

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	WC Docket No. 06-122
Universal Service Contribution Methodology)	
)	
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)	

**COMPTTEL'S COMMENTS IN SUPPORT OF
U.S. TELEPACIFIC'S PETITION FOR
PARTIAL RECONSIDERATION AND REQUEST FOR STAY**

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**COMPTTEL’S COMMENTS IN SUPPORT OF
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COMPTTEL, through undersigned counsel, hereby submits these comments in support of the Petition for Partial Reconsideration and the Request for Stay Pending Reconsideration filed by U.S. TelePacific Corp., d/b/a/ TelePacific Communications (“TelePacific”), of the Order issued in the above-captioned proceeding on November 5, 2012.¹ TelePacific persuasively argues that the Commission should reconsider its decision that leased special access transmission facilities used by carriers as inputs to broadband Internet access service are subject to universal service assessment and that such carriers must be treated as end users rather than resellers for

¹ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, FCC 12-134 (rel. Nov. 5, 2012) (“*Wholesaler-Reseller Clarification Order*”).

reporting purposes. The Commission should also reconsider its directive to the Wireline Competition Bureau to revise the instructions for the 2013 Form 499-A to require reseller certification on a service-by-service, rather than an entity-by-entity, basis.²

I. Introduction and Summary

There is no defensible technical or policy rationale for the Commission's determination that a carrier's liability for universal service contributions on revenues from the transmission component of Internet access service (or other information services) should vary depending on whether the transmission component is owned or leased and on whether the transmission service is provided on a common carrier or private carriage basis. On the contrary, the Commission's differential treatment creates distinctions that are purely arbitrary and capricious and that have discriminatory and anticompetitive financial consequences for carriers that lease common carrier transmission inputs to provide broadband Internet access services to their end users in violation of Section 254(d) of the Communications Act.³

The Commission has candidly admitted that its wholesaler/reseller rules for universal service reporting and contribution purposes and its Form 499-A Instructions are far from precise and that it did not anticipate the implementation difficulties that might arise when a wholesale service is incorporated by a reseller into a non-assessable retail service. When the Wireline Competition Bureau issued its decision vacating the Universal Service Administration Company's ("USAC") decision that TelePacific was liable for universal service contributions on revenues from its retail Internet access service because TelePacific used a DS1 transmission line leased from another carrier to provide those services, it included language suggesting that the

² TelePacific Petition for Partial Reconsideration filed in WC Docket No. 06-122 on December 5, 2012.

³ 47 U.S.C. §254(d).

wholesale revenues from the transmission line should have been classified as end user rather than carrier's carrier revenues and that carriers that lease special access facilities to provide Internet access service should be treated differently for universal service contribution purposes than carriers that self provision or lease transmission facilities on a private carriage basis.

The Commission rejected TelePacific's request to clarify the contribution obligations of wholesalers and resellers as an untimely petition for reconsideration of the *Wireline Broadband Order*. This ruling was not only erroneous as a matter of law but also contrary to the Commission's professed commitment to continually review its rules to determine what needs to be implemented, revised or eliminated to achieve competition objectives effectively and efficiently. Sidestepping review of the contribution obligations of wholesale carriers that lease common carrier transmission facilities to broadband Internet access service providers on timeliness grounds provided an easy way out of implementing what the Commission needs to do achieve its objectives of promoting and protecting competition for the benefit of consumers and to realize its vision of ensuring that consumers have a meaningful choice in affordable services. The public interest deserves more and for that reason, the Commission should grant TelePacific's Petition for Partial Reconsideration, correct its erroneous rulings and restore the level playing field for all providers of broadband Internet access (and other information) services.

II. The Commission's Denial of TelePacific's Request For Clarification Of Contribution Obligations As Untimely Was Clearly Erroneous

A. The Commission's Rules and Rulings Cry Out For Clarification

To paraphrase Justice Scalia, it would be a gross understatement to say that the Commission's rules regarding the universal service contribution and reporting obligations of wholesalers and resellers are not a model of clarity and in many important respects, those rules

are a model of ambiguity and even self-contradiction.⁴ This case began with an erroneous decision by the Universal Service Administrative Company (“USAC”) that TelePacific was liable for universal service contributions on revenues from its Internet access service because TelePacific used DS1 special access circuits leased from an incumbent local exchange carrier as inputs to its integrated broadband Internet access services.⁵ In USAC’s view, the fact that the integrated Internet access service TelePacific provided to the end user was an information service not subject to contribution was irrelevant to TelePacific’s liability for contribution because the information service included a DS1 transmission component.

