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

XO Communication Services, Inc.	**)**	
Request for Review of Decision of the	**)**	**WC Docket No. 06-122**
Universal Service Administrator	**)**	

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC AND PAETEC HOLDING CORP.

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Level 3 Communications, LLC ("Level 3") and PAETEC Holding Corp. (on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC entities, McLeodUSA Telecommunications Services, L.L.C., and Cavalier entities) ("PAETEC") (Level 3 and PAETEC, "Commenters") submit these comments in response to the January 6, 2011 Public Notice in the above-referenced proceeding[1] concerning a request by XO Communications, Inc. ("XO") for Commission review of a decision by the Universal Service Administrative Company ("USAC").[2]

I. Introduction and Summary

XO seeks Commission review of a USAC contributor audit decision that reclassified certain XO revenues as assessable for purposes of universal service contribution requirements. These comments address three issues. First, with respect to private lines, FCC rules require USAC to treat such services as intrastate when the end points of the private line are within one

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[1] *See Wireline Competition Bureau Seeks Comment on XO Communication Services, Inc. Request for Review of a Decision by the Universal Service Administrative Company*, Public Notice, WC Docket No. 06-122, DA 11-24 (rel. Jan. 6, 2011) ("*Public Notice*").

[2] *See XO Communication Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 29, 2010) ("*XO Petition*").

state *unless a customer has certified greater than 10% interstate usage*. Second, USAC cannot impose USF assessments on revenue based on a service's name or underlying transport. As the Bureau held in the *TelePacific Order*,[3] a service is not classified as telecommunications based on the fact that it incorporates a traditional transmission medium, such as a T-1, in its name or as the underlying transport method. Rather, Commission rules require USAC to impose USF assessments on telecommunications and telecommunications services, but not information services. Finally, where the Commission has not evaluated a service that a contributor has classified as information, the Commission, not USAC, should determine whether such service should be reclassified as telecommunications and make such determinations in a transparent and timely manner. Based on the limited public information provided in the appeal, it appears that XO's MTNS service satisfies the Commission's current test because it always offers Internet access.

The Commenters incorporate by reference the comments filed jointly by Level 3 and PAETEC in 2008 concerning the request by Madison River Communications, LLC for review of a decision of USAC,[4] and the comments filed jointly by Level 3, PAETEC and U.S. TelePacific Corp. in 2009 concerning a request by USAC for guidance by the FCC on certain contribution

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[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*, Order, WC Docket No. 06-122 (rel. Apr. 30, 2010) ("*TelePacific Order*").

[4] *Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator*, Comments of Level 3 Communications and PAETEC Communications, Inc., WC Docket No. 06-122 (filed Jan. 29, 2009) ("Madison River Proceeding Comments").

issues related to the Universal Service Fund ("USF").[5] For the Commission's convenience, copies of these prior comments are appended hereto.

II. Private Line Revenues Are Deemed Intrastate if the Endpoints Are Within a State Unless a Customer Certifies Otherwise

Contrary to Commission rules, USAC concluded that XO had an obligation either to perform traffic studies or to obtain other evidence that the traffic on each Dedicated Transport Services circuit is intrastate in order to report the revenue as intrastate. In short, USAC adopted a presumption that all Dedicated Transport Services are interstate.[6] This issue is identical to that raised by Madison River. In 2008, USAC asserted that some or all of Madison River's T-1 retail private line revenues should have been reported as interstate revenues and subject to USF contribution because Madison River could not prove that such services were intrastate in nature. As the Commenters showed in their comments in January 2009, and as XO showed in its appeal, since 1989 the Commission has held again and again that intrastate facilities are jurisdictionally interstate *only if* the customer certifies that more than ten percent of the traffic on that line is interstate in nature.[7] USAC's finding contradicts Commission precedent and, if adopted, would

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[5] *See Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company*, Comments of Level 3 Communications, LLC, PAETEC Communications LLC, and U.S. TelePacific Corp., WC Docket Nos. 05-337 & 06-112, CC Docket No. 96-45 (filed Oct. 28, 2009). ("USAC Guidance Proceeding Comments").

[6] *See XO Petition*, at 14-28.

[7] *MTS and WATS Market Structure*, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Dockets Nos. 78-72 and 80-286, Recommended Decision and Order, 4 FCC Rcd 1352 (1989), at ¶ 1 (such lines should be allocated to the interstate jurisdiction only "through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic."); *MTS and WATS Market Structure*, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Dockets Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660 (1989); *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 4153, 4161 (1995), at ¶ 17 ("a subscriber line is deemed to be interstate if the customer certifies that ten percent or more of the calling on that line is interstate."); GTE Telephone

be an unprecedented "land grab" of state regulatory authority that would have severe consequences for states, the industry, and consumers.[8]

USAC's position with XO recreates the problem that the Commission solved in 1989 and creates new problems for state regulators, the industry, and consumers. If USAC's decision is not overruled, private lines that in all respects appear intrastate would now be allocated by default to the interstate jurisdiction absent customer confirmation otherwise. States would thus cede regulatory authority over all private lines sold within their boundaries, which would in turn result in a drop in reporting of--and corresponding regulatory payments based on--intrastate revenues associated with these private lines.

Even if the Commission were to agree with USAC's position, it must change its rules and find that such "less than" certification (*i.e.*, a circuit will be intrastate only if the customer certifies that there is 10% or less interstate usage) will be required only on a going-forward basis. Given the Commission's reference to customer certifications indicating "more than 10 percent" interstate usage in all prior orders, it was not foreseeable that the certification rule could apply in the "less than" manner now advocated by USAC. If the Commission wishes to "protect the Fund" by assuming interstate jurisdiction, it must change its rules to do so. Moreover, it must direct USAC to apply a rule of reasonableness and accept one-time customer certifications or product (intrastate or interstate) elections. Obtaining jurisdictional use certifications from

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Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22481 (1998), at n. 95 ("GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate."); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Order, 16 FCC Rcd 11167, at ¶ 2 (2001) ("mixed-use lines would be treated as interstate if the customer certifies that more than ten percent of the traffic on those lines consists of interstate calls.").

[8] *See generally* Level 3 Madison River Proceeding Comments.

customers is administratively burdensome. While a carrier may be able to alter its ordering process to incorporate such certifications going forward, the number of customers purchasing private lines is typically much greater than the number of reseller customers, and an annual certification process would be unwieldy.

III. USAC Must Examine and Classify the Services Delivered to the Customer Rather Than Imply Classification by the Name or Underlying Transport

According to the XO Petition, in its audit finding USAC reclassified MTNS-derived revenue as "interstate telecommunications" revenue based on XO marketing materials.[9] USAC's auditors failed to inquire whether MTNS possesses any of the attributes of an information service; examine whether there is protocol processing, access to stored information, wireline broadband Internet access, or any of the many other features that qualify any particular offering as an information service; or determine whether MTNS transmission is inextricably intertwined with enhanced components of the service. Instead USAC reviewed marketing materials on XO's website and presumably based its classification decision on those materials and the fact that the service uses MPLS which, like T-1s, are included in the worksheet instructions as an example of a telecommunications service.

As the Commenters discussed in their prior comments in this docket,[10] USAC is using the wrong method for classifying services as either "information" or "interstate telecommunications." The *2005 Wireline Broadband Order* affirmed and explained the test that the FCC applies to classify services as information or telecommunications:

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[9] *See XO Petition*, at 46-47.

[10] *See generally* Level 3 USAC Guidance Proceeding Comments.

> The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, "between or among points selected by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as "information services." *The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (e.g., e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.* Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability "which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server." The end user therefore receives more than transparent transmission whenever he or she accesses the Internet.[11]
>
> 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. [citing paragraph 59 of the Report to Congress]* The end user of wireline broadband Internet access service receives an integrated package of transmission and information processing 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.[12]

After adding MPLS to the list of telecommunications services in the worksheet, the Bureau confirmed that USAC must follow FCC rules to determine whether a particular service is

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[11] *2005 Wireline Broadband Order* at ¶ 15 (citations omitted) (emphasis added).

