

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Request for Review of a Decision of the)
Universal Service Administrator and)
Emergency Petition for Stay by U.S.)
TelePacific d/b/a TelePacific) CC Docket No. 06-122
Communications)
)
)
To: Wireline Competition Bureau)

**PETITION FOR CLARIFICATION OR IN THE ALTERNATIVE
FOR PARTIAL RECONSIDERATION**

The undersigned parties request that the Bureau clarify or partially reconsider its *TelePacific Order*¹ and confirm that under the Commission’s existing orders and rules TelePacific’s underlying wholesale carriers cannot be forced to restate prior year revenues and make additional contributions to the Universal Service Fund (USF). The USF contribution rules are clear on this point and cannot be changed in this proceeding. The Bureau should confirm that it did not intend otherwise in discussing the universal service contributions of TelePacific’s wholesale carriers in the *TelePacific Order*.

The *TelePacific Order* directs TelePacific to “provide USAC with the names and contact information of its wholesale providers of transmission services. . .so that USAC can assure that all contributions to universal service are promptly paid.” *Id.*, ¶16. A footnote at the end of the order further provides that:

All filing contributors are required to submit a revised FCC Form 499-A if they discover an error in the revenue data that they report. . . . To the extent that TelePacific certified to a provider that TelePacific was contributing directly on

¹ *Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications*, Order, WC Docket No. 06-122, DA 10-752 (April 30, 2010) (“*TelePacific Order*”).

certain revenues, that certification may have impacted the amount of revenues that TelePacific's wholesale provider reported. Accordingly, TelePacific's wholesale providers may be required to revise reported revenue data as appropriate. The provider may also rely on the terms of any agreements with TelePacific to assess TelePacific any pass-through charges that TelePacific avoided due to its reseller certifications.

TelePacific Order ¶16, n.41 (citations omitted).

This discussion suggests that the Bureau intends to direct the Universal Service Administrative Company (USAC) to require that TelePacific's wholesale carriers revise their prior year Form 499s and reclassify as end-user revenues certain "carrier's carrier" revenues reported as such based on TelePacific's reseller certifications. If that is really what is intended, then this approach violates the Commission's orders and rules, which require USF contributions on end-user telecommunications revenues and not on revenues associated with wholesale purchases by resellers. *See* 47 C.F.R. § 54.706(b) (a carrier "shall contribute on the basis of its projected collected interstate and international *end-user telecommunications revenues*. . .") (emphasis added); *see also Federal-State Joint Board on Universal Service*, Order, 12 FCC Rcd 8776, ¶¶ 842-50 (1997) (stressing repeatedly that the basis for universal service contributions is "end-user" revenue or "retail revenues," and not revenue associated with wholesale purchases by reseller customers) (further history omitted) ("*Universal Service First Report and Order*").

The Bureau cannot change these clear contribution requirements in this proceeding and now make TelePacific's wholesale carriers liable for additional contributions on revenues associated with TelePacific transactions. This approach would impermissibly "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *see also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) ("a retroactive rule forbidden by the [Administrative Procedure Act ("APA")] is one which 'alters

the *past* legal consequences of past actions’ ”) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)); *and id.* (citing *Bergerco Canada v. U.S. Treasury Department*, 129 F.3d 189, 192-93 (D.C. Cir. 1997) (treating Justice Scalia’s concurring opinion as “substantially authoritative”)). To change its existing contribution rules the Commission would have to start a new proceeding and comply with the notice and comment provisions of the APA. *USTelecom v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (addressing a change to a preexisting legislative rule that “can be valid only if it satisfies the notice-and-comment requirements of the APA”).

Moreover, the underlying TelePacific wholesale providers have no legal obligation to police TelePacific’s reseller status – especially in situations where TelePacific in fact submitted to these carriers a reseller certification as provided for in the FCC Form 499 Worksheet Instructions.² The Form 499 Worksheet Instructions direct wholesale providers to obtain contribution certifications from resellers and to verify that resellers providing such certifications are listed as current contributors to the fund on the Commission’s online database. Worksheet Instructions at 19. The Worksheet Instructions do not suggest that a wholesale carrier has the ability not to honor such a certification if the reseller is listed as a contributor to the fund.³

Indeed, failure to honor a reseller certification potentially would, with few exceptions, be inconsistent with the Commission’s decision that wholesale providers should exclude reseller revenues from their contribution base, and in some circumstances could even expose the

² See Telecommunications Reporting Worksheet, FCC Form 499-A (revised 2010), Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, http://www.universalservice.org/_res/documents/fund-administration/pdf/forms/form-499A-fy2010-instructions.pdf, at 19 (“Worksheet Instructions”).

