

VIA ECFS

February 16, 2010

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

**Re: WC Docket No. 06-122
U.S. TelePacific Corp. d/b/a TelePacific Communications Emergency
Petition for Stay Pending Commission Review; Request for Review and
Reversal of USAC Decision Letter**

Dear Ms. Dortch:

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific” or “Company”), pursuant to Section 1.1206(b) of the Commission’s Rules, 47 CFR §§1.1206(b), submits this response to the Reply Comments of AT&T Inc. (“AT&T”) filed February 3, 2010.¹

The Record Is Complete and the Commission Should Rule on TelePacific’s Request for Review before March 31, 2010

AT&T clarified that it does not oppose TelePacific’s Petition, but argues that Staff should seek additional information from TelePacific.² TelePacific previously provided additional factual information at staff’s request³ and disagrees that any further information is necessary to decide the question presented in its Request for Review.

¹ TelePacific has filed a Motion to Strike AT&T’s Reply Comments on the grounds that they improperly respond not to matters raised in Initial Comments, but rather to the Petition itself. The submission of this *ex parte* letter is made without prejudice to that Motion, and is intended to be considered only if the Commission denies TelePacific’s Motion to Strike and considers AT&T’s Reply Comments.

² Opposition to Motion to Strike Reply Comments of AT&T Inc., 1, 4 (filed Feb. 12, 2010) (“AT&T Opposition to Motion”).

³ Staff requested additional factual information on the secondary question raised by the Request for Review and TelePacific submitted responses in an *ex parte* letter dated January 20. Because the January 20 *ex parte* letter contained confidential and competitively sensitive business information, it was submitted as a confidential filing and is listed as confidential in the Commission’s ECFS docket history.

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Although AT&T alleges it cannot oppose or support TelePacific's appeal absent additional factual information, AT&T applied its view of the law to alternative fact patterns in its Reply Comments. As such, the FCC has the information it needs to rule on TelePacific's Request for Review. TelePacific urges the FCC to grant its appeal expeditiously, but no later than March 31, 2010.⁴

AT&T's Reading of the Wireline Broadband Order Is Wrong

The fundamental proposition that AT&T advocates is that the Commission should distinguish between local exchange carriers ("LECs") providing wireline broadband Internet access service, such as AT&T, that own all of the underlying facilities and those, like TelePacific, that provide an identical service, but lease the loop (which connects the end user to the LEC's network) from another provider on a common carriage basis. AT&T advocates that the former make no USF contribution, while the latter must contribute to USF either directly (if it has submitted a reseller exemption certificate) or indirectly (if the seller offers the loop on a common carrier basis).⁵ While it is understandable that AT&T would like to gain a regulatorily-imposed cost advantage over competitors such as TelePacific that offer precisely the same service to end users,⁶ but do not own their own loop facilities, the Commission rejected this approach in the *Wireline Broadband Internet Access Order*. In ¶ 16, the Commission stated that:

There is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities. From the end user's perspective, an information service is being offered regardless of whether a wireline broadband Internet access service provider self-provides the transmission component or provides the service over transmission facilities that it does not own. As the Commission indicated in its *Report to Congress*, what matters is the finished product made available through a service rather than the facilities used to provide it. The end user of wireline broadband Internet access service receives an integrated package of transmission and information processing

⁴ As required by the *USAC Decision Letter*, TelePacific made a compliance filing with USAC on February 12, 2010. Absent Commission action by March 31, 2010, TelePacific expects USAC will issue invoices for additional USF contributions in the second quarter 2010 to implement the findings in the *USAC Decision Letter*.

⁵ Because AT&T has applied the law to both fact patterns, it does not need additional information in order to comment on TelePacific's Request for Review.