[12] *Id.* at ¶ 16 (citations omitted) (emphasis added).

telecommunications or information.[13] In sum, USAC may not classify a service as "telecommunications" based on the wireline transmission facilities (T-1 or MPLS) used to provide the service or the names used to market it. It must evaluate the service provided, from the perspective of the end user, to determine whether it qualifies as "information" or "interstate telecommunications."

Because USAC failed to perform the proper analysis in the XO audit, the Commission must review this issue *de novo*. Based on the limited public information provided in the appeal, it appears that XO's MTNS service satisfies the Commission's current test because it always offers Internet access.[14] To the extent the Commission wishes to change its test and classify a service as information based on whether each consumer *uses* the information components of the service, the Commenters agree that any such change must be applied prospectively.

IV. The FCC Must Reassert its Authority to Set Policy and Resolve Ambiguities

The fact that two contributors have raised the same issue on appeal two years apart shows that the current contribution system is in dire need of an overhaul. USAC should not be resolving ambiguous classification questions through contribution audits and the industry should not have to wait multiple years for the FCC to determine whether a USAC determination is consistent with FCC rules. Moreover, USAC needs to seek the FCC's guidance where an issue is ambiguous rather than taking the "conservative" position that "protects" the Fund. As the omission of "stand-alone" from, and the addition of MPLS to, the worksheet instructions shows,

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[13] *See* Letter from Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, FCC, to Michelle Tilton, Director of Financial Operations, Universal Service Administrative Company, DA 09-748 (Apr. 1, 2009).

[14] Because XO's declarations describing the MTNS service are not publicly available, the Commission is in the best position to evaluate the service and classify it.

changing the worksheet instructions without notice and comment can result not only in substantial confusion but also in USAC "resolving" ambiguities by reading the worksheet instructions literally and without regard for FCC rules and precedent.

The FCC should use its upcoming contribution reform notice to steer a better course. The Commission should make all service classifications in the context of a rulemaking, declaratory ruling or USAC request for guidance to give parties notice and the opportunity to comment on the issue and appeal any FCC determination. USAC's 2009 Request for Guidance was faithful to the rule that requires the FCC, rather than USAC to resolve ambiguities.[15] Yet that request is still pending, just as the Madison River and numerous other contribution appeals are. The FCC needs to provide USAC and the industry timely guidance on USF contribution questions and base that guidance on relevant data and legal arguments from all interested parties. It should also put all proposed changes in the Form 499 instructions out for public comment. By providing USAC and the industry with clear, timely guidance, the FCC can improve the stability of the USF contribution base and ensure all providers compete on a level playing field.

V. Conclusion

For the foregoing reasons, the Commenters request that the Commission overturn USAC's findings with respect to interstate classification of XO's Dedicated Transport services, evaluate and classify XO's MPLS-based service, and reassert its authority to resolve ambiguities regarding USF contribution issues in a transparent, timely manner.

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[15] *See* 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").

Respectfully submitted,

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Attachments

Attachments

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator	)))	WC Docket No. 06-122

COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC AND
PAETEC COMMUNICATIONS, INC.

Level 3 Communications, LLC and PAETEC Communications, Inc. (collectively, the "Joint Commenters") submit their Comments in response to the December 30, 2008 Public Notice released by the Federal Communications Commission (the "Commission"). These comments support the request by Madison River Communications, LLC ("Madison River") for review of a decision by the Universal Service Administrative Company ("USAC"). The Joint Commenters agree with Madison River that the USAC decisions are inconsistent with long-standing Commission precedent and must be overruled as a matter of law.

I. THERE WAS NO REQUIREMENT IN 2005 TO CONTRIBUTE TO UNIVERSAL SERVICE BASED UPON REVENUES DERIVED FROM THE TRANSMISSION PORTION OF INTERNET ACCESS SERVICES.

USAC has determined that revenues associated with "the transmission component of [Madison River's] Internet access services" should have been reported as assessable for purposes of the federal universal service fund ("USF").[1] USAC's determination ignores the integrated nature of Internet access services. In September 2005, the Commission confirmed that wireline

[1] Request for Review at 5.

broadband Internet access services are information services.[2] Prior to that, however, the Commission never required providers of Internet access to contribute to universal service on the transmission component of such a service offering. With respect to "non-facilities-based providers," the Commission held that offerings by such providers "combining communications and computing components should *always* be deemed enhanced."[3] Under this "contamination" approach employed since the *Computer Inquiry* decisions of the 1980s, the fact that an enhanced service might use regulated transmission paths did not convert it into a basic or adjunct-to-basic service.[4] Rather, the enhanced component of a non-facilities-based offering "contaminated" the basic component, resulting in the entire offering being "enhanced."[5] Thus, to the extent that Madison River is not a "facilities-based provider," the transmission components of its Internet access services were not subject to USF assessment in 2005.

It is true that the "contamination" analysis "is more complicated when it comes to offerings by facilities-based providers," because the "issue is whether, functionally, the

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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] *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11530 (1998) ("*Report to Congress*"), at ¶ 60 (emphasis added).

[4] *See id*. 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).

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

consumer is receiving separate and distinct services."[6] Madison River claims, however, that a provider should not be deemed "facilities-based" if it relies upon leased last-mile facilities to deliver Internet access services.[7] The Joint Commenters cannot speak to the facts underlying Madison River's service delivery but Madison River's legal argument is correct -- the mere fact that a provider might combine its facilities with leased local access facilities does not mean that the provider should be considered "facilities-based" for purposes of the "contamination" rules arising out of the Commission's *Computer Inquiry* decisions. In those decisions, the fundamental concern was not mere ownership of facilities, but precluding the anticompetitive exercise of "substantial market power in providing network access" by those firms "that control *bottleneck* facilities."[8] A provider that relies upon others for last-mile network access does not "control bottleneck facilities" and such a provider should not be considered "facilities-based" for purposes of a *Computer Inquiry* "contamination" assessment.

Finally, even if Madison River, a non-dominant carrier, *were* deemed "facilities-based" notwithstanding its reliance upon leased facilities, that is not the end of the inquiry. In the *Report to Congress*, the Commission recognized 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."[9] Moreover, as the

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[6] *Id.* at 11530, ¶ 60 (quoting *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318 (1997), at ¶ 282).

[7] Request for Review at 7.

[8] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958 (1986), at ¶¶ 129-132 (emphasis added).

[9] *Report to Congress*, 13 FCC Rcd at 11528, ¶ 55.

Commission observed in 2002, facilities-based carriers are subject to USF 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."[10]

Commission rules have never required facilities-based providers to segregate the telecommunications portion of wireline broadband Internet access for USF reporting, because such transmission services are not provided on a stand-alone basis. The Commission found that when bundled with an information service, the underlying telecommunications service is "contaminated" and the entire service becomes an information service.[11] By contrast, the Commission 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 applied only to *combinations of stand-alone services* that were marketed and sold together as a package at a total price less than the sum of the stand-alone prices.[12] In other words, the combination referred to in the "bundled" safe harbor is a single package at a single price for multiple services, not components linked to form a single service. Although some confusion may exist because the term "bundle" has been used by some to refer to either situation,

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[10] *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).

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

[12] *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.

the circumstances are different -- in the one case, there is a telecommunications service sold *alongside* an information service in a one-price package, while with respect to wireline broadband Internet access the customer receives a single and inseparable "contaminated" service that relies upon telecommunications and information service components.

