the IXC connects through the ILEC tandem in those cases, TelePacific only provides the transport functions necessary to connect customers to the ILEC tandem, and the ILEC connects the customer to his or her presubscribed IXC. In this scenario, TelePacific provides the same access functions that it performs for direct connects, with the exception of transporting customers directly to their presubscribed IXC. An IXC should not be allowed to avoid paying CLEC access charges for non-direct connects simply by refusing to connect directly with a CLEC.

**II. QWEST'S PROPOSAL TO REQUIRE CLECS TO PERFORM ALL OF THE FUNCTIONS ENUMERATED IN PARAGRAPH 55 OF THE CLEC ACCESS CHARGE ORDER REPRESENTS A DEPARTURE FROM THE LANGUAGE OF THE ORDER.**

During the meeting, TelePacific urged the Commission to reject Qwest's Petition for Clarification or, in the Alternative, Reconsideration, filed in CC Docket No. 96-262, on June 20, 2001, in response to the Commission's *CLEC Access Charge Order*. In its Petition, Qwest urges the Commission to conclude that a CLEC must provide each of the services listed in paragraph 55 of that order as necessary to originate and terminate interexchange calls in order to tariff its access services at the benchmark rate established in the order. At least one party has taken the position that the Commission can make this charge retroactive.<sup>3</sup>

The Commission should reject Qwest's Petition. As the Commission recognized in the *CLEC Access Charge Order*, CLECs do not structure their service offerings in the same way as ILECs. In acknowledgment that CLECs structure their access service offerings differently than ILECs, the Commission concluded that the CLEC benchmark rate "does not require any particular rate elements or rate structure."<sup>4</sup> In so concluding, the Commission

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<sup>2</sup> *Brooten v. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13351 n.53 (Com. Car. Bur. 1997).

<sup>3</sup> ITC Delta Com filed an ex parte submission on September 11, 2003, arguing that the *CLEC Access Charge Order* only permits CLECs to tariff the full benchmark rate when it performs all the originating functions for a switched interstate call. Letter from Robert J. Aamoth, Counsel for ITC DeltaCom Communications, Inc. to Marlene H. Dortch, filed on Sept. 11, 2003 in CC Docket Nos. 96-262 and 01-92.

<sup>4</sup> *CLEC Access Charge Order* at ¶55.

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admittedly sought to “preserve the flexibility which CLECs currently enjoy in setting their access rates.”<sup>5</sup> The Commission also recognized that some variation exists among LECs as to what functions make up access service and the terminology that LECs use to refer to the functions they perform. For example, the Commission noted that “there are certain basic services that make up interstate switched access service offered by *most* carriers.”<sup>6</sup> The Commission also described what “switched access service *typically* entails.”<sup>7</sup> It did not state that all LECs currently provide specific functions, nor did it state that on a going-forward basis all LECs must provide specific functions. To do so would yield the inefficient result of requiring some LECs to perform functions that are not necessary to complete an interexchange call. The Commission simply acknowledged that CLECs seek compensation for the same basic elements as ILECs, namely: common line charges, local switching, and transport.<sup>8</sup> The Commission did not state, however, that a LEC itself must provide all of these specific functions nor tariff them separately. The Commission should not now adopt a rule that would require CLECs to emulate an ILEC rate structure.

Although the Commission requires that the composite rate for access service not exceed the benchmark, the Commission acknowledged that the benchmark rate “applies, but is not necessarily limited, to the following specific rate elements and their equivalents: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.”<sup>9</sup> The Commission goes on to state that “[t]he *only* requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark.”<sup>10</sup> Contrary to ITC DeltaCom’s position, the Commission did not conclude that CLECs charging the benchmark rate must provide all the switched access functions. Rather, the Commission concluded that CLECs providing all the switched access functions described in the *CLEC Access Charge Order* may not charge a rate that exceeds the benchmark. Accordingly, the *CLEC Access Charge Order* permits TelePacific to charge the benchmark rate for the access services it provides IXCs, regardless of how TelePacific structures its access functions or its rates.

As noted above, TelePacific performs functions equivalent to those that the ILEC would provide if TelePacific were not providing access. Where TelePacific has a direct connect arrangement with the IXC, TelePacific (in conjunction with the CMRS carrier) provides all of the basic access functions necessary to deliver 8YY CMRS traffic. TelePacific notes that the Commission has acknowledged that LECs may recover access charges from IXCs when

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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interstate interexchange traffic passes from CMRS customers to IXCs via LEC networks.<sup>11</sup> Pursuant to an agreement between the CMRS carrier and TelePacific, the CMRS carrier connects the CMRS caller with the local (CMRS) switch and transports the call over dedicated trunks to TelePacific's wire center. TelePacific then performs the database dip and transports the call from its wire center to the IXC's point of presence. To the extent that IXCs are concerned about paying both the CLEC and the ILEC for access services (e.g., non-direct connects), the IXCs can enter into direct connect arrangements with CLECs and cut out the ILEC altogether.

