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

In the Matter of	)	
	)	
Request of U.S. TelePacific Corp.	)	WC Docket No. 06-122
d/b/a TelePacific Communications	)	
for Review of a Universal Service	)	
Administrator Decision and Stay of	)	
That Decision	)	

COMMENTS OF
NEW EDGE NETWORK, INC.

New Edge Network, Inc. ("New Edge") submits its Comments in response to the January 19, 2010 Public Notice released by the Federal Communications Commission (the "Commission") in the above-captioned proceeding. For the reasons discussed herein, New Edge supports the request by U.S. TelePacific Corp. (d/b/a TelePacific Communications) ("TelePacific") for reversal of a decision by the Universal Service Administrative Company ("USAC") and a stay pending review of TelePacific's appeal.

I. USAC'S DETERMINATION IS CONTRARY TO COMMISSION PRECEDENT.

USAC has determined that "the revenue from [TelePacific's] T-1 special access circuits associated with its T-1 Internet product" should have been reported as assessable for purposes of the federal universal service fund ("USF").[1] This determination is contrary to law and ignores the integrated nature and long-standing regulatory treatment of Internet access services. In

[1] Letter from USAC to J.. Hage III, Re: U.S. TelePacific Corp. d/b/a TelePacific Communications (Filer ID 819502), Status of Revised 2008 FCC Form 499-A ("*USAC Letter*"), at 6 (attached as Exhibit A to U.S. TelePacific d/b/a TelePacific Communications Request for Review and Reversal of Universal Service Administrator Decision).

September 2005, the Commission confirmed that wireline broadband Internet access services are information services.[2] The Commission could not have been more clear in stating this determination turned on the perspective of the end user, and that what ultimately matters for purposes of regulatory classification is "the finished product made available through a service rather than the facilities used to provide it."[3] The "inextricably" intertwined nature of the information and telecommunications components of Internet access stood in stark contrast, the Commission found, to "*stand-alone* ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services that carriers and end users have traditionally used for basic transmission services."[4] Similarly, the Commission has stated that:

> End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services -- both Internet access and a distinct *transmission* service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities.[5]

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[2] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *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*, CC Docket Nos. 95-20, 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC §160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ("*Wireline Broadband Order*").

[3] *Id*. at 14864, ¶ 16.

[4] *Id*. at 14860-61, ¶ 9 (emphasis added).

[5] *Id*. at 14910-11, ¶ 104 (emphasis in original)

Yet USAC's determination reaches precisely the opposite result. By differentiating between the "network layer" and the "service layer" of an integrated Internet access service to require USF contributions upon the former (regardless of whether it is offered on a "stand-alone" basis), USAC has failed to take account of the customer's perspective and has thus departed from the requirements of current law.

USAC's determination is all the more startling given that the 2005 *Wireline Broadband Order* rests atop a series of orders from prior decades confirming that broadband service providers have never been required to segregate the telecommunications portion of Internet access. With respect to facilities-based providers, the Commission recognized in its *Report to Congress* that its rules do not require USF contribution in cases where an Internet Service Provider "owns transmission facilities, and engages in data transport over those facilities in order to provide an information service."[6] Moreover, as the Commission observed in 2002 (and presaging its choice of terms in the *Wireline Broadband Order* three years later), facilities-based carriers are subject to USF contribution requirements only "to the extent they provide broadband transmission services or other telecommunications services *on a stand-alone basis* to affiliated or unaffiliated Internet service providers (ISPs) or to end-users."[7]

USAC's misunderstanding of the nature of Internet access service can perhaps best be seen in its attempt to prod TelePacific toward use of the "bundled" services safe harbor for USF

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[6] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11528 (1998) ("*Report to Congress*"), at ¶ 55.

[7] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *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*, CC Docket Nos. 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3051 (2002), at ¶ 72 (emphasis added).

contribution.[8] The Commission has long held that when "bundled" with an information service, the underlying telecommunications service is "contaminated" and the entire service becomes an information service.[9] By contrast, the Commission has never applied its USF safe harbor for "bundled" services to a transmission service that had been "contaminated" by bundling it with Internet access. Rather, the bundled safe harbor rules apply only to *combinations of stand-alone services* that have been marketed and sold together as a package at a total price less than the sum of the stand-alone prices.[10] In other words, the combination referred to in the "bundled" safe harbor is a single package at a single price for several distinct services, not components that are inextricably linked to form a single service.