The Chief of the Wireline Competition Bureau vacated USAC’s decision, citing the *Wireline Broadband Order* for the proposition that “Internet access service providers that lease or purchase transmission from telecommunications carriers to provide wireline broadband Internet access services are not required to contribute to the universal service fund for revenues derived from the provision of that service.”⁶ In a footnote, however, the Bureau implied that TelePacific’s wholesale transmission providers may be required to restate revenues they had reported to USAC “to the extent that TelePacific certified to a provider that TelePacific was

⁴ See, *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999) (describing the Telecommunications Act of 1996).

⁵ December 10, 2009 Letter from USAC to Hage & Hage Law and Consulting. More than seven years ago, the Commission ruled that wireline broadband Internet access service is an information service not subject to universal service contribution assessment. *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, 20 FCC Rcd 14853(2005) (“*Wireline Broadband Order*”).

⁶ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Opinion, DA 10-752 at ¶8 (rel. Apr. 30, 2010) (“*TelePacific Order*”).

contributing directly on certain revenues.”⁷ The Bureau’s Order generated two new issues: (1) whether revenues from special access broadband transmission services used to provide Internet access service should be classified as carrier’s carrier or end user revenues for USF reporting and reseller certification purposes and (2) whether carriers that lease special access broadband transmission facilities to provide Internet access service should be treated differently for universal service contribution purposes than carriers that provide Internet access service over their own broadband transmission facilities or carriers that lease transmission facilities on a private carriage basis.

Certain incumbent LECs sought clarification or reconsideration of the Bureau’s Order arguing that neither the Commission nor USAC could require wholesale providers to restate revenues for prior years to the extent the wholesalers reasonably relied on a reseller’s certification provided in accordance with the Form 499 instructions.⁸ TelePacific filed comments on the ILECs’ Petition, asserting, among other things, that (1) the Form 499 instructions allow resellers to provide certifications to wholesalers that they are contributors to the universal service fund on an entity-by-entity, rather than a service-by-service, basis and (2) it would be discriminatory and a violation of Section 254(d) of the Act, 47 U.S.C. §254(d), for the Commission to assess USF contributions on common carrier transmission facilities leased by carriers and incorporated into an integrated broadband Internet access service but not on the

⁷ *Id.* at n. 41. The Bureau’s footnote raised concerns because, among other things, the current language of the Commission’s reseller certification requires resellers to certify that their companies are contributors to the universal service fund; it does not require resellers to certify on a service specific or revenue specific basis.

⁸ AT&T Inc., CenturyLink, SureWest Communications and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration filed June 1, 2010 in WC Docket No. 06-122.

identical transmission facilities self-provisioned by carriers providing broadband Internet access service or leased by carriers on a private carriage basis. For those reasons, neither wholesalers of broadband transmission facilities used to provision Internet access service nor the resellers that provide the Internet access service should be assessed USF contribution on revenues from the transmission facilities.⁹ TelePacific’s arguments were supported by other parties.¹⁰

Prior to ruling on the ILECs’ Petition, the Commission released its Further Notice of Proposed Rulemaking in the USF Contribution Methodology proceeding.¹¹ The Further Notice confirmed what carriers had asserted in the TelePacific proceeding – *i.e.*, that carrier’s carrier revenues are not subject to contribution, that broadband Internet access service revenues are not subject to contribution and that the Commission’s reseller certification language directs the reselling company to certify that it is purchasing service for resale in the form of telecommunications and that it “contributes directly to the federal universal service support mechanisms.” The Further Notice also acknowledged infirmities in the current rules and the processes the Commission has adopted to implement them:

Under today’s rules, wholesale carriers generally do not contribute on sales to their customers that contribute to the Fund (carrier’s carrier revenues), but may be required to contribute on sales to customers that do not contribute to the Fund.¹²

⁹ Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications To Petition For Clarification Or In The Alternative For Partial Reconsideration filed in WC Docket No. 06-122 on July 6, 2010.

