

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

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

**COMMENTS OF THE
COALITION FOR FAIRNESS AND RESTRAINT IN
USAC FUND ADMINISTRATION
ON PETITION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR
PARTIAL RECONSIDERATION**

John J. Heitmann
Denise N. Smith

Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8400

*Counsel for The Coalition for Fairness and
Restraint in USAC Fund Administration*

July 6, 2010

Summary

The Coalition for Fairness and Restraint in USAC Fund Administration (the “Coalition”) agrees with the ILEC Petitioners that the Bureau’s TelePacific Order is ambiguous regarding the obligations of ILECs and CLECs with respect to the use of special access T1 circuits as inputs to wireline broadband Internet access service.

The Coalition also agrees with the ILEC Petitioners’ assertion that wholesale providers are permitted to rely on carriers’ valid reseller certificates, after confirming the universal service fund contributor status of the carriers. Commission rules do not require that reseller certificates be prepared or collected on a service-by-service basis, but instead permit certificates to be prepared on an entity-by-entity basis. Moreover, 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 its own facilities to provide wireline broadband Internet access service. As such, a CLEC’s submission of a reseller certificate and an ILEC’s reliance on it in this context are valid.

However, the Coalition does not agree with the ILEC Petitioners’ suggestion that resellers, including facilities-based CLECs, should or could be required to make additional contributions to the USF on T1 special access circuits purchased from other providers and used to provision wireline broadband Internet access. This aspect of the Petition should be denied.

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 fund, CLECs using their own facilities in conjunction with special access T1 inputs were included as facilities-based providers, and were not carved out for disparate and discriminatory treatment as end users. Instead, facilities-based CLECs were ensured of operating on a level competitive playing field with ILECs and other wireline broadband Internet access service providers.

The Commission also must deny the ILEC Petitioners' request that the Commission seek additional fund contributions, if any, directly from resellers for T1 special access services purchased from other providers and used to provision wireline broadband Internet access service because this approach would require rule changes which could not possibly arise out of the ILECs' Petition.

In order to find additional contributions owing in this context, the Commission would have to reach a conclusion that CLECs are not facilities-based providers of wireline broadband Internet access service and are instead simply end users of special access services. Such a determination would represent a dramatic departure from Commission precedent.

Furthermore, granting of the ILEC Petitioners' ill-conceived proposal to collect directly from such a class of newly minted end users also would require a change in the Commission's USF assessment rules since the rules presently do not provide for the assessment and collection of funds directly from end users.

The Petition does not provide an adequate basis for such changes. To effectuate this result, the Commission would need to modify the *Wireline Broadband Order* and conduct a rulemaking. Such action could have only prospective effect.

For the foregoing reasons, the Commission should (a) affirm that wholesalers may rely on valid reseller certificates, and (b) deny the Petitioners' request for the Commission to upend existing precedent and to adopt new rules by seeking to reclassify facilities-based CLECs as end users and by seeking to collect additional fund contributions directly from such newly minted end users.

TABLE OF CONTENTS

	Page
1. WHOLESALE PROVIDERS ARE ENTITLED TO RELY ON VALID RESELLER CERTIFICATES	3
2. FACILITIES-BASED CLEC PROVIDERS OF WIRELINE BROADBAND INTERNET ACCESS ARE NOT END USERS	4
3. CLEC RESELLER CERTIFICATES ARE VALID.....	6
4. THE COMMISSION MUST DECLINE THE ILEC PETITIONERS' INVITATION TO CHANGE THE RULES	9
CONCLUSION	11

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

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

**COMMENTS OF THE
COALITION FOR FAIRNESS AND RESTRAINT IN
USAC FUND ADMINISTRATION
ON PETITION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR
PARTIAL RECONSIDERATION**

The Coalition for Fairness and Restraint in USAC Fund Administration (the “Coalition”) respectfully submits these comments to the Federal Communications Commission (“FCC” or “Commission”) on the Petition for Clarification or in the Alternative for Partial Reconsideration (“Petition”) of the Wireline Competition Bureau’s (“Bureau”) April 30, 2010 Order (“Order”) addressing the Request for Review of the Decision of the Universal Service Administrator filed by U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”).¹

In the Petition, AT&T, CenturyLink, SureWest and Verizon (“ILEC Petitioners”) demonstrate that the Order creates additional ambiguity to the extent that it strays beyond the core issue raised by TelePacific – that of whether the Universal Service Administrative

¹ Comment Sought on Petition for Clarification and Reconsideration of the Wireline Competition Bureau’s TelePacific Order Filed by AT&T Inc., CenturyLink, SureWest Communications, and Verizon, DA 10-1012 (rel. June 3, 2010).

