

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Application for Review of Decision of the)	
Wireline Competition Bureau filed by Global)	
Crossing Bandwidth, Inc.)	
)	
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)	
)	
XO Communications Services, Inc.)	
Request for Review of Decision)	
of the Universal Service Administrator)	
)	
Universal Service Administrative Company)	
Request for Guidance)	

PETITION FOR PARTIAL RECONSIDERATION

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EXECUTIVE SUMMARY

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) requests that the FCC partially reconsider its *2012 Wholesaler-Reseller Clarification Order*¹ and address the issues raised by TelePacific in this proceeding to ensure that the universal service fund (“USF”) contribution rules are applied to TelePacific and similarly situated providers of broadband Internet access services in a competitively neutral and nondiscriminatory manner and not in violation of Section 254 of the Communications Act (“Act”) and the well-established Commission policy of nondiscrimination and competitive neutrality.

The Commission’s errors can be traced to its failure to address material issues presented by TelePacific. It erroneously assumed TelePacific was seeking reconsideration of previously adopted orders and simply dismissed TelePacific’s concerns as untimely.² By failing to address these issues, the Commission adopted a new reseller certification requirement that creates discrimination among providers of broadband Internet access services and adversely affects TelePacific and similarly situated providers of broadband Internet access services. This discrimination materially (1) violates Section 254 of the Act, (2) contradicts the Commission’s policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission’s goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission’s well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of

¹ *AT&T, Inc. CenturyLink, SureWest Communications and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration*, Order, WC Docket No. 06-122, FCC 12-134 (Nov. 5, 2012) (“*2012 Wholesaler-Reseller Clarification Order*”).

² *2012 Wholesaler-Reseller Clarification Order* at n.109.

broadband Internet access services utilizing certain leased special access facilities but not imposing USF on facilities-based providers of the identical service.

TelePacific did not seek then, and is not seeking now, reconsideration of prior FCC Orders. Rather, TelePacific seeks partial reconsideration of the *2012 Wholesaler-Reseller Clarification Order* because it purports to apply the decisions adopted in the *Wireline Broadband Order* and the *Contribution Methodology Order* to TelePacific in a way that violates the Act and Commission rules and policies. Specifically, the *2012 Wholesaler-Reseller Clarification Order* “clarified” that “reseller” certification is required on a service-by-service basis and requires carriers to treat TelePacific as an end-user with respect to any leased special access service that TelePacific incorporates only into a broadband Internet access service. TelePacific properly raises this substantive challenge now because the Commission is attempting to apply unlawfully its prior orders against TelePacific through the *2012 Wholesaler-Reseller Clarification Order*. The Form 499 Instructions that currently apply the carrier’s carrier rule on an entity-by-entity basis, consistent with past Commission orders and rules, effectively exempt telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. The *2012 Wholesaler-Reseller Clarification Order* ignores the conflict its new service-by-service interpretation creates with the *First Report and Order*. The Commission cannot change its definition of reseller certification without acknowledging and explaining the reason for the change.

Reconsideration is appropriate for the Commission to correct the material errors and omissions in the *2012 Wholesaler-Reseller Clarification Order*. Such reconsideration will result in substantial alteration of the decision, which is necessary for the *2012 Wholesaler-Reseller*

Clarification Order to be placed in compliance with the Act and the Commission's long-standing principles of nondiscrimination and competitive neutrality.

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PETITION FOR PARTIAL RECONSIDERATION

I. INTRODUCTION AND BACKGROUND

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) requests that the Federal Communications Commission (“Commission”) partially reconsider its *2012 Wholesaler-Reseller Clarification Order* and address the issues raised by TelePacific in this proceeding to ensure that the universal service fund (“USF”) contribution rules are applied to TelePacific and similarly situated providers of broadband Internet access services in a competitively neutral and nondiscriminatory manner and not in violation of Section 254 of the Communications Act and the well-established Commission policy of nondiscrimination and competitive neutrality. TelePacific simultaneously is filing a Request for Stay Pending Reconsideration.