¹⁰ See *e.g.*, September 4, 2012 Letter from Brita D. Strandberg to Marlene Dortch filed on behalf of Sprint Nextel in WC Docket No. 06-122; August 16, 2012 letter from Thomas Jones to Marlene Dortch filed on behalf of tw telecom in WC Docket No. 06-122; August 1, 2012 Letter from Mary C. Albert to Marlene Dortch filed on behalf of COMPTTEL in WC Docket No. 06-122.

¹¹ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. Apr. 30, 2012) (“*Contribution Methodology FNPRM*”).

¹² *Id.* at ¶ 144.

In the 1997 *Universal Service First Report and Order*, the Commission required telecommunications providers to contribute to the USF based on end-user telecommunications revenues. The Commission made a policy decision to exclude wholesale revenues from the contribution requirements. . . . In adopting the existing wholesale-resale distinction, the Commission concluded that basing contributions on end-user revenues would relieve a wholesale carrier (in a wholesale/resale distribution chain) from making direct contributions to the USF because the wholesale carrier does not earn revenues directly from end users.¹³

At that time, the Commission did not directly focus on the potential implementation difficulties that such a rule would pose in situations where a wholesaler sells a service to another firm that incorporates that wholesale telecommunications into a different offering for its retail customers that is not subject to assessment. In some instances, the revenues from the finished offering may be assessable, while in other cases, such as broadband Internet access service, the retail revenues may not be subject to a contribution obligation.¹⁴

While the Commission has not codified rules specifying the precise manner in which wholesalers verify that their customers are contributing, most providers obtain certifications from their customers specifying that the customer “is purchasing service for resale in the form of U.S. telecommunications,” and that it “contributes directly to the federal universal service support mechanism.”¹⁵

Many contributors may obtain such certifications from their customers only on an entity-wide basis, rather than a service-by-service basis, because the model certification language provided in the instructions beginning in 2007 does not specify service-specific certifications.¹⁶

¹³ *Id.* at ¶ 146.

¹⁴ *Id.* at ¶ 147.

¹⁵ *Id.* at ¶ 164.

¹⁶ *Id.* at ¶ 168. The model certification language that the Commission adopted in 2007 provides as follows: “I certify under penalty of perjury that my company is purchasing service for resale in the form of telecommunications or interconnected Voice over Internet Protocol service. I also certify under penalty of perjury that either my company contributes directly to the federal universal support mechanisms, or that each entity to which I provide resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the federal universal service support mechanisms.” The FCC Form 499-A instructions direct wholesalers to confirm the continuing validity of reseller certificates by verifying the reseller’s contributor status on the Commission’s website.

The Further Notice requested comment on whether the Commission should adopt a rule requiring greater specificity in reseller certifications in an effort to assist wholesalers to more accurately determine whether reseller revenues should be classified as carrier's carrier or end user revenues.

Seven months later, the Commission granted the ILECs' Petition for Clarification of the *TelePacific Order*, and held that a wholesaler is not required to contribute on revenues where it demonstrates a "reasonable expectation that its customer is a reseller."¹⁷ The Commission confirmed that a wholesaler may demonstrate a reasonable expectation that its customer is a reseller by following the guidance in the Form 499-A instructions, including by obtaining a certification containing the Commission's model language, which requires resellers to certify their reseller status on an entity-by-entity, not a service-by-service basis, and by checking the customer's contributor status on the Commission's website.¹⁸ At the same time, the Commission stated:

We do not read the existing definition of "reseller" so broadly that it would enable a company to certify it is a reseller if it contributes on any of its product offerings that may incorporate wholesale inputs. Such a broad reading, in the extreme case, would allow a carrier to claim reseller status for all of its wholesale inputs even though it only contributed on a small fraction of its product offerings. For example, if a customer purchases a DS1 line and incorporates that service into an offering of broadband Internet access service, it is *not* a reseller for purposes of that line because it has no obligation to contribute on those broadband Internet access service revenues.¹⁹

The Commission's seeming adamancy that wholesale customers have always been required to certify their reseller status for each line that they purchase cannot be reconciled with the Form 499-A instructions which provide a safe harbor for wholesalers (1) that have

¹⁷ *Wholesaler-Reseller Clarification Order* at ¶34 .

¹⁸ *Id.* at ¶40.

