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February 19, 2010

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Ex Parte Notice** – Request by U.S. TelePacific Corp. d/b/a TelePacific Communications for Review and Reversal of Universal Service Administrator Decision, WC 06-122

Dear Ms. Dortch:

The undersigned counsel to the Coalition for Fairness and Restraint in USAC Fund Administration (the "Coalition") spoke by telephone yesterday with Vickie Robinson and today with Nicholas Degani, both of the Federal Communications Commission's Wireline Competition Bureau. The remarks made during the conversations were consistent with statements in the Coalition's January 29, 2010 comments and the attached *ex parte* letter filed today in the above-referenced proceeding.

Please contact the undersigned at (202) 342-8544 if you have any questions regarding this filing.

Respectfully submitted,

John J. Heitmann

John J. Heitmann

Attachment

cc: Nicholas Degani, Wireline Competition Bureau
Vickie Robinson, Wireline Competition Bureau

Attachment

Coalition for Fairness and Restraint in USAC Fund Administration,
Ex Parte Letter (Feb. 19, 2010)

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February 19, 2010

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 06-122
Request by U.S. TelePacific Corp. d/b/a TelePacific Communications
for Review and Reversal of Universal Service Administrator Decision

Dear Ms. Dortch:

On behalf of the Coalition for Fairness and Restraint in USAC Fund Administration ("Coalition"), and in accordance with the Federal Communications Commission's ("FCC" or "Commission") rules, this written *ex parte* letter is being filed electronically for inclusion in the public record of the above-referenced matter.

The procedural posture of this matter started out strange and it recently has taken unexpected turns. As we noted in our initial comments filed on January 29, 2010, it is odd that we are in the midst of a raging debate over Universal Service Administrative Company's ("USAC") interpretation and enforcement of Commission regulations, when the Commission itself has plainly stated that USAC has no authority to engage in either activity.[1] This is not the proper way to raise issues regarding universal service contribution obligations, especially those that potentially impact an entire segment of the industry and critical broadband services provided predominantly to small-to-medium sized businesses in particular.[2]

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1 Comments of the Coalition for Fairness and Restraint in USAC Fund Administration on Issues Raised In or By the TelePacific Request, at 2-6 (filed Jan. 29, 2010) ("Coalition Comments").

2 Coalition Comments at 9.

Nevertheless, recent record filings by both TelePacific and AT&T signal a shift in the issues "raised" or that which might potentially be addressed in a ruling by the Wireline Competition Bureau or perhaps even the Commission.[3] Because these issues are of great importance and concern to the Coalition and its members, we must provide you with additional information in response to these developments.

In its "Reply Comments", AT&T suggests that TelePacific is obligated to contribute on wholesale inputs acquired on a common carrier basis because TelePacific is a "non-facilities based" provider of wireline broadband Internet access.[4] TelePacific, for its part, warns that the decision it asks the Bureau to make will have industry-wide ramifications, at least with respect to competitive local exchange carriers ("CLECs").[5] If that is to be the case, then the decision should not be based on what AT&T says or what TelePacific says, but rather upon what the *Wireline Broadband Order* and other relevant Commission precedents say.

These precedents say that CLECs using wholesale inputs such as special access and UNEs in conjunction with facilities they own to provide wireline broadband Internet access *are facilities-based* providers of wireline broadband Internet access. The Commission has long classified CLECs as facilities-based providers, even when CLECs combine transmission facilities leased or transmission services purchased from other providers with transmission and switching facilities they own and use to provide services such as wireline broadband Internet access service. For example, it its initial post 1996 Act universal service order, the Commission concluded that carriers using UNEs are "facilities-based".[6]

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3 *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Andrew D. Lipman, Bingham McCutcheon LLP, Counsel to U.S. TelePacific Corp. (Feb. 16, 2010); Opposition to Motion to Strike Reply Comments of AT&T Inc. (filed Feb. 12, 2010); Motion to Strike Reply Comments of AT&T Inc. (filed Feb. 5, 2010); Reply Comments of AT&T Inc. (filed Feb. 3, 2010) ("AT&T Reply Comments"); Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Tamar E. Finn, Bingham McCutcheon LLP, Counsel to U.S. TelePacific Corp. (Feb. 1, 2010); Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Andrew D. Lipman, Bingham McCutcheon LLP, Counsel to U.S. TelePacific Corp. (Feb. 1, 2010).