The Commission erroneously assumed TelePacific was seeking reconsideration of previously adopted FCC Orders and simply dismissed TelePacific's concerns as untimely.³ By imposing USF on the leased special access circuits used only in TelePacific's broadband Internet access service, but not on the identical circuits used in the broadband Internet access service offered by an ILEC over its own facilities, the Commission acted arbitrarily and capriciously without even acknowledging, let alone resolving, all of the issues TelePacific presented.

TelePacific did not seek then, and is not seeking now, reconsideration of prior Commission Orders. Rather, TelePacific seeks partial reconsideration of the *2012 Wholesaler-Reseller Clarification Order* because it attempts to apply the decisions adopted in the *Wireline Broadband Order* and the *Contribution Methodology Order* to TelePacific in a way that violates the Act and Commission rules and policies. TelePacific is requesting that the Commission reconsider its inappropriate application upon TelePacific of these prior Commission Orders.

Specifically, the *2012 Wholesaler-Reseller Clarification Order* "clarified" that "reseller" certification is required on a service-by-service basis and requires carriers to treat TelePacific as an end-user when TelePacific incorporates leased special access services only into its broadband Internet access service. The Form 499 Instructions that apply the carrier's carrier rule on an entity-by-entity basis create an exemption for telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. The *2012 Wholesaler-Reseller Clarification Order* ignores the conflict its new service-by-service interpretation creates with the *First Report and Order*.⁴ The Commission cannot change its reseller certification without acknowledging and explaining the reason for the change.

³ *2012 Wholesaler-Reseller Clarification Order* at n.109.

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Report and Order*").

In the *2012 Wholesaler-Reseller Clarification Order*, the Commission purported to resolve various requests for review and petitions for clarification, including the Petition for Clarification or in the Alternative for Partial Reconsideration filed by AT&T Inc., CenturyLink, SureWest Communications, and Verizon⁵ of certain language in the *TelePacific Order*⁶ relating to the transmission component of broadband Internet access services and USF reporting obligations. However, the Commission failed to address several material issues raised by TelePacific, including TelePacific’s argument that it is discriminatory for the FCC to assess USF on the incumbent local exchange carrier (“ILEC”) when the ILEC provides special access circuits to TelePacific as an input to TelePacific’s wireline broadband Internet access service – resulting in TelePacific indirectly contributing to the USF in the form of ILEC surcharges – while there is no USF contribution at all when the ILEC uses its own facilities as an input to the ILEC’s wireline broadband Internet access service. This discrimination (1) violates Section 254 of the Act, (2) contradicts the Commission’s policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission’s goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission’s well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access services while not imposing USF on facilities-

⁵ *AT&T Inc., CenturyLink, SureWest Communications and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration*, WC Docket No. 06-122 (filed June 1, 2010) (“Petition for Clarification”).

⁶ *Request for Review of a 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, 25 FCC Rcd 4652 (Wireline Comp. Bur. 2010) (“*TelePacific Order*”).

based providers of the identical service.⁷ The Commission’s action unilaterally to change the “reseller certification,” without first deciding the threshold question of whether the application of USF contribution rules in the manner stated in the *2012 Wholesaler-Reseller Clarification Order* violates Section 254 of the Act and well-established Commission policies of competitive neutrality and leveling the playing field for all forms of broadband Internet access, is both arbitrary and contrary to law.