Commission precedent makes clear that USF contribution and the "bundled" safe harbor were never applicable to wireline broadband Internet access, even as offered by a facilities-based provider. Indeed, the Commission acknowledged this in its *Wireline Broadband Order*:

> Under current law, the Commission has permissive authority to require "[a]ny other provider of interstate telecommunications to contribute to universal service if required by the public interest." The question of "whether and under what circumstances the public interest would require us to exercise our permissive authority over wireline broadband Internet access providers" is pending before the Commission in this docket. In addition, the question of "whether other facilities-based providers of broadband Internet access services may, as a legal matter, or should as a policy matter, be required to contribute" is also pending before us. We expect to address these issues in a comprehensive fashion either in this docket or in the Universal Service Contribution Methodology proceeding now pending in Docket No. 96-45.[13]

By referring to its permissive authority and policy questions regarding whether to expand the scope of USF obligations to other types of providers, the Commission recognized that certain Internet service providers were not required to report, or to contribute to USF based on, the contaminated broadband transmission service. The Commission acknowledged that the issue of whether facilities-based providers should contribute would be addressed in a subsequent proceeding. Accordingly, wireline broadband Internet services that are single, integrated service

[13] *Wireline Broadband Order*, 20 FCC Rcd at 14915, ¶ 112 (citations omitted).

offerings -- as compared to bundled packages of stand-alone telecommunications and information services -- have never been subject to USF assessment.

II. USAC'S DETERMINATION THAT PRIVATE LINES ARE *INTERSTATE* UNLESS PROVEN TO BE *INTRASTATE* CONTRADICTS WELL-ESTABLISHED COMMISSION PRECEDENT AND WOULD RESULT IN AN UNPRECEDENTED INTRUSION UPON STATE REGULATORY MATTERS.

USAC has asserted that some or all of Madison River's T-1 retail private line revenues should have been reported as interstate revenues and subject to USF contribution because Madison River "cannot prove" that such services were intrastate in nature.[14] USAC's view contradicts Commission precedent, and if adopted, represents an unprecedented "land grab" of state regulatory authority that would have severe consequences for states, the industry, and consumers.

A review of the historic jurisdictional treatment of private lines confirms the error of USAC's position. Prior to 1989, "the cost of special access lines carrying both state and interstate traffic [was] generally assigned *to the interstate jurisdiction*."[15] The problem with this approach, according to a Joint Board appointed to study the issue, was that it "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."[16] The Joint Board recommended that the Commission adopt separations procedures for private lines -- specifically that such lines be allocated to the interstate jurisdiction only "through customer certification that each special access line carries *more than a*

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[14] Request for Review at 13.

[15] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Recommended Decision and Order, 4 FCC Rcd 1352 (1989), at ¶ 1 (emphasis added).

[16] *Id*.

de minimis amount of interstate traffic."[17] Since the only certification mentioned by the Joint Board was to validate whether the line carried *more than* a certain amount of *interstate* traffic, and since the problem the Joint Board sought to solve was excessive interstate allocation, it stood that absent certification of interstate use, the line should be considered *intrastate* when the A and Z locations are in the same state.

The Commission adopted the Joint Board's recommendations without modification a few months later.[18] In doing so, the Commission took express note of the "administrative benefits" of a rule that required certification by customers where "each of their special access lines carries *more than* a de minimis amount of interstate traffic."[19] Since then, the Commission has reaffirmed that certification is required to establish the *interstate* jurisdiction of a dedicated circuit that would otherwise appear to be *intrastate* in nature. For example, in 1995 the Commission summarized its rule regarding the jurisdiction of mixed-use private lines as follows: "a subscriber line is deemed to be interstate *if* the customer certifies that ten percent or more of the calling on that line is interstate."[20] In 1998, the Commission relied upon the "10% rule" to conclude that GTE's DSL services were interstate, since "GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate."[21] Finally, in 2001, the Commission

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[17] *Id*. at 1357, ¶ 32 (emphasis added).

[18] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660 (1989).

[19] *Id*. at 5660, ¶ 3 (emphasis added).

[20] *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 4153, 4161 (1995), at ¶ 17 (emphasis added).

[21] *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22481 (1998), at n. 95.

upheld continued use of the "10% rule," noting that under this rule, "mixed-use lines would be treated as interstate *if* the customer certifies that more than ten percent of the traffic on those lines consists of interstate calls."[22]

Thus, the Commission has not waivered in its interpretation that interstate treatment of a geographically intrastate private line is conditional and that such a line should be considered jurisdictionally interstate only *if* the customer certifies that more than ten percent of the traffic on that line is interstate in nature. Since 1989, the "more than 10%" certification has been necessary only to "convert" what appears to be an intrastate line into an interstate line. By contrast, the Commission has never indicated that this rule (or certification thereunder) was meant to achieve the opposite -- to *confirm* that an intrastate line really was intrastate. Indeed, if USAC's position on the 10% rule were correct, GTE would never have needed to collect customer certifications in 1998 regarding the interstate use of DSL; by USAC's view, those lines would already have been considered interstate unless GTE or its customer could prove that they were being used for intrastate purposes. USAC's position turns the 10% rule on its head and erroneously shifts the presumptive jurisdiction of private lines contrary to Commission precedent.[23]

USAC's position recreates the problem that the Joint Board and the Commission sought to solve in 1989 and creates new problems for state regulators, the industry, and consumers.

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[22] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Order, 16 FCC Rcd 11167 (2001), at ¶ 2 (emphasis added).

[23] A simple example may help to demonstrate the error in this logic. Take again the Commission's 1995 statement that, under the 10% rule, "a subscriber line is deemed to be interstate if the customer certifies that ten percent or more of the calling on that line is interstate." Replace "interstate" with "red," and further assume that "intrastate" is "blue." With such a substitution, the Commission's rule can be summarized as follows: "If customer certifies red, then red." USAC, however, would extrapolate from this simple rule to conclude: "Unless customer certifies blue, then red." But the original rule made the state of being "red" conditional upon certification by the customer, and the latter conclusion is an impermissible and unsupported leap in logic.

Private lines that in all respects appear intrastate would now be allocated by default to the interstate jurisdiction absent customer confirmation. States would be forced to cede regulatory authority over all private lines sold within their boundaries, which would in turn result in a drop in reporting of -- and regulatory payments -- intrastate revenues associated with these private lines. And the implications from a historical perspective could be even more severe: those carriers who have reasonably relied for years on a "more than 10% interstate" certification could face the prospect of having many (if not all) of their intrastate private lines suddenly reclassified retroactively as interstate and subject to USF assessment. The consequences of such a finding would have implications throughout the telecommunications industry. For example, if Madison River were liable for USF contribution for years past because such private lines are now deemed interstate, it would be entitled to refunds from state authorities for prior state universal service contributions and other state regulatory fees and surcharges paid with respect to the affected private lines (since the revenues from those lines turned out not to be intrastate after all). Thus, not only would USAC's position usurp jurisdiction over services that have been subject to state regulatory authority for at least two decades, but it could also result in significant sums being transferred -- both retroactively and on a going-forward basis -- from state to federal coffers at a time when states can least afford the loss of those funds.

Finally, even if the Commission were to agree with USAC's position regarding private line certification, it should find that such "less than" certification (*i.e.*, a circuit will be intrastate only if the customer certifies that there is 10% or less interstate usage) will govern and be required only on a going-forward basis. Given the Commission's reference *only* to customer certifications indicating "*more than* 10 percent" interstate usage in all prior orders, it was not foreseeable that the certification rule could possibly apply in the "*less than*" manner now

advocated by USAC, and applying liability retroactively based upon such a new interpretation would be both inequitable and unlawful.[24] Because USAC implements this new interpretation in USF audits, it is by definition arbitrary and inequitable. Only carriers subjected to audit are forced to comply with USAC's reclassification of private lines, usually retroactively. The private line sector of the industry is highly competitive. USAC's piecemeal approach to implementing this unlawful reclassification and resulting USF assessment means that USAC, and not the market, determines which members of the industry are the most competitive and whether certain limited groups of private line customers are being required to fund a greater portion of the federal interstate programs supported by the USF assessments.

III. CONCLUSION

For the foregoing reasons, the Joint Commenters request that the Commission overturn USAC's findings with respect to the two issues on which Madison River seeks review.

Dated: January 29, 2009

Respectfully submitted,

/s/ Tamar E. Finn

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[24] *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).