⁶ AT&T implies there is no regulatory disadvantage because it must treat affiliated and unaffiliated ISPs equally. AT&T Opposition to Motion, at 3. AT&T ignores the fact that an ILEC may provide broadband Internet access directly, not through an affiliate, and obtain a significant competitive advantage under its reading of the *Wireline Broadband Order*.

capabilities from the provider, and the identity of the owner of the transmission facilities does not affect the nature of the service to the end user. Thus, in addition to affirming our tentative conclusion above “that wireline broadband Internet access service provided over a provider’s own facilities is an information service,” we also make clear that wireline broadband Internet access service is an information service when the provider of the retail service does not provide the service over its own transmission facilities.⁷

The language from ¶ 16 quoted above is dispositive. It directly contradicts AT&T’s claim that because TelePacific leases, rather than owns, a portion of the underlying transmission facilities (*i.e.*, the loop), TelePacific should be treated differently from an owner of transmission facilities such as AT&T. Without discussing ¶ 16 or attempting to explain why it does not dispose of AT&T’s contention, AT&T purports to find a different rule in ¶ 103 of the *Wireline Broadband Order*. AT&T’s reliance on ¶ 103 is misplaced because the Commission states that ¶ 103 addresses “the provision of transmission as a wholesale input to ISPs.” While the Commission concludes in that paragraph that a facilities-based provider may choose to offer broadband transmission as a telecommunications service “to an ISP,” that conclusion is irrelevant to the ILEC’s provision of broadband transmission to TelePacific, a competitive LEC that owns at least a portion of its own transmission facilities and offers both telecommunications and information services over such facilities.

Apart from the fact that the language cited by AT&T does not support AT&T’s conclusion, there are numerous legal and policy reasons for treating facilities-based and non facilities-based providers of broadband Internet access service identically, as TelePacific demonstrated in its Request for Review, Petition for Stay, and February 1, 2010 *ex parte* letter in this Docket.

- Commission regulation should create a level playing field for facilities-based and non-facilities based providers of broadband Internet access services;⁸
- Imposing USF obligations (direct or indirect) on non-facilities-based providers⁹ but not facilities-based providers would undermine the level playing field and the

⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 16 (2005) (“*Wireline Broadband Order*”).

⁸ Petition for Stay at 6-7, 15; TelePacific’s February 1, 2010 *ex parte* letter, at 2.

⁹ For these purposes, based on USAC’s ruling, “non-facilities based providers” includes carriers that have comprehensive networks of switches and fiber but rely on ILECs for last mile access services.

principles of competitive neutrality and nondiscrimination set forth in the *First Report and Order* and 47 U.S.C. § 254;¹⁰

- TelePacific complies with the Form 499-A test for treatment as an “other contributor”;¹¹
- Good tax policy requires that when the end user is exempted from a tax, the exemption should not be undermined by taxing an upstream provider;¹²
- Good tax policy reasons against discrimination between otherwise similar providers based on the technology used to provide the same end product.¹³

Where There Has Been Uncertainty About Applying USF Contributions to Specific Services, the FCC Has Applied USF Obligations Prospectively

As shown above, ¶ 103 addresses the sale of wholesale inputs to ISPs, not the use of wholesale transmission inputs by competitive LECs such as TelePacific that own at least a portion of the transmission facilities used to deliver broadband Internet access to end users.¹⁴ As TelePacific showed in its February 1, 2010 *ex parte*, it satisfies the Form 499-A standard for certifying a reseller exemption with respect to the services it purchases from ILECs.¹⁵ Contrary to AT&T’s position, the *Wireline Broadband Order* does not address the issue of whether USF is owed by either party (the ILEC or competitive LEC) when a competitive LEC offering broadband Internet access service to an end user purchases common carrier transmission facilities from an ILEC.

Because the portion of the *Wireline Broadband Order* on which AT&T relies discusses only the sale of wholesale transmission to ISPs, and not transactions between ILECs and CLECs, to the extent that the Commission wishes to adopt the position taken by AT&T, it must do so only on a prospective basis. In prior appeals of USAC decisions that raised novel issues, the rulings have been prospective only. In the audio bridging case, for example, the Commission noted that where it was unclear to the industry how to

¹⁰ Request for Review at 17-18; Petition for Stay at 7, 10-12, 14-15; TelePacific’s February 1, 2010 *ex parte* letter at 3-5.