Based on the language of the *2012 Wholesaler-Reseller Clarification Order*, TelePacific believes that partial reconsideration of the *2012 Wholesaler-Reseller Clarification Order* is necessary because of the Commission’s arbitrary and capricious failure to address the material issues TelePacific presented in the underlying proceeding and the Commission’s inappropriate application of the *Wireline Broadband Order* and the *Contribution Methodology Order*. By failing to address these issues, the Commission instituted rules, through the *2012 Wholesaler-Reseller Clarification Order*, which materially contradict the Act and adversely affect TelePacific and similarly situated providers of broadband Internet access service. Therefore, this Petition for Reconsideration must be granted to give the Commission an opportunity to correct this material error in the *2012 Wholesaler-Reseller Clarification Order*.⁸

⁷ Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications to Petition for Clarification or in the Alternative for Partial Reconsideration, WC Docket No. 06-122 (filed July 6, 2010) (“TelePacific Opposition”); Letter from Andrew Lipman *et al.*, Counsel for U.S. TelePacific Corp. d/b/a TelePacific Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 2 (filed Feb. 1, 2010) (“TelePacific Feb. 1, 2010 *Ex Parte*”).

⁸ The Commission has consistently held that “the only valid grounds for rehearing are manifest error or omission so material that the corrections would result in substantial alteration of the original decision. Correspondingly, rehearing generally is not available for the purpose of rearguing matters on which there has been deliberation and decision . . .” *In re: Liability of Sonic Cable TV Grover City, CA Arroyo Grande, CA Pismo Beach, CA*, 1985 FCC LEXIS 2585 (FCC 1985) citing *Empire State Cable TV Co., Inc. (Binghamton, NY)*, 10 FCC 2d 341, 342 (1967).

II. TELEPACIFIC’S PETITION FOR RECONSIDERATION CHALLENGES A SPECIFIC APPLICATION OF PREVIOUSLY ADOPTED FCC ORDERS TO TELEPACIFIC AND IS NOT AN UNTIMELY PETITION FOR RECONSIDERATION OF THE *WIRELINE BROADBAND ORDER* OR THE *CONTRIBUTION METHODOLOGY ORDER*.

As TelePacific has argued,⁹ when an agency attempts to enforce an order against a party, the agency cannot escape a substantive challenge merely because the time for review of the initial rulemaking order has passed.¹⁰ The Telecommunications Access Policy Division recognized a party’s right to challenge application of a rule in the context of a USAC appeal, stating that “even where the period for challenging a general rule has passed, parties may still challenge a specific application of the rule on the grounds that the rule is substantively invalid.”¹¹ As the U.S. Court of Appeals for the District of Columbia Circuit explained, “administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.”¹² Applying these previously adopted FCC Orders to TelePacific and similarly situated carriers as the Commission suggested in the *2012 Wholesaler-Reseller Clarification Order* would violate the principle of competitive neutrality and Section 254 of the

See also Reconsideration of Commission’s Action, 77 FCC 2d 54, 55 (1980); *WWIZ, Inc. (Lorain, OH)*, 37 FCC 685, 686 (1964).

⁹ Notice of *Ex Parte* Communications Letter from Tamar E. Finn, Counsel for U.S. TelePacific Corp. to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 (filed Mar. 31, 2011).

¹⁰ *See, e.g., Functional Music, Inc. v. Federal Communications Commission*, 274 F.2d 543, 546 (D.C. Cir. 1958) (providing that review of a final agency order can be obtained after the initial limitations period in cases where the agency takes further action to apply the rule.)

¹¹ *Petition for Reconsideration of the Request for Review of the Decision of the Universal Service Administrator by Prince George’s County Schools, Upper Marlboro, Maryland; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association Inc.*, Order on Reconsideration, 17 FCC Rcd 8649, ¶5 (Telecommunications Access Policy Division, 2002) (citing *Functional Music*).

¹² *Functional Music*, 274 F.2d at 546.

Act, would create an unlevel playing field, and would unfairly disadvantage TelePacific and other similarly situated carriers vis-à-vis their competitors that provide broadband Internet access over their own facilities. Such a requirement is an institutionalization of commercial inequality and directly contradicts the Commission’s goal of fostering competition and ensuring affordable broadband Internet access to every American. TelePacific is permitted to raise this substantive challenge now because the Commission is attempting to unlawfully apply its prior orders against TelePacific through the *2012 Wholesaler-Reseller Clarification Order*.