USAC's determination is also contrary to earlier Commission precedent with respect to Internet access services offered by non-facilities-based providers. The Commission has never required those Internet access providers who rely on bottleneck transmission facilities supplied by others to contribute to universal service on the transmission component of such a service offering. Instead, the Commission has consistently held *for decades* that offerings by non-facilities providers "combining communications and computing components should *always* be deemed enhanced."[11] Under this "contamination" approach, the fact that an enhanced service

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[8] *See* Petition for Stay Pending Commission Review by U.S. TelePacific Corp. d/b/a TelePacific Communications, at 8.

[9] *Report to Congress*, 11 FCC Rcd at 11529, ¶ 57.

[10] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 98-183, *1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Bundling Rules in the Interexchange, Exchange Access, and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418, 7424-25 and 7446-49 (2001) at ¶¶ 10-12 and 48-55.

[11] *See, e.g., Report to Congress*, 13 FCC Rcd at 11530, ¶ 60 (emphasis added); *see also Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order,

might use regulated transmission paths did not convert it into a basic or adjunct-to-basic service.[12] Rather, the enhanced component of a non-facilities-based offering "contaminated" the basic component, resulting in the entire offering being "enhanced."[13] Thus, it has been clear since long before the *Wireline Broadband Order* that providers of enhanced or information services -- both those who self-provision the underlying T-1 network facilities and those who rely on special access facilities provided by others to deliver broadband -- need not segregate for regulatory purposes the underlying transmission component of those services.

In the end, USAC acknowledges that the intertwined or contaminated nature of the service as viewed from the customer's perspective played no part whatsoever in its decision here:

> USAC makes no determination whether TelePacific's product 'always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications,' which would result in its classification as an information service as TelePacific argues. Regardless of TelePacific's classification of its T-1 service, . . . this service . . . is a basic transmission service . . . subject to USF reporting and contribution obligations.[14]

But what USAC has made beside the point here is *precisely the point* under the collective precedent discussed above -- the *Wireline Broadband Order* and earlier Commission rulings put this very question about the nature of the service front and center. USAC's determination that a

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104 FCC 2d 958 (1986), at ¶¶ 129-132 (identifying concerns with respect to the anticompetitive exercise of "substantial market power in providing network access" by firms "that control bottleneck facilities").

[12] *See Report to Congress*, 13 FCC Rcd at 11529, ¶ 58 ("An offering that constitutes a single service from the end user's standpoint is not subject to common carrier regulation simply by virtue of the fact that it involves telecommunications components.") (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, 420-28 (1980), at ¶¶ 97-114).

[13] *See Report to Congress*, 13 FCC Rcd at 11529-30, ¶¶ 57-60.

[14] *See USAC Letter*, at 5 (emphasis added).

carrier must contribute to USF based upon the transmission component of a wireline broadband Internet access service should therefore be reversed.

II. USAC'S DETERMINATION WOULD CAUSE HARM TO THE BROADBAND INTERNET ACCESS MARKET AND UNDERMINE THE OBJECTIVES OF THE NATIONAL BROADBAND PLAN.

Beyond the substantial legal shortcomings discussed above, USAC's determination constitutes bad policy. Of perhaps greatest concern are the dramatic ripple effects that USAC's decision would create throughout the broadband Internet access marketplace. USAC's view would result in the regulatory-driven selection of "winners and losers" among broadband Internet access service providers based solely upon the type of underlying *facilities* used to provide those services -- facilities that are largely invisible and irrelevant to the customer. If sustained, this determination would subject every broadband provider who uses a special access T-1 (whether self-provided or as a wholesale input), and potentially any multitude of other transmission mechanisms such as ATM, Frame Relay and Ethernet, in delivering a finished broadband service to a substantially greater cost-of-service than those competitors who deliver the same or a functionally equivalent broadband Internet access services via other facilities. Specifically, based upon the current universal service contribution rate, a provider offering broadband Internet access service over a T-1 would face the need either to: (1) "eat" the costs of a 14.1% universal service contribution (thereby reducing or eliminating margins); or (2) pass through such contribution costs to the customer (thereby increasing the total amount the customer must pay for the service and making the service less competitive on price than similar services using different transmission mechanisms). In either case, a competitor who offers the same speed/level of broadband Internet access service through other means (such as via DSL, fiber, or fixed wireless)

would realize material competitive advantages in the form of greater margins and/or lower effective prices for the customer.[15]