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

REQUEST FOR UNIVERSAL	**)**	
SERVICE FUND POLICY	**)**	**WC Docket No. 05-337**
GUIDANCE REQUESTED BY THE	**)**	**WC Docket No. 06-122**
UNIVERSAL SERVICE ADMINISTRATIVE	**)**	**CC Docket No. 96-45**
COMPANY	**)**	

COMMENTS

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Dated: October 28, 2009

SUMMARY

USAC requested that the FCC provide it guidance on three USF contribution issues that arose during USAC audits of carrier-filed FCC Forms 499. While the Commenters applaud USAC's and the FCC's efforts to make the guidance process more transparent, they are concerned that the request and Public Notice do not ask the right questions and, with respect to the questions that have been asked, unfairly prejudge the outcome. Whether or not intended to prejudge the outcome, the USAC request refers to VPN and Dedicated IP as "telecommunications services." The Public Notice repeats this reference.

Commenters explain why certain Dedicated IP and VPN services qualify as information services. Commenters also apply the FCC's *2005 Wireline Broadband Order* to show why any wireline Internet access product delivered at a speed of 200 kbps or higher, regardless of local loop or transport protocol, qualifies as an information service. Commenters use this example to show that an information service does not contain separate telecommunications and information components and that providers are not required to "unbundle" or allocate revenue to the transmission component of a functionally integrated, finished information service. USAC cannot rely on the bundled safe harbor or any other theory to require a carrier to assign a portion of the information service revenue to the transmission used to deliver the information—whether DSL, T-1, ATM, Frame Relay, or dedicated IP. There is no reason to treat Internet access services sold to enterprise customers, or sold on a "dedicated" basis, differently from the shared infrastructure consumer Internet access service sold by cable ISPs and ILECs. This is precisely what USAC proposes.

The same argument applies to any information service. Under current law, USAC may not require a contributor to allocate revenue from a functionally integrated information service between information and telecommunications components.

Commenters also describe the inconsistency between the FCC's determination that a wireline broadband Internet access service is a functionally integrated information service not subject to USF contribution and USAC's position that the classification question is irrelevant, but only for wireline transmission technologies. USAC "derives" a local loop telecommunications service only from wireline information services, not from competing non-wireline information services. Commenters believe that USAC takes this position, at least in part, based on the 499-A worksheet instructions, which copied paragraph nine of the *2005 Wireline Broadband Order* almost verbatim, with the exception that the instructions omit the key term "stand-alone" when discussing traditional PSTN technologies such as T-1s, ATM, and Frame Relay. USAC's inconsistent position puts facilities-based wireline broadband Internet access providers at a disadvantage vis-à-vis providers using non-wireline technologies.

The FCC should make clear that USAC must classify services based on the service the carrier provides to the end user, not the names of the accounts in which the company records the revenue. To ensure that services appropriately are classified and that revenues are subject to contribution on a competitively-neutral and non-discriminatory basis, the FCC should establish an expedited process to provide guidance to the industry and USAC, not just on referred issues, but also on common mistakes that USAC finds and "corrects" during 499 Audits.

The FCC needs to provide USAC and the industry timely guidance on USF contribution questions and base that guidance on relevant data and legal arguments from all interested parties. The FCC should make all service classifications in the context of a rulemaking, declaratory ruling or USAC appeal to give parties notice and the opportunity to comment on the issue and appeal any FCC determination. It should also put all proposed changes in the Form 499 instructions out for public comment. By providing USAC and the industry with clear, timely guidance, the FCC can improve the stability of the USF contribution base and ensure all providers compete on a level playing field.

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

REQUEST FOR UNIVERSAL	**)**	
SERVICE FUND POLICY	**)**	**WC Docket No. 05-337**
GUIDANCE REQUESTED BY THE	**)**	**WC Docket No. 06-122**
UNIVERSAL SERVICE ADMINISTRATIVE	**)**	**CC Docket No. 96-45**
COMPANY	**)**	

Level 3 Communications, LLC ("Level 3"), PAETEC Communications, Inc. and U.S. TelePacific Corp. ("TelePacific") (collectively, "Commenters") submit these comments in response to the September 28, 2009 Public Notice in the above-referenced proceeding.[1]

I. Introduction and Context

The Universal Service Administrative Company ("USAC") requested that the Federal Communications Commission ("FCC" or "Commission") provide it guidance on three Universal Service Fund ("USF") contribution issues that arose during USAC audits of carrier-filed FCC Forms 499. While the Commenters applaud USAC's and the FCC's efforts to make the guidance process more transparent, they are concerned that the request and Public Notice do not ask the right questions and, with respect to the questions that have been asked, unfairly prejudge the outcome.

Although written as three requests about "services" and "products," the USAC request effectively asks two questions about services (prepaid calling cards and Virtual

[1] *See Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administration Company*, Public Notice, WC Docket Nos. 05-337 and 06-122 and CC Docket No. 96-45, DA 09-2117 (rel. Sept. 28, 2009) ("*2009 Public Notice*").

Private Networks ("VPNs")) and three questions about transmission technologies (ATM, Frame Relay, and Dedicated IP). Whether or not intended to prejudge the outcome, the USAC request refers to VPN and Dedicated IP as "telecommunications services."[2] The Public Notice repeats this reference.[3]

Commenters are concerned that USAC's request for guidance about the classification of ATM, Frame Relay, and Dedicated IP services perpetuates classification problems because USAC does not start with the relevant question—whether a service is an information service. The following excerpt from a USAC audit report shows that USAC believes the classification question is irrelevant, but only for wireline transmission technologies:

> USAC management disagrees with [REDACTED]'s argument that when local loops are combined with internet access services the result is a contaminated information service that is not subject to the bundled safe harbor rule. USAC agrees with [REDACTED]'s point about the contamination of transmission and internet access as it pertains to cable modem service offerings and more recently wireless broadband and the FCC has declared that transmission component of these services are not "telecommunications service" under section 3 of the act. USAC is not reclassifying any such services.
>
> The products being reclassified by IAS in finding #4 are plain local loops (and PRI circuits associated with [REDACTED]'s local service) that run through the Public Switch Telephone Network ("PSTN"). These local loops are traditional private line (T1, T3, Gigabit Ethernet) services that FCC has stated are not inextricably intertwined with the information processing capabilities of internet access. Due to the type of local loop products being reclassified and the FCC 05-150 order Financial

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[2] *See* Letter from Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company, to Julie Veach, Acting Chief, Wireline Competition Bureau, Federal Communications Commission, p. 3 (filed Aug. 19, 2009) ("*USAC Letter*").

[3] *2009 Public Notice* at 2.

> Operations agree with IAD that [REDACTED]'s local loop revenues should be reclassified from non-telecommunications reported on line 418 to private line revenues reportable on lines 305, 312, 406, and 415 on the FCC 2006 499-A form.[4] [citations omitted]

This excerpt shows that USAC "derives" a local loop telecommunications service only from wireline information services, not from competing non-wireline information services. This position violates the FCC's policy of leveling the playing field for all forms of broadband Internet access services.[5] Commenters believe that USAC takes this position, at least in part, based on the 499-A worksheet instructions, which copied paragraph nine of the *2005 Wireline Broadband Order* almost verbatim, with the exception that the instructions omit the key term "stand-alone" when discussing traditional Public Switched Telephone Network ("PSTN") technologies such as T-1s, ATM, and Frame Relay. As shown herein, this USAC position is inconsistent with the FCC's determination that a wireline broadband Internet access service is a functionally integrated information service not subject to USF contribution. There is no reason to treat Internet access services sold to enterprise customers, or sold on a "dedicated" basis, differently from the shared infrastructure consumer Internet access service sold by cable ISPs and ILECs. This is precisely what USAC proposes.

The *2005 Wireline Broadband Order* holds that if a service is enhanced, it does not matter whether the provider uses ATM, Frame Relay, or Internet Protocol to deliver

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[4] USAC Audit No. CR2006CP082.

[5] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Demand Proceedings,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 17 (2005) ("*2005 Wireline Broadband Order*").

the service. Because the service is inextricably intertwined, the entire service is an information service and no contribution is due on the transmission input (referred to by USAC as the local loop) to the information service.