¹⁹ *Id.* at n.111 (emphasis in original).

procedures in place to ensure that they report as revenues from a reseller only revenues from “entities” that reasonably would be expected to contribute to universal service and (2) that obtain annual certifications from resellers that the “company contributes directly to the federal universal support mechanisms.” Nor can it be reconciled with the Commission’s finding that the existing model reseller certificate language “does not clearly reflect the longstanding requirement that in order to classify revenues as carrier’s carrier revenues, wholesalers must have a reasonable expectation that their customers are ‘resellers’” defined as entities that both incorporate purchased telecommunications into their own service offerings and contribute to the universal service fund based on revenues from those offerings.²⁰

B. TelePacific (And The Rest Of The Industry) Is Entitled To Clarification

Given the disparity between the Commission’s definition of “reseller”²¹ and how it instructs carriers to report revenues and verify reseller status for universal service purposes, the Commission erred in declining to address the issues raised in TelePacific’s request for clarification as an untimely request for reconsideration of the *Wireline Broadband Order*. Assessing universal service charges on leased but not self-provisioned transmission components used in the provision of broadband Internet access service (or any other information service) violates the non-discrimination provisions of Section 254(d) and the Commission’s long-standing policy that universal service support mechanisms and rules should be competitively

²⁰ *Id.* at ¶41.

²¹ The Commission defines “reseller” as a telecommunications carrier that incorporates purchased telecommunications services into its own offerings and can reasonably be expected to contribute to support universal service based on revenues from those offerings. *Id.* at ¶ 34. Although the Commission alleges that it has consistently held that the two prongs of the definition are separate and independent, its reseller certification form does not require resellers to certify that they contribute to universal service based on revenues from each separate offering incorporating wholesale services.

neutral.²² The Commission’s denial of TelePacific’s request for clarification of the contribution obligations of wholesale carriers that sell transmission to broadband Internet access providers on procedural grounds²³ is wrong as a matter of law and is particularly egregious in light of its conclusion that revenues from transmission services that are incorporated into broadband Internet access services are to be classified as end user, rather than carrier’s carrier revenues. As the Commission is (or should be) well aware, the D.C. Circuit has repeatedly held that the Commission cannot deny review of the application of a rule to a particular party simply because the time has expired for seeking review of the order adopting the rule.²⁴ *See e.g., Functional Music, Inc. v. FCC*, 274 F. 2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) (because administrative rules and regulations are capable of continuing application, limiting the right of review of a rule to the time period for review of the order promulgating the rule “would effectively deny many parties ultimately affected by a rule an opportunity to question its validity”); *Alvin Lou Media, Inc. v. FCC*, 571 F. 3d 1, 16 (DC Cir. 2009) (this court permits statutory challenges to an agency’s application or reconsideration of a previously promulgated rule even if the period for review of the initial rulemaking has expired); *Graceba Total Communications v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) (statutory challenges to an agency’s application of a previously promulgated rule are permissible even if the period for review of the initial rulemaking has expired). Nonetheless, that is the very basis asserted by the Commission for declining to address the issues raised by TelePacific.

²² *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 at ¶47 (1997).

²³ *Wholesaler-Reseller Clarification Order* at n. 109.

²⁴ See TelePacific Petition for Partial Reconsideration at 5-6.

The denial of TelePacific’s request for clarification on timeliness grounds is also inconsistent with the strategies and objectives to promote competition that the Commission adopted in its own Strategic Plan for 2012-2016. In order to achieve the objective of ensuring that “effective policies are in place to promote and protect competition for the benefit of consumers” and to realize its vision of “a competitive market for communications services to ensure consumers have a meaningful choice in affordable services,” the Commission has committed to “continually review the Commission’s rules to determine what rules need to be implemented, revised or eliminated to achieve competition objectives effectively and efficiently.”²⁵ Refusing to review the requirement that universal service charges be assessed on leased special access transmission facilities used to provide integrated Internet access service but not on self-provisioned or non-common carrier transmission facilities used to provide the same service did not promote a competitive market or ensure that consumers have a meaningful choice in affordable services. Instead, it condoned, through inaction, the conferral of a significant financial advantage on carriers that own last mile facilities over carriers that lease such facilities.

Because wholesalers will increase their prices to resellers by the amount of the universal service assessment they must pay on leased transmission facilities, the resellers’ end user customers also will be subject to a not insignificant increase in the prices they pay for their integrated broadband Internet access services. The magnitude of the universal service assessment factor, which exceeded 17% in all but one quarter of 2012 and has been set at 16.1% for the first quarter of 2013,²⁶ exacerbates the inequity of treating Internet service providers that

²⁵ Federal Communications Commission, Strategic Plan 2012-2016 at 14-15.