Company's ("USAC") interpretation of the 2005 *Wireline Broadband Order*² was erroneous. No party has challenged the Order's core holding that "Internet access service is not currently subject to universal service contribution requirements."³ Yet, the pleadings preceding the Order, the Order itself, and the Petition make clear that there is abundant ambiguity regarding the obligations of ILECs and CLECs with respect to the use of special access T1 circuits as inputs to wireline broadband Internet access service.

In a prior pleading, the Coalition argued that as facilities-based providers of wireline broadband Internet access, CLECs and ILECs could rely on reseller certifications covering special access T1 inputs to that service.⁴ TelePacific similarly argued that as a non-facilities-based provider of wireline broadband Internet access, it too could rely on the reseller certification and its status as a contributor to the universal service fund ("USF").⁵ In contrast, AT&T argued that non-facilities-based CLECs could not rely on such certifications and instead must contribute to the fund on such inputs.⁶ In doing so, AT&T may have overlooked the fact that its assertion suggests that it underpaid into the fund.⁷

The Order itself states that the Bureau lacks "sufficient information...to address TelePacific's contention that no federal universal service contributions should be assessed on

² *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*").

³ *Universal Service Contribution Methodology; Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications*, DA 10-752 (rel. April 30, 2010), ¶ 13 ("*Order*").

⁴ See e.g., Letter to Marlene H. Dortch, FCC, from John H. Heitmann, Counsel to the Coalition for Fairness and Restraint in USAC Fund Administration at 4-5 (Feb. 19, 2010) ("*Coalition February 19 Letter*").

⁵ Letter to Marlene H. Dortch, FCC, from Andrew D. Lipman, Counsel to U.S. TelePacific, Corp. d/b/a TelePacific Communications at 6-7 (Feb. 1, 2010).

⁶ Reply Comments of AT&T Inc., at 4-5 (filed Feb. 3, 2010).

⁷ Coalition February 19 Letter at 7, n.27.

revenues derived from the sale of T-1 lines to TelePacific.”⁸ Thus, the Bureau did not resolve the ambiguity with respect to TelePacific in particular, or with respect to others more generally.

1. Wholesale Providers Are Entitled to Rely on Valid Reseller Certificates

Now, AT&T and three other ILECs ask the Commission to affirm that they did not underpay into the fund with respect to T1 special access services provided to TelePacific and that they are entitled to rely on TelePacific’s reseller certificates.⁹ While the ILEC Petitioners appear to be getting ahead of themselves (the Bureau has made no findings of underpayment and TelePacific has only recently filed the information required by the Order), the Coalition does not dispute these linked points. Wholesale providers are entitled to rely on valid reseller certificates provided by contributing carriers. The ILEC Petitioners correctly note that wholesale providers are required to obtain certificates and to verify that resellers are listed in the Commission’s online database as current contributors to the fund.¹⁰ Additional verification measures are not required and compliance with these should be conclusive.¹¹ Nor should the Commission change course, as the burdens that would be imposed on both the wholesalers and resellers have neither been vetted nor justified.

The Coalition also does not dispute that the ILECs properly contributed (and did not underpay into the fund) to the extent that each relied on valid reseller certificates submitted by TelePacific. While we are not privy to all of the facts pertinent to TelePacific’s purchase of special access T1s, its submission of reseller certificates, and the services TelePacific provided

⁸ Order, ¶ 13.

⁹ Petition at 4-5.

¹⁰ *Id.*, at 3.

¹¹ See e.g., *In re: Federal-State Joint Board on Universal Service; Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, 24 FCC Rcd 10824, ¶¶ 13-14 (WCB Aug. 17, 2009).

over those T1s, it is clear that a wholesale provider is entitled to rely on a valid reseller certificate once it has verified the reseller's status as a contributor to the fund.