¹¹ TelePacific’s February 1, 2010 *ex parte* letter at 6-7.

¹² *Id.* at 7-8.

¹³ *Id.* at 8.

¹⁴ Zahn Decl., ¶ 5.

¹⁵ TelePacific’s February 1, 2010 *ex parte* letter at 6-7.

treat a particular service offering under existing regulations, prospective application of USF obligations was appropriate.¹⁶ Comparing AT&T's comments with those of other commenting parties shows that there are disagreements in the industry concerning whether TelePacific owes USF contributions under the *Wireline Broadband Order*. Further, to the extent that parties addressed the issue, all but AT&T supported prospective application.¹⁷ Thus under *InterCall*, AT&T's suggested change to the law, if adopted by the Commission, should be applied prospectively only.

TelePacific's Appeal Challenges the Wireline Broadband Order as Applied to TelePacific and Is Not an Untimely Petition for Reconsideration

As shown above, AT&T's interpretation of the *Wireline Broadband Order* is wrong. Assuming, *arguendo*, that AT&T is right, however, TelePacific may still challenge application of the *Wireline Broadband Order* in this context. When an agency attempts to enforce an order against a party, the agency cannot escape a substantive challenge merely because the time for review of the initial order has passed.¹⁸ The Telecommunications Access Policy Division recognized a party's right to challenge application of a rule in the context of a USAC appeal, stating that "even where the period for challenging a general rule has passed, parties may still challenge a specific application of the rule on the grounds that the rule is substantively invalid."¹⁹ As the U.S. Court of Appeals for the District of Columbia Circuit explained, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity."²⁰ Applying the *Wireline Broadband Order* as AT&T suggests would violate the principle of competitive neutrality and Section 254.

¹⁶ *Request for Review by InterCall, Inc., of Decision of the Universal Service Administrator*, CC Docket 96-45, Order, FCC 08-160, ¶¶ 12-24 (2008).

¹⁷ Coalition for Fairness and Restraint in USAC Fund Administration Comments at 3; New Edge Network Comments at 8, n.21.

¹⁸ See, e.g., *Functional Music, Inc. v. Federal Communications Commission*, 274 F.2d 543, 546 (D.C. Cir. 1958) (providing that review of a final agency order can be obtained after the initial limitations period in cases where the agency takes further action to apply the rule).

¹⁹ *Petition for Reconsideration of the Request for Review of the Decision of the Universal Service Administrator by Prince George's County Schools, Upper Marlboro, Maryland; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order on Reconsideration, 17 FCC Rcd 8649, ¶ 5 (Telecommunications Access Policy Division, 2002) (citing *Functional Music*).

²⁰ *Functional Music*, 274 F.2d at 546.

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TelePacific is permitted to raise this substantive challenge to the *Wireline Broadband Order* now because USAC is attempting to enforce it against TelePacific.

Conclusion

AT&T does not have the authority to determine “what a broadband Internet access provider’s universal service contribution obligations are.”²¹ The Commission should resolve this industry dispute about whether the *Wireline Broadband Order* intended to tilt the playing field by subjecting competitive LECs providing broadband Internet access service to some form of USF contribution (direct or indirect) where such LECs own substantial network components but rely on ILECs for the vast majority of last mile facilities. TelePacific strongly believes that the *Order* is clear and TelePacific owes no USF contributions (direct or indirect) on its broadband Internet access service. If the Commission disagrees and finds internal contradictions in the *Order*, given the uncertainty in the industry and consistent with *Intercall*, it should apply its determination prospectively. While TelePacific supports making the Fund sufficient, that principle should not trump the principles of competitive neutrality and nondiscriminatory contributions. If contributions on broadband Internet access are necessary to ensure the sufficiency of the Fund, the Commission should change the rules, prospectively, so that all providers (wireline, cable, wireless, etc.), whether or not they own loop facilities, contribute on an equitable and nondiscriminatory basis.

Sincerely,

/s/

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²¹ AT&T Reply Comments at 2.