III. THE COMMISSION MUST CORRECT THE MATERIALLY ERRONEOUS DIRECTIVE IMPOSED UPON TELEPACIFIC THROUGH THE 2012 WHOLESALER-RESELLER CLARIFICATION ORDER AND THE COMMISSION MUST ABIDE BY ITS COMMITMENT TO CREATE A LEVEL PLAYING FIELD FOR ALL BROADBAND INTERNET ACCESS SERVICES

In a series of orders, the Commission deliberately and expressly created a level playing field for all broadband Internet access services, regardless of the transmission technology or network used to deliver such services to end users.¹³ In the seminal *Wireline Broadband Order*,

¹³ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, ¶56 (2007) (stating the Commission’s goal of “encouraging the development of information services by ensuring that they remain free from common carrier regulation, and services the Act’s overarching goal of fostering competition by providing a level playing field in the market and removing unnecessary regulatory impediments.”); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶2 (2006) (classifying broadband over power lines as an information service and holding that such classification “furthers the Commission’s goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶1 (2005) (“*Wireline Broadband Order*”) (finding that the Commission’s determination that broadband access to the Internet over wireline is an information service “furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner, after a transitional period”); *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 Invent Over Cable Facilities*, Declaratory Ruling and

the Commission was clear that a broadband Internet access service would be classified as an information service regardless of the underlying transmission technology.¹⁴ As explained on the record,¹⁵ and again below in Section III.A., the Commission subsequently clarified that this bedrock nondiscrimination principle also applies in the case of indirect contribution by downstream providers that purchase broadband transmission from facilities-based carriers to incorporate in their broadband Internet access services. The *2012 Wholesaler-Reseller Clarification Order*, however, substantially alters this nondiscrimination principle and actually creates discrimination among providers of broadband Internet access services. This discrimination (1) violates Section 254 of the Act, (2) contradicts the Commission’s policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission’s goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission’s well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access services while not imposing USF on facilities-based providers of the identical service. Reconsideration is an appropriate mechanism for the Commission to correct the material errors and omissions in the *2012 Wholesaler-Reseller Clarification Order*. Such reconsideration will result in substantial alteration of the Commission’s original decision, which is a necessary correction for the *2012*

Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶6 (200) (holding that the Commission’s Order “seek[s] to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures” and “strive[s] to develop an analytical approach that is to the extent possible consistent across multiple platforms”).

¹⁴ *Wireline Broadband Order*, ¶16.

¹⁵ TelePacific Feb. 1, 2010 *Ex Parte*.

Wholesaler-Reseller Clarification Order to be consistent with the Act and the Commission's long-standing principles of nondiscrimination and competitive neutrality.

A. Indirect USF Contributions and the *Contribution Methodology Order*

In 2006, months after the time to appeal the *Wireline Broadband Order* had passed, an independent Internet Service Provider ("ISP"), EarthLink, Inc. ("EarthLink"), wrote to then-Bureau Chief Thomas Navin seeking clarification of that Order to ensure that it was implemented to treat ILECs and other ISPs in a competitively neutral manner.¹⁶ EarthLink explained that if the ILEC selling DSL transmission service treated EarthLink as an end user, EarthLink would be required to make an indirect contribution to USF. In contrast, the ILEC would not be required to make any USF contribution when providing the wireline broadband Internet access service to its direct end users. In short, EarthLink's indirect USF contribution (through the ILEC) put EarthLink at a distinct competitive disadvantage in the market for wireline broadband Internet access service.

The Commission, in order to ensure its commitment to a level playing field, correctly fixed this inequity in footnote 206 of the *Contribution Methodology Order*.¹⁷ Citing the EarthLink *ex parte*, the Commission held that providers of detariffed broadband transmission services would not be required to contribute to USF on such services after the end of the

¹⁶ Notice of *Ex Parte* Communication Letter from Mark J. O'Connor, Counsel to EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33 (filed June 8, 2006) ("EarthLink *Ex Parte*").