²⁶ See Public Notice DA 11-2020 (setting first quarter 2012 assessment factor at 17.9%); Public Notice DA 12-396 (setting second quarter 2012 assessment at 17.4%); Public Notice DA

lease common carrier broadband transmission facilities less favorably than Internet service providers that self-provision or lease the transmission facilities on a private carriage basis. Contrary to the Commission's commitment to continually review its rules to determine what needs to be implemented, revised or eliminated to achieve competition objectives effectively and efficiently, sidestepping review of the contribution obligations of wholesale carriers that lease common carrier transmission facilities to broadband Internet access providers on timeliness grounds is nothing more than a facile means of avoiding the action the Commission needs to take to achieve its objectives of promoting and protecting competition for the benefit of consumers and to realize its vision of ensuring that consumers have a meaningful choice in affordable services. The public interest deserves better.

III. The Commission Must Relevel The Playing Field

Section 254(d) of the Act provides that every telecommunications carrier that provides interstate telecommunications services shall contribute on an equitable and nondiscriminatory basis to the specific, predictable and sufficient mechanisms established by the Commission to preserve and advance universal service. Over 15 years ago, the Commission determined that universal service support mechanisms and rules must be competitively neutral and explained that “[i]n this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage or disadvantage one provider over another and neither unfairly favor nor disfavor one technology over another.”²⁷ The Commission found that competitive

12-1484 (setting fourth quarter 2012 assessment at 17.4%); Public Notice DA 12-2014 (setting first quarter 2013 assessment factor at 16.1%).

²⁷ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 at ¶47 (1997).

neutrality is consistent with the provisions of Section 254 including the “explicit requirement of equitable and nondiscriminatory contributions.”²⁸

In the *Wireline Broadband Order* issued eight years later, the Commission classified wireline broadband Internet access service as an information service not subject to universal service assessment and explicitly concluded that the “transmission component of wireline broadband Internet access service is *not* a telecommunications service.”²⁹ The information service classification applies regardless of whether the Internet access service is provided over the provider’s own transmission facilities or, as is true for TelePacific and many other competitive carriers, transmission facilities leased from another party.³⁰ The Commission further determined that neither the statute nor relevant precedent mandates that a broadband transmission service be a telecommunications service when provided to an information service provider.³¹

In the *Wireline Broadband Order*, the Commission distinguished broadband transmission services used for basic transmission purposes, which are telecommunications services, from broadband transmission facilities used to provide Internet access services that inextricably intertwine transmission and information processing capabilities, which are not telecommunications services.³² There is no question that broadband transmission facilities used

²⁸ *Id.* at ¶48.

²⁹ *Wireline Broadband Order* at ¶4 (emphasis added).

³⁰ *Id.* at ¶¶ 14, 16.

³¹ *Id.* at ¶ 103.

³² *Id.* at ¶ 9.

to provide Internet access services, whether they are leased³³ or self-provisioned, are not used for basic transmission purposes. In order to ensure competitive neutrality, the contribution obligations on broadband transmission facilities must be determined in a manner consistent with the purpose for which the transmission facilities are used, not on ownership of the facilities or the manner in which they are leased. If the transmission services are used to provide telecommunications services, they should be assessable, but if they are used to provide information services, they should not be assessable.

The Commission's determination that wholesale customers that lease or purchase special access transmission facilities to provide Internet access service must be treated as end users rather than resellers for universal service reporting and assessment purposes improperly ignores the purpose for which the transmission facilities are used and grants an unfair advantage to Internet service providers that own last mile transmission facilities over Internet service providers that lease or purchase the transmission facilities. The arbitrary and inequitable nature of such an application of the Commission's wholesaler/reseller rules is further illustrated by the differential treatment accorded to transmission facilities provided to Internet service providers on a private carriage basis and those provided on a common carrier basis. The Commission has determined that a wholesaler that provides broadband transmission service to an Internet service provider on a non-common carrier basis is not required to contribute to universal service on the basis of revenues derived from the provision of that transmission service, but a wholesaler that provides the same transmission service to an Internet service provider on a common carrier basis

³³ The identity of the owner of broadband transmission facilities does not affect the nature of the service to the end user. *Id.* at ¶ 16.

is required to contribute on the revenues from the transmission service.³⁴ In other words, wholesale revenues from transmission services provided on a private carriage basis are carrier's carrier revenues not subject to universal service assessments whereas wholesale revenues from transmission services provided on a common carrier basis are treated as end user revenues that are subject to universal service assessment.