2. Facilities-Based CLEC Providers of Wireline Broadband Internet Access Are Not End Users

The Coalition does disagree, however, with the ILEC Petitioners' suggestion that the Commission should seek additional fund contributions, if any are required, directly from resellers for T1 special access services purchased from other providers and used to provision wireline broadband Internet access.¹² This aspect of the Petition should be denied.

First, it is implausible to suggest that the Commission could somehow announce that *all* CLECs' reseller certificates issued in this context are invalid and that *all* CLECs are transformed into "retail end users" when providing wireline broadband Internet access using special access T1s. Commission precedent makes clear that CLECs using wholesale special access T1s in conjunction with facilities they own to provide wireline broadband Internet access are not end users but are instead properly classified as *facilities-based* providers of wireline broadband Internet access.

Indeed, the Commission has long classified CLECs as facilities-based providers, even when CLECs lease transmission facilities or purchase transmission services from other providers and combine those with transmission and switching facilities they own in order to provide services such as wireline broadband Internet access service. For example, 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

¹² Petition at 4-5.

calls.”¹³ 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, these 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.¹⁴ 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.¹⁵ In describing the wireline broadband Internet access service marketplace, the Commission provides statistics on facilities-based wireline broadband Internet access lines which include CLEC lines provisioned using special access inputs.¹⁶ Thus, it is clear that, for purposes of the *Wireline Broadband Order*, CLECs using special access inputs are facilities-based providers of wireline broadband Internet access, not retail end users of special access services.

¹³ *In re: APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemangement Services, and Intera Communications Corp., v. Network IP, LLC, and Network Enhanced Telecom, LLP*, 20 FCC Rcd 2073, ¶ 15 (Enforcement Bureau 2005).

¹⁴ *Wireline Broadband Order*, ¶ 3, n.7.

¹⁵ The 2005 Report, based on information from the Form 477 and 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 as of December 31, 2004*, at n.4 (July 2005) (“*High Speed Services July 2005 Report*”).

¹⁶ *Wireline Broadband Order*, ¶ 51 (citing *High Speed Services July 2005 Report* at Table 3 (including CLEC lines)).

By contrast, “non-facilities-based” providers are classified as stand-alone 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. Such ISPs have long been treated as end user purchasers of special access service. Facilities-based CLECs providing wireline broadband Internet access are not stand-alone ISP end users but instead provide service to retail end users.

Thus, when the Commission concluded in the *Wireline Broadband Order* that facilities-based providers that offer wireline broadband Internet access service on an integrated basis do not have to contribute to the universal service fund, CLECs were included and were not carved out for disparate and discriminatory treatment as end users. Instead, facilities-based CLECs were ensured of operating on a level competitive playing field with ILECs and other wireline broadband Internet access service providers.

3. CLEC Reseller Certificates Are Valid

Because facilities-based CLEC providers of wireline broadband Internet access are not end users, it is clear that they need not contribute indirectly to the fund on the special access inputs they purchase from ILECs and other providers.¹⁷ Instead, facilities-based CLECs purchase such facilities under valid reseller certificates.¹⁸ Those certificates do not result in a minimum – or a maximum – contribution guarantee but rather guarantee that the CLEC is a contributor to the fund and that the CLEC contributes on its end user revenues as required by Commission regulations.¹⁹ In some cases, the reseller’s contribution is based on retail revenues

¹⁷ CLECs do not contribute directly or indirectly on UNEs used in a similar manner. UNEs are leased facilities and are not telecommunications services. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8865, ¶ 157 (“*First Universal Service Order*”).

¹⁸ Coalition February 19 Letter at 4-5.

¹⁹ *See, e.g.*, Telecommunications Reporting Worksheet, FCC Form 499-A 2010, Instructions at 19.

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.

FCC rules and the guidance provided by the Form 499A instructions permit reseller certifications to be made on an entity-by-entity basis, and do not require certifications on an individual service order basis.²⁰ In determining that contribution 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.”²¹

Similarly, the Wireline Competition Bureau recently explained that its rules regarding the classification of reseller revenues by wholesale carriers “ensure[] that wholesale 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.”²² Nothing in the FCC’s universal service orders or rules requires this determination to be made on an individual service-by-service basis. To the contrary, it would be virtually impossible for wholesale carriers to classify all of their revenues based on the end user services that their reseller customers may choose to provide.