4 AT&T Reply Comments at 4-5.

5 TelePacific Feb. 16, 2010 Letter at 3-4.

6 *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶¶ 154-168 (1997) ("*First Universal Service Order*").

More recently, the Commission explained that the use of the term "facilities-based" means a carrier has "some form of possessory interest in at least some of the equipment (such as a switch) used to complete calls."[7] CLECs have such a possessory interest not only in leased facilities, but also in the facilities they own and use to complete wireline broadband Internet access "calls". Thus, CLECs clearly are facilities-based providers of wireline broadband Internet access.

Though the *Wireline Broadband Order* does not expressly define the term "facilities-based", the use of the term in that order makes clear that the Commission did not intend to narrow the meaning of the term established in prior decisions. For example, in paragraph 3, the Commission recognizes the presence of "intramodal" wireline broadband Internet access competitors and cites to its own Form 477, in which it requires "facilities-based providers of high-speed telecommunications capability" to provide information about their operations.[8] CLECs are treated as "facilities-based" providers for Form 477 purposes and have been classified as such by the Commission in reports derived from Form 477 data.[9] In describing the wireline broadband Internet access service marketplace, the Commission includes UNE-based CLEC DSL offerings in its description of facilities-based providers' wireline broadband Internet access offerings, and provides statistics on facilities-based wireline broadband Internet access lines which include CLEC lines provisioned using UNE and special access inputs.[10] Thus, it is clear that, for purposes of the *Wireline Broadband Order*, CLECs using UNEs and special access inputs are facilities-based providers of wireline broadband Internet access.

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7 *In re: APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp., v. Network IP, LLC, and Network Enhanced Telecom, LLP*, 20 FCC Rcd 2073, ¶ 15, n.35 (Enforcement Bureau 2005).

8 *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 3, n.7 (2005) ("*Wireline Broadband Order*").

9 The 2005 Report cited in the *Wireline Broadband Order* states that "an entity is a facilities-based provider of high-speed service if it provides the service over its own 'local loop' facilities connecting to end users or over unbundled network elements (UNEs), special access lines, and other leased lines...."). *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2004*, at n.4 (July 2005) ("*High Speed Services July 2005 Report*").

10 *Wireline Broadband Order*, ¶ 51 (*citing High Speed Services July 2005 Report* at Table 3 (including CLEC lines)).

By contrast, "non-facilities based" providers are defined as ISPs (*e.g.*, AOL and EarthLink, at least as these entities conducted business at the time the *Wireline Broadband Order* was adopted) and not CLECs. ISPs have long been treated as end users; CLECs providing wireline broadband Internet access are not end users but instead provide service to end users. Thus, when the Commission concluded in the *Wireline Broadband Order* that *facilities-based* providers of wireline broadband Internet access do not have to contribute to the universal service fund, CLECs were included and were not carved out for disparate and discriminatory treatment.

With regard to the so-called "second question" – whether CLECs must contribute on the *special access* inputs they purchase from AT&T and other providers, the answer clearly is "no".[11] CLECs purchase such facilities under valid reseller certificates.[12] Those certificates do not result in a minimum – or a maximum – contribution guarantee but rather guarantee that the CLEC is a contributor to the FUSF and that the CLEC contributes as required by Commission regulations.[13] In some cases, the contribution is based on retail revenues much higher than the value of the special access input; in others, it may be the same value; in some, it may be less; and in the case of wireline broadband Internet access, it is none at all.

It is important to understand that FCC rules and the guidance provided by the Form 499A instructions require reseller certifications to be made on an entity-by-entity basis, and not on an individual service order basis.[14] For example, in determining that FUSF obligations would not apply to "carrier's carrier" revenues, the Commission required wholesale carriers to establish "documented procedures to ensure that it reports as reseller revenues only revenues *from those entities* that reasonably would be expected to contribute to support universal service."[15] Similarly, the Wireline Competition Bureau recently explained that its rules regarding the classification of reseller revenues by wholesale carriers "ensure[] that wholesale

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11 CLECs do not contribute directly or indirectly on UNEs used in a similar manner. UNEs are leased facilities and are not telecommunications services. *See First Universal Service Order* at 8865, ¶ 157.

12 *See* TelePacific Feb. 1, 2010 Letter (Lipman) at 3-4.

13 *See, e.g.*, Telecommunications Reporting Worksheet, FCC Form 499-A 2009, Instructions at 19.