The FCC should make clear that USAC must classify services based on what is provided to the end user, not the names of the accounts in which the company records the revenue. USAC audits are accounting-based and USAC auditors review contributor financial statements and revenue accounts. The names of revenue accounts, however, do not always accurately reflect what service is provided to the customer. For example, revenues from an integrated information service may be separated into multiple revenue accounts. Reporting the revenue from an information service across multiple revenue accounts with names such as email, Internet access, T1 transmission, or Domain Naming Service ("DNS") does not mean that certain of those individual accounts must be reported as telecommunications revenue. As the Bureau directed in its April 1, 2009 letter, USAC must first ask the question of how to classify the service provided to the end user.[6] Once the service is classified, USAC should ask what revenue accounts make up the service. The service classification, not the revenue account names, dictates whether revenue is classified as information or telecommunications.

Commenters first explain why certain Dedicated IP and VPN services qualify as information services. Next, Commenters apply the FCC's *2005 Wireline Broadband Order* to show why any wireline Internet access product delivered at a speed of 200 kbps

[6] Letter from Ms. Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission to Ms. Michelle Tilton, Director of Financial Operations, USAC, DA 09-748 (filed Apr. 1, 2009).

or higher, regardless of local loop or transport protocol, qualifies as an information service. Commenters use this example to show that an information service does not contain separate telecommunications and information components and that providers are not required to "unbundle" or allocate revenue to the transmission component of a functionally integrated, finished information service.[7] USAC cannot rely on the bundled safe harbor or any other theory to require a carrier to assign a portion of the information service revenue to the transmission used to deliver the information—whether DSL, T-1, ATM, Frame Relay, or dedicated IP. The same argument applies to any information service. USAC may not require a contributor to allocate revenue from a functionally integrated information service between information and telecommunications components.

To ensure that services appropriately are classified and that revenues are subject to contribution on a competitively-neutral and non-discriminatory basis, the FCC should establish an expedited process to provide guidance to the industry and USAC, not just on referred issues, but also on common mistakes that USAC finds and "corrects" during 499 Audits. Absent an appeal by the audited carrier, the industry has no insight into how USAC reviews and classifies real world service revenue for Form 499 contribution purposes.

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[7] Commenters use the term "unbundled" because USAC relies in part on the bundled safe harbor to support the position that revenue from an information service must be allocated to a telecommunications service. As the FCC made clear in the *2005 Wireline Broadband Order*, however, nothing in that order affects an incumbent LEC's obligations to unbundle network elements under Section 251(c)(3) of the Act. *2005 Wireline Broadband Order* at ¶127 ("competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities").

Finally, the FCC needs to provide USAC and the industry timely guidance on USF contribution questions and base that guidance on relevant data and legal arguments from all interested parties. The FCC cannot reclassify services by amending universal service contribution worksheet instructions without notice and comment. As the omission of "stand-alone" from, and the addition of MPLS to, the worksheet instructions shows, changing the worksheet instructions without notice and comment can result in substantial confusion. The FCC should make all service classifications in the context of a rulemaking, declaratory ruling or USAC appeal to give parties notice and the opportunity to comment on the issue and appeal any FCC determination. It should also put all proposed changes in the Form 499 instructions out for public comment. By providing USAC and the industry with clear, timely guidance, the FCC can improve the stability of the USF contribution base and ensure all providers compete on a level playing field.

II. Certain Dedicated IP services qualify as information services.

Commenters believe that the dedicated IP referral is a prime example of USAC confusing services provided to end users and revenue accounts. For example, Level 3 provides a dedicated Internet access service at various speeds. When Level 3 provides dedicated Internet access over IP transmission, it reports the revenue in an account labeled "dedicated IP." Rather than focus on the service offering, USAC's letter indicates that it focuses on the name of the revenue account and how customers use the service.[8] In short, USAC applies the wrong test.

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[8] *USAC Letter* at p. 3 ("Further inquiry disclosed that the dedicated IP *revenue account* was primarily related to data transport using IP.") (emphasis added).

The *2005 Wireline Broadband Order* affirmed and explained the test that the FCC applies to classify services as information or telecommunications:

> The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, "between or among points selected by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as "information services." *The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (e.g., e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.* Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability "which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server." The end user therefore receives more than transparent transmission whenever he or she accesses the Internet.[9]
>
> 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. [citing paragraph 59 of the Report to Congress]* The end user of wireline broadband Internet access service receives an integrated package of transmission and information processing 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

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[9] *2005 Wireline Broadband Order* at ¶ 15 (citations omitted) (emphasis added).

> service is an information service when the provider of the retail service does not provide the service over its own transmission facilities.[10]

As explained herein, USAC may not derive a telecommunications service from an information service based on the wireline transmission facilities used to provide the service. Although this applies regardless of the type of transmission capacity, where the transmission *component* underlying the information service is IP, the case for no USF assessment is even stronger. Prior to September 2005, the FCC never stated that IP transmission services were subject to USF. Indeed, the FCC removed from the Form 499-A Instructions any reference to IP-based services:

> As noted by certain commenters, this Commission in its April 10, 1998 Report to Congress considered the question of contributions to universal service support mechanisms based on revenues from Internet and Internet Protocol (IP) telephony services. We note that the Commission, in the Report to Congress, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony. Since we do not effect any substantive change on this issue, we need not address commenter concerns about proper notice under the Administrative Procedures Act.[11]

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[10] *Id.* at ¶ 16 (citations omitted) (emphasis added).

[11] *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 FCC Rcd 16602, ¶ 22 (1999) (internal citations omitted). The proposed instructions included the following reference: "this category [ordinary long distance and other switched toll] includes calls handled using internet technology as well as calls handled using more traditional switched circuit techniques." *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295, Appendix B, p. 23 (1998).

The FCC has always taken a hands-off approach to the Internet and still has pending an open rulemaking on the application of USF to non-interconnected VoIP IP-enabled services. As part of that rulemaking, the FCC is considering the question of how IP-enabled service providers should contribute to USF:

> If certain classes of IP-enabled services are determined to be information services, could or should the Commission require *non*-facilities-based providers of such services to contribute to universal service pursuant to its permissive authority? Would such providers "provide" telecommunications? If the Commission were to exercise its permissive authority over facilities-based and non-facilities based providers of IP-enabled services, how could it do so in an equitable and nondiscriminatory fashion? Would the Commission identify specific services that are subject to its permissive authority? How would providers of IP-enabled services identify the portion of their IP-enabled service revenues that constitute end-user telecommunications revenues?[12]

To date, the FCC has not answered these questions. It must answer the questions in its rulemaking before it can give USAC guidance on the classification of dedicated IP transmission.

Because the FCC always has treated IP-based services with a light touch, because it never has classified dedicated IP transmission services that perform protocol processing as a telecommunications service, and because the FCC's rules do not include IP transmission services in the USF contribution base, the FCC should find that dedicated IP should not be classified as a telecommunications service subject to USF contribution.

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[12] *IP-Enabled Services*, Notice of Proposed Rulemaking, Docket No. WC 04-36, FCC 04-28, ¶ 64 (rel. Mar. 10, 2004).

III. Certain VPNs are information services.

Like Internet access, at least some VPN services provide features and functionalities that qualify them as information services. For example, a VPN may provide users the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others, which the FCC has found makes a service information.[13] So long as the provider of the VPN "supports such functions," and regardless of whether "subscribers use all of the functions," of the VPN, the FCC found that wireline broadband services offering these functions are information services.[14] In addition, some customers purchase VPNs exclusively or primarily to connect to the Internet. They receive IP addresses and are required to name the VPN provider as their Internet Service Provider.

USAC cannot reclassify these information service revenues based on the names of the revenue accounts in which they are reported. Commenters understand that because VPN services sometime consist of distinct charges, such as a loop charge, USAC may view the loop charge (or perhaps the entire service) as being subject to USF contribution as a telecommunications service. As explained below, however, moving even the loop portion of an information service into the USF contribution base would be inconsistent with years of treatment of contaminated information services and the *2005 Wireline Broadband Order*. The FCC has stated for years that when provided as part of an

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[13] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 36 (2002).