¹⁷ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, n.206 (2006) ("*Contribution Methodology Order*") ("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.").

transition period (August 2006). Absent this clarification, as EarthLink pointed out,¹⁸ the FCC could have inadvertently tilted the broadband information services arena by effectively affording a cost advantage to incumbent facilities-based providers of retail DSL-based Internet access information services in the amount of the USF contribution. In the instant proceeding, the FCC again could inadvertently tilt the wireline broadband Internet access service arena by effectively affording a cost advantage to incumbent facilities-based providers of retail broadband Internet access in the amount of the USF contribution on special access services. Under the *2012 Wholesaler-Reseller Clarification Order*, TelePacific is required to contribute indirectly to the USF on its broadband Internet access service, while the ILECs are not required to make any USF contributions on the identical service. Ownership of the facilities used in the provision of broadband Internet access service should not affect the FCC's exemption of such service from USF contributions. "What matters is the finished product rather than the facilities used to provide it."¹⁹

B. Section 254 and the USF Principle of Competitive Neutrality

Section 254(d) requires contributions to USF be assessed on an "equitable and nondiscriminatory basis, to the specific, predictable and sufficient mechanisms established by the [FCC]."²⁰ In the *First Report and Order*, the FCC adopted a principle of competitive neutrality:

competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.²¹

¹⁸ EarthLink *Ex Parte*, p.1

¹⁹ *Wireline Broadband Order*, ¶16.

²⁰ 47 U.S.C. §254(d).

²¹ *First Report and Order*, ¶47.

Further, the Universal Service Administrative Company (“USAC”) is required to administer the universal service support mechanisms “in an efficient, effective and competitively neutral manner.”²²

Assessing USF contributions on the provider of the upstream transmission service (here, the ILECs providing TelePacific special access circuits) utilized as an input to TelePacific’s broadband Internet access service violates the principle of competitive neutrality. It also contradicts and undermines the USF exemption the Commission granted for the finished service, especially because the Commission went out of its way to emphasize that “there is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities.”²³

In the *2012 Wholesaler-Reseller Clarification Order*, the Commission acted reflexively to impose USF on the transmission service merely because it is offered on a common carrier basis (*i.e.*, as a telecommunications service). Although footnote 26 of the *Contribution Methodology Order* does not address directly whether transmission service offered on a common carrier basis enjoy the same exemption when sold for use as an input in a broadband Internet access service, for purposes of Section 254(g)’s equitable and nondiscriminatory requirement and the competitive neutrality principle, common versus private carriage is a distinction without a difference. The Commission determined in 1997 that the “principle of competitive neutrality” mandates that all “entities that provide interstate telecommunications,” including those that operate on a non-common-carrier basis, must contribute to universal service.²⁴ This rule was codified at 47 C.F.R. §54.706(a), and remains in effect. The Commission therefore cannot apply

²² TelePacific Opposition at 5 *citing* 47 C.F.R. §54.701(a).

²³ *Wireline Broadband Order*, ¶16.

²⁴ *First Report and Order*, ¶¶794-796.

the *Contribution Methodology Order* to exempt private carriers without also exempting common carriers providing the same services.²⁵ Imposing USF indirectly on the special access service input is like pulling the first string that unravels the competitive neutrality quilt the Commission fashioned in the *Wireline Broadband Order*.