14 Reseller certifications are not used for UNEs.

15 *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 12 FCC Rcd 18400, 18508 (1997) (Second Order on Reconsideration) (emphasis added); *see* Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc., 24 FCC Rcd 10824, ¶ 5 (WCB Aug. 17, 2009) ("*Global Crossing Order*").

carriers perform an appropriate level of due diligence *in determining whether their customers are resellers* that will, or likely will, contribute directly to the universal service fund."[16]

Nothing in the FCC's universal service orders or rules suggest that this determination is to be made on an individual service-by-service basis. To the contrary, it would be virtually impossible for wholesale carriers to classify their revenues for USF purposes based on the end user services that their CLEC customers may choose to provide. It would be unreasonably burdensome to expect wholesale carriers to collect reseller certificates and establish customer accounts based on the classification of each and every end user service that a CLEC provides at any given time.[17] Moreover, CLECs often purchase facilities that are used as inputs for simultaneously providing multiple services to customers (*e.g.*, voice and wireline broadband Internet access) – some assessable and some not. These services also will change over time. It would be unreasonably burdensome for a CLEC to have to comply with a service order-by-service order or even partial service certification system. In short, the classification of revenues by a wholesale provider depends upon the reseller's status as a CLEC, not on the particular end user service that the reseller provides.

Accordingly, if no contribution is required on a retail service, it does not follow that a CLEC must then contribute directly or indirectly on a special access input purchased under a reseller certificate. This is precisely the result provided for by the *Wireline Broadband Order*. That order makes plain that facilities-based providers of wireline broadband Internet access do not contribute on that product when they offer it on an integrated basis, as an information service with no separate telecommunications service component. There is no requirement in the *Wireline Broadband Order* or elsewhere for a CLEC to contribute directly or indirectly on a special access service it combines with other facilities to provide such a service. As such, the CLEC's submission of the reseller certificate and the ILEC's reliance on it are valid.

AT&T's contrary assertions are unsupported and its reliance on paragraph 103 of the *Wireline Broadband Order* is misplaced.[18] That paragraph addresses the provision of wholesale wireline broadband Internet access transmission service inputs to ISPs. It does not

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16 *Global Crossing Order*, ¶ 12 (emphasis added).

17 In addition, Form 499 instructions permit wholesale carriers to verify a reseller's classification as a contributor by using the FCC's USF filer database. *See, e.g.*, 2009 FCC Form 499A instructions at 19. The database lists the contributor's status as a whole; it is not possible to determine from this database whether a reseller contributes on a particular service or not.

18 *See* AT&T Reply Comments at 2-3 (citing *Wireline Broadband Order*, ¶ 103).

address the use of special access (or leased facilities) by facilities-based CLECs.[19] The use of transmission as part and parcel of a facilities-based provider's offering of wireline broadband Internet access is addressed in paragraph 104 of the *Wireline Broadband Order*.

Paragraph 104 makes clear that, to the extent that a facilities-based provider (a) uses its own transmission facilities (including "owned" facilities, as well as those leased and purchased on a carrier-to-carrier basis to fill-out its "own network" used to provide wireline broadband Internet access services),[20] and (b) offers wireline broadband Internet service on an integrated basis (in other words, it does not choose to offer the transmission component on a stand-alone basis as a telecommunications service), the transmission component is part of an integrated information service and is not a telecommunications service. As such, it is not subject to any universal service contribution, whether on a direct or indirect basis.

While the foregoing seems eminently clear to us, we are cognizant that ample confusion has arisen over the contribution obligations raised by USAC's actions and decision with respect to TelePacific. Even the Bell companies seem to disagree with respect to the contribution obligations.[21] And while the Coalition agrees with the result for which TelePacific advocates, we do so at least to some extent for different reasons (largely, as explained herein).

All this, of course, shows that to the extent CLECs such as TelePacific are somehow to be singled-out for disparate and discriminatory treatment, the decision to do that (leaving aside, for the moment, the lawfulness of such a decision on the merits) could have prospective effect only. Nothing in the *Wireline Broadband Order* requires CLECs to treat themselves as end users when they use special access as an input to their own facilities-based wireline broadband Internet access service offerings. Even if such a requirement could be read into existing regulations, precedent regarding prior appeals of USAC decisions requires that such a ruling be prospective in application.[22]

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19 We agree with TelePacific's assertion that "¶ 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." TelePacific Feb. 16, 2010 Letter, at 4.