[14] *2005 Wireline Broadband Order at* ¶ 15.

information service, the underlying telecommunications component is "contaminated" and the entire service becomes an information service.

Many VPN products qualify under the current application of the information service definition because they all provide customers a single, integrated service. Although the provider may separate revenue for the loop components of a VPN, the provider offers the VPN to its customer as a single, integrated service, and that service offers features and functions that the FCC has stated trigger an information service classification. Even assuming *arguendo* that USAC can determine how a customer uses a VPN, under FCC rules, USAC cannot classify that service based on the customer's "primary use" of it. Therefore, FCC rules did not and do not require such providers to contribute to USF based on the transmission services that were contaminated by bundling them with information services in the form of a VPN.

IV. The 2005 Wireline Broadband Order reaffirms and explains the test USAC must apply when classifying services, and the associated revenue accounts, as information or telecommunications.

In this section, Commenters apply the FCC's *2005 Wireline Broadband Order* to show why a wireline Internet access product delivered at a speed of 200 kbps or higher, regardless of local loop or transport protocol, qualifies as an information service. Commenters use this example to show that an information service does not contain separate telecommunications and information components and that providers are not required to "unbundle" or allocate revenue to the transmission component of a functionally integrated, finished information service. USAC cannot rely on the bundled safe harbor or any other theory to require a carrier to assign a portion of the information service revenue to the transmission used to deliver the information—whether DSL, T-1,

ATM, Frame Relay, or IP. The same argument applies to any information service. Under current law, USAC may not require a contributor to allocate revenue from a functionally integrated information service between information and telecommunications components.

A. Any Internet Access Product delivered at a speed of 200 kbps or above qualifies as "wireline broadband Internet access service."

The *2005 Wireline Broadband Order* defines wireline broadband Internet access service as follows:

> Wireline broadband Internet access service, for purposes of this proceeding, is a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities. The term "Internet access service" refers to a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups.[15]

In that proceeding, the FCC stressed:

> that our actions in this Order are limited to wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, a fiber-to-the-curb or fiber-to-the-premises (FTTP) network, or *any other type of wireline facilities*, and whether that component is provided using circuit-switched, packet-based, or any other technology… For purposes of this proceeding, we define the line between broadband and narrowband consistent with the Commission's definition in other contexts (*i.e., services with over 200 kbps capability in at least one direction*). Although this definition remains in effect today, the Commission has indicated that it may examine the definition and modify it for future purposes.[16]

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[15] *Id.* at ¶ 9.

[16] *Id.* at n.15 (emphasis added) (citations omitted).

The FCC further explained that:

> Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capability with data transmission such that the consumer always uses them as a unitary service.[17]
>
> That is, the transmission component of wireline broadband Internet access service is "part and parcel" of [that service] and is integral to [that service's] other capabilities. *NCTA v. Brand X*, slip op. at 26 (quoting *Cable Modem Declaratory Ruling*, 19 FCC Rcd at 4823, para. 39).[18]

Internet access products, whether using the ISP's facilities or facilities leased from another wireline provider, are information services under these rules. Just like cable modem providers, providers of wireline Internet broadband access service provide their end-user customers a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always and necessarily uses them as a unitary service.

B. Wireline broadband Internet access service is an information service and is not subject to universal service assessments.

The FCC concluded that wireline broadband Internet access service, whether or not provided over a provider's own facilities, appropriately is classified as an information service because its providers offer a single, integrated service (*i.e.*, Internet access) to end users.

> Applying the definitions of "information services," "telecommunications," and "telecommunications service," we conclude that wireline broadband Internet access service…is appropriately classified as an information

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[17] *Id.* at ¶ 9.

[18] *Id.* at ¶ 9, n.17.

> service because its providers offer a single, integrated service (*i.e.*, Internet access) to end users.[19]

Such an information service is not subject to common carrier regulation:

> [t]he Supreme Court stated that, from an end user's perspective, cable modem service does not provide a transparent ability to transmit information. *See NCTA v.* Brand *X*, slip op. at 26-29; *see also Report to Congress*, 13 FCC Rcd at 11529, para. 58 (stating that "[a]n 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").[20]

The FCC went on to explain that:

> Like cable modem service…, wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (*e.g.*, email, web pages, and newsgroups). These applications encompass the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications," and taken together constitute an information service as defined by the Act.[21]

As an information service, revenues from wireline broadband Internet access service are not subject to universal service assessments. This position, taken by the FCC in the *2005 Wireline Broadband Order*, was further clarified in the FCC Press Release of August 5, 2005:

> Specifically, the Commission determined that wireline broadband Internet access services are defined as information services functionally integrated with a telecommunications component.[22]

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[19] *2005 Wireline Broadband Order* at ¶ 14.

[20] *Id.* at ¶ 14, n.36.

[21] *Id.* at ¶ 14.

[22] *See FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services*, FCC Press Release (rel. Aug. 5, 2005).

The FCC's position on this classification has been interpreted and restated several times since the issuance of the *2005 Wireline Broadband Order*. Commissioner Jonathan S. Adelstein restated the FCC's position in his Statement regarding the *2006 Contribution Methodology Reform Order*.

> Last August, the Commission embarked on an unchartered path by reclassifying broadband Internet access services as information services, outside the framework of our traditional Title II authority. Nowhere is this path more murky than in the case of universal service, where reclassifying these services removes their revenues from the mandatory contribution requirements of Section 254. At the time of the reclassification, the Commission adopted a transitional mechanism to stabilize funding for universal service support and made an extraordinary commitment to preserve and advance universal service.[23]

In March 2007, the FCC classified wireless broadband Internet access service as an information service and stated:

> Specifically, the Ruling finds that the transmission component underlying wireless broadband Internet access service is "telecommunications," and that the provision of this telecommunications transmission component as part of a functionally integrated wireless Internet access service is an information service. This approach is consistent with the framework that the Commission already has established for cable modem service, wireline broadband Internet access service, and BPL-enabled Internet access

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[23] *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability, Truth-in Billing and Billing Format; IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, p. 149 (2006) ("*2006 Contribution Methodology Reform Order*").

> service, thus furthering the goal of regulating like services in a similar manner.[24]

Even the USAC website reflects the FCC's position that wireline broadband Internet access service is an information service:

> On September 23, 2005, the Federal Communications Commission released an order (FCC 05-150) that, among other things, classified wireline broadband Internet access service as an information service.[25]

USAC directs carriers to paragraph 113 of the *2005 Wireline Broadband Order* for information regarding contributions.

> Paragraph 113 of the 2005 Wireline Broadband Internet Access Order sets forth the contribution obligations for facilities-based providers of wireline broadband Internet access services when they are no longer subject to mandatory contribution during the 270-day period following the effective date of this order or until the FCC adopts new contribution rules in its Contribution Methodology proceeding, whichever occurs earlier.[26]

Paragraph 113 of the *2005 Wireline Broadband Order* states:

> Accordingly, we conclude that facilities-based providers of wireline broadband Internet access services must continue to contribute to existing universal service support mechanisms *based on their current level of reported revenue* for the transmission component of their wireline broadband Internet access services for a 270-day period after the effective date of this Order or until we adopt new contribution rules in the Universal Service Contribution Methodology proceeding, whichever occurs earlier. That is, wireline broadband Internet access providers must maintain their *current universal service contribution levels* attributable to the provision of wireline broadband Internet access service for this 270-day period. We take this action, as a matter of policy, to preserve existing levels of

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[24] *See FCC Classifies Wireless Broadband Internet Access Service as an Information Service*, FCC Press Release (rel. Mar. 22, 2007).

[25] *See "Helpful Hints for Contributor Companies,"* http://www.universalservice.org/fund-administration/forms/499qchints.aspx).