Companies like New Edge and TelePacific face stiff competition for each customer, with incumbents controlling a substantial amount of the broadband Internet access market and possessing the capability to reach nearly every customer.[16] Foisting a "tax" of up to 14.1% on only one type of provider of broadband Internet access service, based *solely* upon the underlying facility input used to provide that service and not the type of service delivered, can hardly be considered technologically or competitively neutral as required by law.[17] Moreover, subjecting only certain broadband Internet access services to contribution -- based again only upon the underlying technology used to deliver them -- undermines the development of a comprehensive National Broadband Plan focused on the ubiquity and affordability of broadband services.[18] Indeed, in seeking comment to support the National Broadband Plan, the Commission has

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[15] It is useful here to hearken back to the Commission's discussion in the *Wireline Broadband Order* with respect to what end users expect to *pay for* in receiving Internet access services (see footnote 5, *supra*, and accompanying text). Certainly a customer looking to obtain a certain speed (*e.g.*, 1.544 mbps) of Internet access would not expect to pay a tax to only one of the providers offering such a service, based solely upon an underlying network facility deployment that is invisible and irrelevant to the customer.

[16] *See* Request for Review at 17-18. This is not to say that the entire broadband Internet access market is competitive; the discussion here only notes that providers such as New Edge and TelePacific almost always face an incumbent provider (as well as other competitors in many cases) in seeking to win any given customer's business.

[17] 47 C.F.R. § 54.701(a).

[18] *See A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342, 4399 (2009) (Statement of Commissioner McDowell) ("First, it is critical that our plan be competitively and technologically neutral. . . . [O]ur plan must not favor one particular technology or type of provider over another, even inadvertently. . . . Thus, as we proceed, we must be mindful of the law of unintended consequences before making any new rules.") Certainly, an outcome that results in a 14.1% tax on services provided via one type of network technology but not over others can hardly be called competitively or technologically neutral. Indeed, "discriminatory" would be a better term for such a policy -- particularly when another copper-based technology (DSL) would not be subject to the same tax.

recognized the value of copper (such as would be used for a special access T-1) as a transmission technology to deliver ubiquitous broadband Internet access services to end users.[19] Further, the Commission has noted that affordability is a primary barrier to adoption of broadband.[20] Yet USAC's determination would impose additional costs on the delivery of broadband services by providers using certain copper transmission technologies. The Commission should reject USAC's determination in light of the negative consequences it would inject into the commercial broadband marketplace, the effect it would have on the availability and affordability of broadband Internet access services for consumers, and the potential impact of such a policy on the development of a broader and better-thought National Broadband Plan.[21]

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[19] *Comment Sought on Impact of Middle Mile and Second Mile Access on Broadband Availability and Deployment*, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice NBP #11 (rel. Nov. 4, 2009).

[20] *Comment Sought on Broadband Adoption*, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice NBP #16 (rel. Nov. 10, 2009).

[21] If the Commission decides contrary to the foregoing to uphold USAC's determination and subject the transmission component of a wireline broadband Internet access service to USF contribution if that transmission component is a T-1 loop or transport facility, the Commission should apply this policy only on a going-forward basis. As discussed above, the regulatory focus for decades has been upon the customer's perspective and the "inextricably" intertwined or "contaminated" nature of a service; it was not foreseeable that providers would be required to: (1) segregate the transmission component; (2) somehow identify the revenues derived from that component; and (3) report and contribute to USF based upon such revenue estimates. Applying liability retroactively based upon such a new interpretation -- and without further guidance as to how such revenues for the transmission component should be identified -- would be both inequitable and unlawful. *See, e.g.*, *Retail, Wholesale & Dep't Store Union*, 466 F.2d 380, 390 (DC Cir. 1980); *see also Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731 (2008), at ¶ 24 (finding that prospective application of a decision requiring USF contribution was appropriate "because of the lack of clarity" in prior decisions and industry practice).

III. CONCLUSION

For the foregoing reasons, the Commission should reverse USAC's determination with respect to the assessment of USF contributions where a T-1 loop or transport facility is used as the network transmission layer for a wireline broadband Internet access service.

Respectfully submitted,

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