In addition, no rule requires wholesale carriers to collect reseller certificates based on the classification of each and every end user service that a CLEC provides at any given

²⁰ *Id.*

²¹ 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*”) (emphasis added); *see also* *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).

²² *Global Crossing Order*, ¶ 12 (emphasis added).

time.²³ 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 can change over time. In short, the classification of revenues by a wholesale provider presently depends upon the reseller’s status as a CLEC, not on every 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, a CLEC’s submission of a reseller certificate and an ILEC’s reliance on it in this context are valid.

As explained previously by the Coalition, contrary assertions are unsupported. Paragraph 103 of the *Wireline Broadband Order* addresses the provision of wholesale wireline broadband Internet access transmission service inputs to ISPs. It does not address the use of special access by facilities-based CLECs.²⁴ The use of transmission as part and parcel of a facilities-based provider’s offering of wireline broadband Internet access is addressed in

²³ 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.*, 2010 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.

²⁴ Paragraph 103 addresses the sale of wholesale inputs to ISPs, not the use of wholesale transmission inputs by CLECs that own at least a portion of the transmission facilities used to deliver broadband Internet access to end users.

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),²⁵ 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.

4. The Commission Must Decline the ILEC Petitioners’ Invitation to Change the Rules

Finally, the Commission must deny the ILEC Petitioners’ request that the Commission seek additional fund contributions, if any, directly from resellers for T1 special access services purchased from other providers and used to provision wireline broadband Internet access because this approach would require rule changes which could not possibly arise out of the ILECs’ Petition. In order to find additional contributions owing in this context, the Commission would have to reach a conclusion that CLECs are not facilities-based providers of wireline broadband Internet access service and are instead simply end users of special access services. As explained above, such a determination would represent a dramatic departure from Commission precedent.

Furthermore, granting of the ILEC Petitioners’ ill-conceived proposal to collect directly from such a class of newly minted end users would also require a change in the Commission’s USF assessment rules since the rules presently do not provide for the assessment

²⁵ 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.

and collection of funds directly from end users.²⁶ The Petition does not provide an adequate basis for such rule changes. To effectuate this result, the Commission would need to conduct a rulemaking with adequate notice and comment and which could have only prospective effect.²⁷

Such a dramatic change in Commission precedent and rules could not reasonably be applied retroactively, as it would impermissibly “impair rights a party possessed when [it] acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”²⁸ Indeed, 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.²⁹

²⁶ See *Federal-State Joint Board On Universal Service*, 12 FCC Rcd 8776, 9210, ¶ 853 (1997). (explicitly “reject[ing] commenters’ suggestions that the Commission mandate that carriers recover contributions through an end-user surcharge”) The Commission further noted that “[a] federally prescribed end-user surcharge would dictate how carriers recover their contribution obligations and would violate Congress’s mandate and the wish of the state members of the Joint Board” and that “[m]andating recovery through an end-user surcharge would eliminate carriers’ pricing flexibility to the detriment of consumers.” *Id.*

²⁷ E.g., *United States Telecom Assn. v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (a change to a preexisting rule “can be valid only if it satisfies the notice-and-comment requirements of the APA”).

²⁸ *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 v. Georgetown University Hospital*, 488 U.S. 204, 219 (Scalia, J., concurring)); and *id.* (citing *Bergerco Canada v. U.S. Treasury Dept.*, 129 F.3d 189, 192-93 (D.C. Cir. 1997) (finding Justice Scalia’s concurring opinion to be “substantially authoritative”).

²⁹ See *Request For Review by InterCall, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd 10731, ¶ 24 (June 30, 2008). The pleadings submitted in this docket to date demonstrate widespread consensus supporting the position that, if the Commission decides to pursue additional collections on special access T1s, it should do so on a prospective basis only. 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; Petition, at 2-3.

Conclusion

For the foregoing reasons, the Commission should (a) affirm that wholesalers may rely on valid reseller certificates, and (b) deny the Petitioners' request for the Commission to upend existing precedent and to adopt new rules by seeking to reclassify facilities-based CLECs as end users and by seeking to collect additional fund contributions directly from such newly minted end users.

Respectfully Submitted,



John J. Heitmann
Denise N. Smith

Kelley Dye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8400

*Counsel for The Coalition for Fairness and
Restraint in USAC Fund Administration*

July 6, 2010