C. Upstream Assessment of USF Undermines the Exemption of Broadband Internet Access Service from USF

Exempting telecommunications services from USF contribution, in these particular circumstances, is consistent with the text of the statute, congressional intent and the authority delegated to the FCC. By way of example, in the *First Report and Order*, the Commission recognized that carriers providing telecommunications services on a wholesale basis would not contribute to USF on such services, even though such services fall under the “mandatory” contribution category of telecommunications services. The Commission justified this “exemption” of certain telecommunications services to avoid the double counting problem.²⁶ The Commission explained the problem as follows:

[I]f facilities-based carrier X sells \$200.00 worth of telecommunications services directly to a customer, its contribution will be \$20.00. If reseller B buys \$180.00 worth of wholesale services from carrier A and B sells the same retail services in competition with X after adding \$20.00 of value, B would owe a contribution of \$20.00 on these \$200.00 worth of services, but B would also be required to recover the portion of the \$18.00 contribution that A must make and would likely pass on to B. Therefore, while X would face \$200.00 in service costs and \$20.00 in support costs, B would face \$200.00 in service costs and almost certainly substantially more than \$20.00 in support costs.²⁷

²⁵ “Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.” *National Conservative Political Action Committee v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1979); accord, *Colorado Springs v. Solis*, 589 F.3d 1121, 1132 (10th Cir. 2009).

²⁶ *First Report and Order*, ¶845.

²⁷ *Id.*

The facts here are strikingly similar. If facilities-based carrier X sells \$200 worth of broadband Internet access to a direct customer, its USF contribution will be \$0. If reseller B (here, TelePacific) buys \$180 worth of wholesale services from facilities-based carrier A and B sells the same retail services in competition with X after adding \$20 of value, B would owe a contribution of \$0, but B would also be required to recover the portion of the \$18 USF contribution that A must make and would likely pass on to B. Therefore, while X would face \$200 in service costs and \$0 in USF contribution, B would face \$200 in service costs and \$18 in USF contribution costs.

In the *Contribution Methodology Order*, the Commission eliminated an upstream contribution obligation in a way that respects its exemption for the finished broadband Internet access service. The same rationale justifies an “exemption” for telecommunications services used as an input in broadband Internet access. It is inconsistent with well-established principles that once an exemption is granted for a certain product, the fee or tax will not be imposed on upstream providers. The upstream exemption is necessary to avoid the manifest unfairness of the cascading effects of fees and taxes.

D. Refusing to Apply USF to Upstream Carriers Promotes Good Policy

As TelePacific argued,²⁸ although tax policy considerations are not directly relevant to USF policy considerations, they are helpful as analogies. Like USF, state sales taxes as applied nationwide are cascading taxes that generally are only imposed on retail sales made to consumers. Therefore, sales at stages earlier than the retail level (non-retail sales or wholesales), generally are not subject to the tax. The exemption for non-retail sales avoids the cascading effect of taxes imposed at each stage of the production process.

²⁸ TelePacific Feb. 1, 2010 *Ex Parte*, p.7-8.

When a cascading tax is applied, it causes an amount of tax paid at a previous stage to be again subject to tax at a later stage in the production and, as a result, the same amount may be taxed multiple times in the processes of production and distribution, creating a “tax-on-tax” effect.²⁹ Cascading taxes have the obvious flaw of taxing specialized, nonintegrated production processes far more heavily than others. To combat this effect, most states impose the sales tax on the gross amount of the retail sale ensuring that all of the component costs of production (*i.e.*, raw materials, labor, etc.) as well as returns on capital (*i.e.*, interest, rent and profits) are included in the tax base as reflected in the final price of the product sold to the consumer, thus avoiding discrimination against nonvertically integrated companies in favor of vertically integrated companies.³⁰

An indirect USF contribution by TelePacific based on the cost of the broadband transmission service it leases from an ILEC to provide a retail information service is a cost that the competing provider owning the broadband transmission facilities (*e.g.*, the ILEC) does not bear when providing the identical retail information service. For this reason, it is axiomatic sales tax policy that once an entity is provided an exemption, the taxing authority should not undermine that exemption by imposing tax on the upstream provider. In fact, where one party in the chain ultimately is required to bear the burden of a tax, the tax law provides the necessary exemption, deduction and credit mechanisms to ensure the tax falls as intended.