³ When a wholesale provider sells a reseller an interstate telecommunications service and the reseller provides it with a reseller certification covering that service, the wholesale provider reasonably would assume that the reseller is using that facility in turn to provide an interstate telecommunications service, particularly since the reseller is certifying under penalty of perjury.

underlying carrier to damages if the reseller ends up contributing twice to the fund based on the same telecommunications service revenue (*i.e.*, both indirectly to the fund via a line-item charge from its wholesale provider and directly to the fund). This is exactly the problem the Commission sought to prevent when it concluded in its *Universal Service First Report and Order* that resellers have a direct obligation to contribute to the fund and that contributions should be based on end-user telecommunications revenues, not gross telecommunications revenues. *Universal Service First Report and Order*, ¶¶ 842-50.

While the reseller certification process itself creates concerns,⁴ if this process has any import at all it must mean that wholesale carriers that in fact obtain these certifications from resellers, and which necessarily honor the certifications, are entitled to rely on them. If not, then the process is meaningless. In addition, the Worksheet Instructions further provide that carriers “that *do not comply* with the [reseller certification] procedures will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users.” Worksheet Instructions at 19 (emphasis added). There is nothing to suggest that carriers that *do comply* with these directions can still nonetheless be made to restate their revenues and make additional contributions to the fund if it later turns out that a reseller, for whatever reason, should not have signed a contribution certification. In fact, the Worksheet admonition would be superfluous, and potentially misleading language if the carriers would be responsible whether or not they comply with the certification procedures. Instead of going after contributions from carriers that followed the procedures in good faith, USAC and the Commission should pursue required additional contributions, if any, directly from the reseller, which has certified under

⁴ See, *e.g.*, Comments of Verizon and Verizon Wireless, *Request for Review of Decision of Universal Service Administrator by Global Crossing Bandwith Inc.*, WC Docket No. 96-45, USAC Audit Report No. CR2005CP007 (Oct. 1, 2009).

penalty of perjury that it is reselling the wholesale provider's telecommunications service input as telecommunications or interconnected VoIP and is contributing directly to the fund. *Id.*

Finally, as a practical matter for many wholesale providers – especially large carriers – filing and refiling a Form 499 is extremely complex. These forms state millions and in some cases billions of dollars of assessable and non-assessable revenues, reflecting roll-ups from thousands of reseller and other customer accounts. Assembling and validating this data is time consuming and resource draining.⁵ Similarly, the process of reclassifying from “FUSF exempt” to “non-FUSF-exempt” hundreds (if not thousands) of circuits sold to a reseller over a multiple-year period can in many situations be labor intensive and costly, and wholesale providers are unlikely to have agreements in place obligating resellers to compensate the wholesale provider for the significant administrative costs that they may have caused due to this reclassification. And even in situations where prior year revenues can accurately be restated, it is not at all certain that a wholesale carrier would be able to recover additional contributions from its reseller customer(s) due to a variety of practical and contractual issues. It would, therefore, be especially improper to require wholesale carriers that obtained a contribution certification from a reseller customer to make additional contributions to the fund without any realistic prospect that the carrier could recover both those contributions and its associated administrative costs from its customer.

For these reasons, the Bureau should clarify that it does not intend to require TelePacific's wholesale carriers to refile prior year Form 499s and make additional contributions

⁵ In addition, the form must ultimately be attested to by a senior company officer. Worksheet Instructions at 33.

to the fund.⁶ In other words, further proceedings involving TelePacific's wholesale carriers, if any, should be limited to inquiring about what those carriers may have sold TelePacific and requesting copies of any reseller certifications that TelePacific and its affiliates provided. In the alternative, the Bureau should reconsider this aspect of the *TelePacific Order*.

Respectfully submitted,

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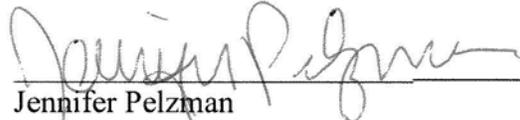
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June 1, 2010

⁶ The Bureau also could clarify that in other similar circumstances it does not intend to require wholesale carriers to refile prior year forms.

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of June 2010, I caused copies of the foregoing Petition for Clarification or in the Alternative Partial Reconsideration to be served upon each of the parties listed below by first-class mail, postage prepaid.


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