**III. THE COMMISSION SHOULD REJECT QWEST'S PROPOSAL BECAUSE ITS APPLICATION WOULD CONSTITUTE AN IMPERMISSIBLE RETROACTIVE RATEMAKING.**

As US LEC stated in its August 25, 2003 ex parte, if the Commission determines that CLECs can no longer charge the full benchmark for CMRS traffic, it may only order CLECs to alter their rates on a prospective basis.<sup>12</sup> The courts have long held that the retroactive application of new or modified rules on past conduct or actions constitutes impermissible retroactive rulemaking.<sup>13</sup> As Justice Scalia stated in *Bowen*, a forbidden retroactive rule is "one which alters the past legal consequences of past actions."<sup>14</sup>

The prohibition on retroactive rulemaking applies equally to legislative and interpretative rules. The Commission has made specific pronouncements regarding retroactive rulemaking in the context of LEC rates. Specifically, the Commission has stated that "the rule against retroactive ratemaking bars the Commission from . . . forcing a carrier to reduce rates to make up for past overrecovery." *In the Matter of Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961, 9072 ¶ 253 (1995); *see also In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and*

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<sup>11</sup> Indeed, in addressing whether CMRS providers can receive access charges from IXCs, the Commission tentatively concluded that "CMRS providers should be entitled to recover access charges from IXCs, as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks." *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 ¶116 (1996) (emphasis added). *See also TSR Wireless v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11184 ¶31 (2000) (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16016-17 ¶1043 (1996) (LEC-CMRS traffic carried by an interexchange carrier falls within the access charge regime)).

<sup>12</sup> Letter from Richard M. Rindler, Counsel for US LEC Corp. to Marlene H. Dortch, filed on Aug. 25, 2003 in CC Docket Nos. 96-262 and 01-92.

<sup>13</sup> *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Bowen v. Georgetown*, 488 U.S. 204 (1988); *Nader v. FCC*, 520 F.2d 182 (U.S. App. D.C. 1975).

<sup>14</sup> 488 U.S. at 219.

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*Provision of 800 Services*, Order on Reconsideration, 12 FCC Rcd 5188, 5195 n.44 (stating that “to the extent that the incumbent LECs are arguing that they should be entitled to actually recoup monies they could have earned by retroactively increasing rate elements in certain baskets, as opposed to using these amounts to offset their refund liability, this has been consistently rejected as retroactive ratemaking”).

While the courts have held that retroactivity generally is not favored in the law,<sup>15</sup> a court will start with a presumption in favor of retroactivity if the case involves “new applications of existing law, clarifications, and additions.”<sup>16</sup> As the D.C. Circuit has made clear and the Commission itself has recognized, there is a distinction between new applications of law and the “substitution of new law for old law.”<sup>17</sup> Agencies are permitted to correctly apply a rule that was in effect at the time; however, when a rule changes the existing legal landscape, as Qwest and ITC DeltaCom propose here, and the agency applies that rule change to past actions, the agency has engaged in impermissible retroactive rulemaking. It is this important distinction between the new application of law versus the substitution of new law for the law that previously applied that ITC DeltaCom’s *ex parte* fails to capture. The cases ITC DeltaCom cites are inapposite because they deal with situations where the agency was deemed to have merely clarified a rule that was already in place. As described above, the current state of law does not require a CLEC itself to perform all of the access functions necessary to originate or terminate interexchange traffic as a prerequisite for charging the benchmark rate. If the Commission were now to conclude that CLECs are required to provide all of the access functions listed in the text quoted above, it would be supplanting the current rule (which does not require CLECs to provide all of those functions) with a new one. Such a rule change could be lawfully applied on a prospective basis only. To conclude now that CLECs overcharged IXCs for the past two years and are required to refund such overcharges would constitute impermissible retroactive ratemaking.

Even if the Commission were to agree with ITC DeltaCom’s (erroneous) position and conclude that the adoption of Qwest’s proposal does not constitute a change in the legal landscape, that would not be the end of the inquiry. If applying the new rule to past conduct “would work a ‘manifest injustice,’”<sup>18</sup> the court will deny retroactivity. The Commission would have to demonstrate that an injustice would not result from the application to past conduct of its new holding that CLECs may charge the full benchmark only if they perform all of the originating access functions listed in paragraph 55 of the *CLEC Access Charge Order*. Such a ruling cannot be justified. Indeed, it would eliminate the flexibility that CLECs have enjoyed in structuring their service offerings, an objective that the Commission expressly stated in the

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<sup>15</sup> 488 U.S. at 208.

<sup>16</sup> *Communications Vending Corporation of Arizona, Inc. et al., v. Citizens Communications Company*, Memorandum Opinion and Order, 17 FCC Rcd 24201 (2002) (citing *Verizon Telephone Companies, et al., v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)).

<sup>17</sup> *Id.* (citing *Verizon Telephone Companies, et al., v. FCC*, 269 F.3d 1098, 1112 (D.C. Cir. 2001)).

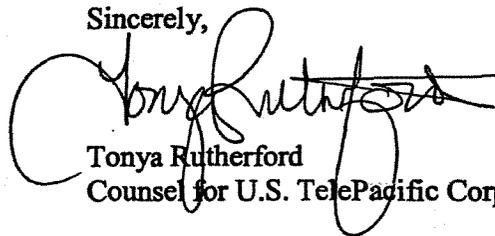
<sup>18</sup> *Id.*

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*CLEC Access Charge Order* it wanted to preserve. Furthermore, the rule change would force a rate structure designed for a monopolist on carriers that operate in a competitive environment, a result that directly contradicts the competitive goals of the Communications Act of 1934, as amended. For the reasons articulated herein, the Commission should reject Qwest's proposal and ITC DeltaCom's arguments made in support thereof.

In accordance with Commission rules, this letter is being filed in the aforementioned dockets. If you have any questions, please contact me at (202) 637-1023.

Sincerely,



Tonya Rutherford  
Counsel for U.S. TelePacific Corp.

cc: Christopher Libertelli