[26] *Id.*

> universal service funding, and prevent a precipitous drop in fund levels while we consider reform of the system of universal service in the Universal Service Contribution Methodology proceeding.[27]

By referring to the current level of reported revenue, the FCC recognized that some providers were not currently reporting, or contributing to USF based on, the contaminated broadband transmission service.[28] This is consistent with the *Wireline Broadband NPRM* that initiated the wireline broadband proceeding and which stated:

> [u]nder our existing rules and policies, telecommunications carriers providing telecommunications services, *including broadband transmission services*, are subject to [USF] contribution requirements. In particular, with respect to wireline telecommunications carriers, such carriers must contribute 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. Accordingly, those carriers must contribute based on the revenues associated with the telecommunications services.[29]

Clearly, then, the FCC intended, and USAC understood, that wireline broadband Internet access service must be classified as an information service and must not be subjected to universal service assessments.

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[27] *2005 Wireline Broadband Order* at ¶ 113.

[28] At least one commenter in the wireline broadband proceeding, Sprint, argued that prior FCC decisions did not lead to the conclusion that broadband transmission "bundled" with Internet access was subject to USF contribution, and was in fact directly contradicted by the FCC's tentative conclusive in the NPRM that broadband transmission was an information service. *See* Initial Comments of Sprint Corporation, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, p. 19, n.17 (filed May 3, 2002).

[29] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 72 (2002) ("*Wireline Broadband NPRM*") (emphasis added).

C. Whether provided by a facilities-based or non-facilities-based carrier, wireline broadband Internet access service is not subject to universal service assessments.

When the FCC applies current law to classify a service, even where it has attempted to make that classification apply prospectively, the courts have refused to defer to the FCC's determination on retroactivity: "In cases in which there are 'new applications of existing law, clarifications, and additions,' the courts start with a presumption in favor of retroactivity."[30]

Non-facilities-based providers never have been required to contribute to universal service for the transmission component of wireline broadband Internet service - prior to the *2005 Wireline Broadband Order* or after:

> ISPs that own no telecommunications facilities and lease transmission, such as T1 lines, from telecommunications carriers to transmit their information services, do not contribute directly to universal service…[31]

The rules never have required *non-facilities-based* providers to segregate the telecommunications portion of wireline broadband Internet service for universal service fund reporting purposes because such entities are not telecommunications carriers and do not provide transmission services on a stand-alone basis. The FCC defined "facilities-based" in the 2002 NPRM:

> For purposes of this Notice, we use the term "facilities-based" to refer to providers of broadband Internet access services that furnish their own last-

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[30] *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2006) (citations omitted).

[31] *Wireline Broadband NP*RM at ¶ 74.

> mile connection, irrespective of the transmission medium, to the customer.[32]

It also stated that:

> [u]nder our existing rules and policies, telecommunications carriers providing telecommunications services, *including broadband transmission services*, are subject to [USF] contribution requirements. In particular, with respect to wireline telecommunications carriers, such carriers must contribute *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. Accordingly, those carriers must contribute based on the revenues associated with the telecommunications services.[33]

FCC rules thus require contribution to USF by facilities-based carriers only *to the extent* that an underlying transmission service is offered on a *stand-alone* basis. The FCC never required facilities-based carriers to segregate the telecommunications transmission component of a wireline broadband Internet service for USF reporting purposes where such transmission services are not otherwise provided on a stand-alone basis. To the contrary, the FCC previously found that when provided as part of an information service, the underlying telecommunications component is "contaminated" and the entire service becomes an information service.[34]

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[32] *Id.* at n.36.

[33] *Id.* at ¶ 72 (emphasis added).

[34] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 57 (1998) ("*Report to Congress*"); *see also Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980).

D. Wireline broadband Internet access service is classified based on the service provided to the end user; it does not contain separate telecommunications service and information service components.

In the Wireline Broadband Internet Access proceeding, the FCC determined that whether a telecommunications service is being provided turns on what the entity is "offering…to the public" and the customers' understanding of that service:

> 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 service and a distinct transmission service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of telecommunications service to the end user *irrespective of how the service provider may decide to offer the transmission component to other service providers*.[35]

The FCC also "disagree[d] with those commenters that argue[d] that wireline broadband Internet access service necessarily includes *both* an information service *and* a telecommunications service."[36] It explained that "[t]hose arguments are premised on an assumption, which this Order fundamentally alters, that the carrier continues to be under a Commission-imposed compulsion to offer the transmission underlying that service as a telecommunications service."[37]

In that same proceeding, the FCC clarified that "some providers of wireline broadband Internet access service may choose to offer a *stand-alone* broadband

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[35] *2005 Wireline Broadband Order* at ¶ 104 (emphasis added).

[36] *Id.* at n.31 (emphasis in original).

[37] *Id.*

telecommunications service on a common carrier basis. To the extent that they do so, they must continue to contribute to universal service mechanisms on a permanent basis pursuant to Section 254(d)."[38]

USAC cannot avoid this finding by looking at revenue accounts in isolation. For example, TelePacific provides wireline broadband Internet access services at various speeds.[39] Although TelePacific reports components of its Internet access service in, for example, revenue accounts named "bonded T1" and "channels data transport," USAC cannot rely on those account names to claim the "service" primarily is data transport and classify the revenue as telecommunications. Regardless of a company's accounting methodology, wireline broadband Internet access service is *not* two stand-alone services; first, broadband transmission provided on a common carrier basis and second, Internet access. Rather, wireline broadband Internet access service is a functionally integrated, finished information service.

E. Providers of wireline broadband Internet access service are not required to "unbundle" or allocate revenue to the transmission component of a functionally integrated, finished wireline broadband Internet access service offering.

Pursuant to the *Computer Inquiry* requirements, a "facilities-based" provider that offered an enhanced service (now called an "information service") was required to unbundle the transmission component of the enhanced service and to offer the

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[38] *Id.* at n.357 (emphasis added).

[39] *See, e.g.*, http://www.telepacific.com/products/bondedT1.asp.

transmission component pursuant to tariff and separate from the enhanced service offering. However, in the *2005 Wireline Broadband Order*, the FCC determined that:

> Facilities-based wireline broadband Internet access service providers are no longer required to separate out and offer the wireline broadband transmission component (*i.e.*, transmission in excess of 200 kbps in at least one direction) of wireline broadband Internet access services as a stand-alone telecommunications service under Title II, subject to the transition explained below. In addition, the Bell Operating Companies (BOCs) are immediately relieved of all other *Computer Inquiry* requirements with respect to wireline broadband Internet access services.[40]
>
> We decline to continue to impose any *Computer Inquiry* requirements on facilities-based carriers in their provision of wireline broadband Internet access service. Consequently, BOCs are immediately relieved of the separate subsidiary, CEI and ONA obligations with respect to wireline broadband Internet access services. In addition, subject to a one-year transition period for existing wireline broadband transmission services, all wireline broadband Internet access service providers are no longer subject to the *Computer II* requirements to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis.[41]

The FCC clarified that the actions taken in the *2005 Wireline Broadband Order* are limited to the transmission component of wireline broadband Internet access service only.[42] Therefore, after the one-year transition period, facilities-based providers no longer are required to provide the transmission component underlying wireline broadband Internet access service as a separate common carrier service and such services, when provided on a non-common carrier basis after the expiration of the 270-day freeze period, are not subject to universal service assessment.

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[40] *2005 Wireline Broadband Order* at ¶ 5.

[41] *Id.* at ¶ 41.

[42] *Id.* at n.107.

The FCC confirmed its position in the *2006 Contribution Methodology Reform Order*:

> Furthermore, we note that in the Wireline Broadband Internet Access Order, the Commission permitted facilities-based providers to cease providing the transmission component underlying that service as a separate common carrier service if they choose. (Citation omitted) To the extent that a provider has discontinued providing that service as a common carrier service, it is not required to contribute to the universal service fund based on the revenues derived from providing that transmission service after the expiration of the 270-day contribution freeze period.[43]

Even though wireline carriers no longer are *required* to provide the transmission component of wireline broadband Internet access service on a common carrier basis, such carriers my *choose* to do so and, in that event, revenue from the *stand-alone* transmission component is subject to universal service assessments if it is provided on a *common carrier* basis.