Tax policy lends support for the principle that different producers of like products and services should be treated similarly unless economic considerations otherwise distinguish the

²⁹ Dr. Robert F. Van Brederode, *A Normative Evaluation of Consumption Tax Design: The Treatment of the Sales of Goods under VAT in the European Union and Sales Tax in the United States*, 62 Tax Law 1055, 1064 (2009).

³⁰ Daniel S. Goldberg, *E-Tax: Fundamental Tax Reform and the Transition to a Currency Free Economy*, 20 VA Tax L. Rev. 1, 34 (2000).

producers. The Supreme Court in *Complete Auto Transit v. Brady*³¹ found that a Commerce Clause violation occurs where a tax unfairly burdens, and as a result discriminates against, interstate commerce, unless the state provides a sufficient justification for the discrimination. The policy reasons against discriminating against otherwise similar providers because of geographic or technological distinctions between services providers is equally applicable to USF policy. Giving facilities-based providers a “tax” (*i.e.*, USF) advantage over non-facilities-based providers of the same service amounts to a governmental preference for one carrier over another, and generally is avoided under tax policy as distortive to the proper functioning of free markets.

E. FCC Form 499-A Instructions and Entity-by-Entity Exemption

In tandem with addressing TelePacific’s substantive arguments that the *2012 Wholesaler-Reseller Clarification Order* as applied to TelePacific violates the Act, the Commission should revisit its finding about “reseller” certification in footnote 111 and paragraphs 40-41. As TelePacific and others argued,³² the current Form 499 Instructions that apply the carrier’s carrier rule on an entity-by-entity basis effectively creates an exemption for telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. Although the *2012 Wholesaler-Reseller Clarification Order* recognizes that the industry applies current Form 499-A reseller exemption instructions on an entity-by-entity basis,³³ it ignores similar language from the original 1997 worksheet instructions. The original

³¹ 430 U.S. 274 (1977).

³² TelePacific Feb. 1, 2010 *Ex Parte*; Notice of *Ex Parte* Communication Letters from Tamar E. Finn, Counsel to TelePacific, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed July 26, 2012, July 30, 2012, Sept. 4, 2012); Notice of Joint *Ex Parte* Communication Letter from Nancy Lubamersky, VP, Public Policy and Strategic Initiatives for TelePacific, Michael Saperstein, Director-Federal Regulatory Affairs for Frontier Communications and Malena F. Barzilai, Senior Government Affairs Counsel of Windstream to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed Aug. 20, 2012).

³³ *2012 Wholesaler-Reseller Clarification Order*, ¶40-41.

1997 worksheet required contributors to report “as revenues from resellers only revenues from *entities* that reasonably would be expected to contribute to support universal service.”³⁴ Like the current worksheet instructions, the 1997 instructions categorized “resellers” on an “entity” basis.

The *2012 Wholesaler-Reseller Clarification Order* also ignores the conflict its new service-by-service interpretation creates with the *First Report and Order*. The Commission originally classified reseller revenue as end user revenue in only one limited instance, directing contributors to classify carrier revenue as end user revenue “when such carriers utilize telecommunications services *for their own internal uses*.”³⁵ As TelePacific argued, the Commission cannot change its reseller certification standards without acknowledging and explaining the reason for the change.³⁶ USF contribution obligations must be consistent with the Act and Commission rules and orders.³⁷ Indeed, the Form 499 Instructions state that contributors should consult Commission rules to determine their obligations.³⁸

The *2012 Wholesaler-Reseller Clarification Order* cites no language from the *First Report and Order* or the 1997 worksheet instructions to support its determination that allowing “instances where neither the wholesaler nor its customer contributed on its respective revenues” was inconsistent with the Commission’s “original intent.”³⁹ If the Commission wants every telecommunications service to be subject to USF contribution once, it should reverse the *First*

³⁴ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service*, 12 FCC Red 18400, 18508 (1997) (“*NECA Order*”).