20 For universal service purposes, the Commission previously has included wholesale inputs used by CLECs as being part of a facilities-based CLEC's "own facilities". *See First Universal Service Order*, ¶¶ 154-168.

21 *See, e.g.*, Reply Comments of Qwest Communications International Inc. at 2 (filed Feb. 3, 2010) (stating that "TelePacific might not have an obligation to contribute into the USF on the T-1 transmission if USAC had determined that the service it was providing to end-user customers was wireline broadband Internet access service.") ("Qwest Reply Comments"); *but see* AT&T Reply Comments at 3-5.

22 *See* Coalition Comments at 3-4.

As TelePacific has explained, in its *Intercall* decision, the Commission determined that where it is unclear to the industry how to treat a service under existing regulations, prospective application of the USF obligations is appropriate.[23] In this case, the comments of the Coalition, NewEdge, COMPTEL/CALTEL and an RBOC (Qwest) indicate widespread agreement in the industry that TelePacific's treatment of its wireline broadband Internet service (including its special access inputs) is consistent with the *Wireline Broadband Order*.[24] There is similar consensus that any contrary decision endorsed by the Commission should apply only on a prospective basis – if at all.[25]

Any result that leaves a CLEC contributing on special access inputs used in its offering of facilities-based wireline Internet access would create a disfavored class of competitors contrary to the statutory mandate to which the Commission must adhere.[26] Even AT&T does not advocate such a result (at least not on a prospective basis).[27]

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23 *See Request For Review by InterCall, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd 10731, ¶ 24 (June 30, 2008).

24 *See, e.g.*, Coalition Comments at 7-8, 10; Comments of New Edge Network, Inc. at 1-5 (filed Jan. 29, 2010) ("NewEdge Comments"); COMPTEL Comments in Support of U.S. TelePacific Corp. d/b/a TelePacific Communications' Request for Review and Reversal of Universal Service Administrator Decision at 4-7 ("COMPTEL/CALTEL Comments"); Qwest Reply Comments at 2-4.

25 Coalition Comments at 3-4; New Edge Comments at n.21; TelePacific Feb. 16, 2010 Letter at 6; TelePacific Feb. 1, 2010 Letter (Finn) at 2; TelePacific Feb. 1, 2010 Letter (Lipman) at 9; U.S. TelePacific Corp. d/b/a TelePacific Communications Request for Review and Reversal of Universal Service Administrator Decision at 19-20 (filed Jan. 8, 2010) ("TelePacific Request for Review"); *see also* COMPTEL/CALTEL Comments at 12.

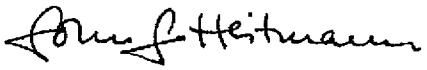
26 *See, e.g.*, Coalition Comments at 9-12; New Edge Comments at 6-8; COMPTEL/CALTEL Comments at 10-12; TelePacific Feb. 16, 2010 Letter at 3-4; TelePacific Feb. 1, 2010 Letter (Finn) at 1-2; TelePacific Feb. 1, 2010 Letter (Lipman) at 4-5, 9; TelePacific Request for Review at 16-19.

27 *See* AT&T Reply Comments at 5. Evidently, AT&T stands ready to collect from TelePacific contributions on past special access revenues that AT&T presumably did not report as being assessable. However, it may not be clear as to whether AT&T or TelePacific would be responsible for any past under-reporting or under-contributing with respect to AT&T's special access revenues. The prospect of this wrangle (and we take no position here as to the proper resolution of this issue), is yet another reason why any decision finding a contribution obligation should not have any retroactive impact.

Based on the forgoing discussion, as well as the reasons set forth in our initial comments, the Coalition urges the Commission to act promptly by reversing USAC's TelePacific decision. In so doing, the Commission should make clear that USAC has no powers other than those the Commission has given to it. The Commission also should make clear that facilities-based CLECs, who have long been leaders in providing facilities-based wireline broadband Internet access services to Americans, are not subject to direct or indirect universal service fund contributions but instead operate on a level playing field with and are subject to the same rules as are all other facilities-based providers of wireline broadband Internet access services.

If you, the Commission or any members of its staff have any questions regarding this submission, please do not hesitate to contact us.

Respectfully submitted,



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Proceeding

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06-122	In the Matter of Universal Service Contribution Methodology Federal-State Joint Board on Universal Service 1998 Biennial Regulatory Review. .. ..

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