The FCC's "Safe Harbor" rule does not apply to a transmission service that is "contaminated" by information processing. The FCC never has applied its USF safe harbor for "bundled" services to a transmission service that has been "contaminated" by bundling it with Internet access. Rather, the bundled safe harbor rules applied only to combinations of stand-alone services that were marketed and sold together as a package at a total price less than the sum of stand-alone prices.[44]

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[43] *2006 Contribution Methodology Reform Order* at n.206.

[44] *Report to Congress at ¶ 57.*

The combination referred to in the "bundled" safe harbor is a single package at a single price for multiple services, not components linked to form a single service.[45] In offering wireline broadband Internet access service, the provider is not "bundling" multiple services at a single price. Instead, it is integrating components into a single, finished service. To determine whether a product offering is an "enhanced" or "information" service, the FCC applies, among other tests, a "contamination" doctrine. The doctrine is premised on the ability to separate the basic and enhanced elements of a functionally integrated service offering.

Under this approach, use of regulated transmission paths (*i.e.*, a T-1 circuit) does not convert an enhanced service (*i.e.*, Internet access) into a basic or adjunct-to-basic service. The enhanced component of a particular service offering contaminates the basic component and, as a result, the FCC treats *all* of that particular offering as "enhanced."

> [a]n 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.[46]
>
> Since *Computer II*, we have made it clear that offerings by non-facilities-based providers combining telecommunications and computing components should always be deemed enhanced.[47]

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[45] *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418, ¶¶ 10-12, 48-55 (2001) (discussing "price bundling" by non-dominant carriers of CPE, enhanced services and interstate interexchange services; price bundling by dominant carriers of CPE, enhanced and local exchange services; and unbundling the single price for a package of services, such as voicemail and basic phone service, into prices for stand-alone services that make up the price bundle).

[46] *Report to Congress* at ¶ 58.

[47] *Id.* at ¶ 60.

Based on this "contamination doctrine," the transmission component of wireline broadband Internet access service is contaminated and, therefore, must be deemed "enhanced." As an "enhanced" or "information" service, neither the transmission component nor the bundled service offering (*e.g.*, wireline broadband Internet access service) is assessable under the FCC's universal service fund contribution rules.

F. The Form 499-A instructions do not require providers of wireline broadband Internet access service to report end user revenue for such service on Line 406.

Line 406 of the 2008 FCC Form 499A requests revenues from "local private line and special access service [include the transmission portion of wireline broadband Internet access provided on a common carrier basis]."[48] The 2008 Form 499A Instructions state:

> Amounts reported on Line 406 include revenues from the transmission component of wireline broadband Internet access service to the extent described below as well as other revenue from private line and special access service.[fn41] Specifically, Line 406 includes all revenue from broadband service (including the transmission component of wireline broadband Internet access service) *provided on a common carrier basis*. Revenues for the provision of wireline broadband Internet access transmission on a non-common carrier basis should be reported on Line 418.3.[49]

Footnote 41 referenced in the above citation states:

> Wireline broadband Internet access service is a service that uses wireline facilities of the telephone network to provide subscribers with Internet access capabilities. It can be provided over facilities such as copper loops, hybrid copper-fiber loops, fiber-to-the-curb, fiber-to-the-premises, or any

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[48] 2008 FCC Form 499A Instructions, p. 5.

[49] *Id.* at p. 26 (emphasis added).

> other type of wireline facilities, and can use circuit-switched, packet-based or any other technology. Wireline broadband Internet access service inextricably intertwines information processing capabilities with data transmission such that the consumer always uses them as a unitary service. Wireline broadband Internet access service should be carefully distinguished from other wireline broadband services such as ATM, frame relay, gigabit Ethernet service, and other high-capacity special access services that end users have traditionally used for basic transmission purposes. These services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because these services typically are used for basic transmission purposes, they are telecommunications services and must be reported on Line 406. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, Report and Order, 20 FCC Rcd 14853, 14860, para. 9 (2005), *petitions for review pending, Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases), 3rd Cir. Filed Oct. 26, 2005.[50]

The FCC also states in Paragraph 9 of the *2005 Wireline Broadband Order*:

> Wireline broadband Internet access service, for purposes of this proceeding, is a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities. The term "Internet access service" refers to a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups. Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service. For example, as we explained in the Wireline Broadband NPRM, where wireline broadband Internet access service enables an end user to retrieve files from the World Wide Web, the end user has the capability to interact with information stored on the service provider's facilities. To the extent a provider offers end users a capability to store files on the service provider's computers to establish "home pages," the consumer is utilizing

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[50] *Id.*

> the "capability for…storing…or making available information." In short, providers of wireline broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition. These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as *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 purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions. These broadband telecommunications services remain subject to current Title II requirements.[51]

The 2008 FCC Form 499A instructions omit the term "stand-alone" which appears in paragraph 9 of the *2005 Wireline Broadband Order*. Although this term is important to differentiate between wireline broadband Internet access service (an information service) and basic transmission service (a telecommunications service), its omission does not and cannot change the substantive USF contribution requirements adopted in the *2005 Wireline Broadband Order*. Paragraph 14 and footnote 38 of the Order provide further clarification:

> …like cable modem service …, wireline broadband Internet access service *combines computer processing, information provision, and computer interactivity with data transport*, enabling end users to run a variety of applications (*e.g.*, e-mail, web pages, and newsgroups). These applications encompass the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," and *taken together constitute an information service* as defined by the Act.[52]

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[51] *2005 Wireline Broadband Order* at ¶ 9 (emphasis added).

[52] *Id.* at ¶ 14 (emphasis added).

> In contrast, to the extent a service does *not* provide these capabilities, *but merely provides transmission* whether narrowband or broadband, it would not be an information service. *See supra* para. 9 (explaining the difference between wireline broadband Internet access service and other wireline broadband transmission services).[53]

The *2005 Wireline Broadband Order* makes clear that USF contributions on broadband transmission services only are due when the service "merely provides transmission" capability with no computer processing. Although the 2008 FCC Form 499A instructions omit the term "stand-alone," they retain the requirement that broadband transmission subject to USF contribution be offered on a common carrier basis ("telecommunications services") and not be combined with computer processing. Any time data transport is combined with computer processing in a functionally integrated service, it qualifies as an "information service" not subject to USF assessment.

V. To prevent a competitive disadvantage, the FCC must find that universal service obligations do not apply to providers of wireline information services.

Imposing universal service obligations on a facilities-based or on a non-facilities based provider of wireline broadband Internet access (either directly or indirectly through the carriers that sell local loops) puts wireline providers at a competitive disadvantage in the broadband Internet access market *vis-a-vis* carriers using other technologies that do not make universal service contributions on their broadband Internet access services. While the FCC removed this competitive disadvantage for local loops purchased on a non-common carrier basis in the *2006 Contribution Methodology Reform Order*, it has not clearly addressed this issue for local loops purchased as

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[53] *Id.* at n.38 (emphasis added).

common carrier services. Moreover, as the excerpt from USAC's audit report shows, USAC is misinterpreting the *2005 Wireline Broadband Order* to put facilities-based wireline broadband Internet access providers at a competitive disadvantage vis-à-vis providers using non-wireline technologies. These outcomes are not competitively neutral and need to be clarified or changed so that USF contributions are applied equally to all providers of information services, regardless of transmission technology.

VI. Conclusion

Products provided on a stand-alone basis for basic transmission purposes (*i.e.*, stand-alone ATM service, frame relay, gigabit Ethernet service, as described in paragraph 9 of the *2005 Wireline Broadband Order*) are telecommunications services and end user revenue from such services properly would be reported on Line 406 of FCC Form 499A. If a revenue account is named for a transmission service, however, that does not begin and end the inquiry. USAC must determine what service is provided to the end user and classify all of the revenue accounts that make up that service accordingly. USAC cannot force a carrier providing wireline broadband Internet access or any other service that meets the FCC's definition of "information service" to "unbundle" that service to produce a telecommunications service. The carrier may classify the revenue as information service not subject to USF contribution.

Respectfully submitted,

_*/s/ Tamar Finn*_____

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