³⁵ *First Report and Order* at ¶844 (emphasis added).

³⁶ TelePacific September 4, 2012 *Ex Parte*, p. 2, n.6.

³⁷ April 1, 2009 Letter from Jennifer McKee, Acting Chief, Telecommunications Access Policy Division to Michelle Tilton, Director of Financial Operations, USAC, DA 09-748.

³⁸ 2012 Form 499-A Instructions, p. 2.

³⁹ *2012 Wholesaler-Reseller Clarification Order*, ¶40.

Report and Order's limited classification of carrier revenues as end user revenues only where the carrier utilized the service for its internal use and explain the reason for the change, including how such reversal is consistent with the Act's requirement that USF contributions be equitable and nondiscriminatory.

IV. THE COMMISSION SHOULD GRANT TELEPACIFIC'S PETITION FOR RECONSIDERATION TO ENSURE COMPETITIVE NEUTRALITY AND COMPLIANCE WITH SECTION 254 OF THE ACT.

The question posed and left unanswered is whether requiring the ILECs selling special access circuits to treat purchasers as an end user violates Section 254's principle of equitable and non-discriminatory contributions if those circuits are purchased solely to provide broadband Internet access service. TelePacific argued that legal and policy considerations compel the same answer whether contributions are required directly or indirectly: requiring one provider (TelePacific) but not another (the carrier that owns these facilities) to make USF contributions on wireline broadband Internet access service violates Section 254's requirement that USF contributions be equitable and non-discriminatory. When EarthLink pointed out how the *Wireline Broadband Order* applied to EarthLink resulted in similar discrimination months after the time to appeal that Order had passed, the Commission changed the rules to avoid such discrimination. When TelePacific pointed out how the *Wireline Broadband Order* as applied to TelePacific would result in discrimination, the Commission avoided answering the question by claiming TelePacific's request was untimely.

While the FCC prudently must manage the overall fund, it must do so within the universal service principles laid down by Congress. Therefore, while sustainability of the Fund is

important, that goal does not override the Congressional directive that all contributions be assessed on a non-discriminatory basis.⁴⁰

Requiring TelePacific and other similarly situated carriers to make *indirect* USF contributions when their competitors that own facilities are not subject to the same requirement violates Section 254 of the Act (which requires equitable and nondiscriminatory contributions), contradicts the Commission’s policy mandating a level playing field for all broadband Internet access services, impedes the Commission’s goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and violates the Commission’s well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access facilities.

By effectively requiring TelePacific and other similarly situated providers to make indirect USF contributions on the leased special access service input used in their finished broadband Internet access product, the *2012 Wholesaler-Reseller Clarification Order*, if it is allowed to stand, will significantly disadvantage and handicap all providers that do not own such facilities. This, in turn, will have an adverse effect on competition and the supply of broadband, to the detriment of customers who rely on a proliferation of innovative and competitively-priced broadband Internet access, web hosting, data management, and similar offerings and will significantly impede the FCC’s goal of fostering competition and ensuring affordable access to broadband Internet access services to every American. Such an indirect USF contribution on TelePacific’s and other similarly situated providers’ broadband Internet access service will tilt

⁴⁰ Any determination that the Fund is or may become “unsustainable” is a matter for Congress to address.

the playing field and determine winners and losers in the competitive broadband Internet marketplace.

TelePacific placed all of these issues in the proceeding through a series of *ex partes* and pleadings, yet the Commission arbitrarily and capriciously failed even to address them in the *2012 Wholesaler-Reseller Clarification Order*. The Commission therefore should reconsider this aspect of the *2012 Wholesaler-Reseller Clarification Order* and clarify that its rules cannot be applied to TelePacific and similarly situated purchasers of special access services in violation of the Act and long-standing principles of competitive neutrality.

V. CONCLUSION

For the foregoing reasons, the Commission should grant TelePacific's Petition for Partial Reconsideration.

Respectfully submitted,

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