Although the Commission reemphasized in the *Wholesaler-Reseller Clarification Order* that in order to be considered a reseller, a company must both incorporate purchased telecommunications into its own service offerings **and** contribute to the universal service fund based on **revenues from those offerings**,³⁵ an Internet service provider that obtains broadband transmission facilities from a wholesaler on a private carrier basis and incorporates those facilities into Internet access service is treated as a reseller even though it does not contribute to the universal service fund based on revenues from that Internet access service offering. There is no technical or legal justification for treating Internet service providers that purchase broadband transmission facilities on a private carrier basis as resellers not subject to universal service charges but treating Internet service providers that purchase broadband transmission facilities on a common carrier basis as end users subject to universal service charges.

In order to remedy this grossly non-competitively neutral state of affairs and to level the playing field for all Internet access service providers, the Commission must grant TelePacific's Petition for Partial Reconsideration and vacate its determination that wholesalers must treat Internet service providers that purchase broadband transmission facilities on a common carrier basis as end users and pay universal service charges on the transmission revenues. In light of the Commission's holding in the *Wireline Broadband Order* that the transmission component of

³⁴ *TelePacific Order* at n. 6 and ¶8.

³⁵ *Wholesaler-Reseller Clarification Order* at ¶31.

wireline broadband Internet access service is not a telecommunications service, there is no statutory basis for subjecting the transmission revenues to different universal service assessments depending on whether the transmission service is self-provisioned or leased. Nor is there any statutory basis for treating transmission components purchased on a common carrier basis as assessable and treating the same transmission components purchased on a private carriage basis as unassessable. The only reasonable and equitable interpretation of the statute and application of the Commission's universal service rules and policies is that service providers that purchase broadband transmission service to incorporate into their end user Internet access service offerings continue to be treated as resellers whether the transmission service is provided on a common carriage or private carriage basis and that neither the wholesaler that sells the broadband transmission component to the reseller nor the reseller that incorporates that transmission component into a retail broadband Internet access service is subject to universal service assessment on the revenues from the transmission component.

IV. The Commission Should Reconsider Its Directive To Modify The 2013 Form 499-A Instructions

Restoring the reseller status of carriers that lease or purchase special access facilities and incorporate those facilities into retail broadband Internet access service will obviate the need for service-by-service reseller certification.³⁶ When the Commission grants TelePacific's Petition for Reconsideration, it must also withdraw its directive to the Wireline Competition Bureau to revise the reseller certification language.

In the event the Commission denies TelePacific's Petition for Reconsideration, which it should not do, it should still withdraw its directive to the Bureau to revise the reseller

³⁶ *Wholesaler-Reseller Clarification Order* at ¶41.

certification language. The Commission has recognized the need to modify the current reseller certification process to provide greater clarity regarding contribution obligations when wholesale inputs are incorporated into other services that are not telecommunications services and therefore not subject to assessment under the current rules.³⁷ It is currently reexamining the respective contribution obligations of wholesalers and resellers and the existing rules and policies for assessing universal service contributions on revenues from broadband Internet access services in an open rulemaking proceeding.³⁸ A full record has been developed in that rulemaking proceeding and any changes to the reseller certification language and process should be made based on the record in that proceeding in which all interested parties have had the opportunity to participate rather than in this adjudicatory proceeding where participation has been limited but where changes to the certification language and processes will apply industry wide.

Although the Commission explicitly stated that it was not prejudging “what rules the Commission may ultimately adopt in” the rulemaking proceeding,³⁹ the revised reseller certification language that the Bureau has proposed for the 2013 Form 499-A Instructions is identical⁴⁰ to the language on which the Commission has requested comment in the rulemaking proceeding.⁴¹ As a result, it appears that the Commission has prejudged what it intends to do in

³⁷ *Contribution Methodology FNPRM* at ¶143.

³⁸ *Contribution Methodology FNPRM*.

³⁹ *Wholesaler-Reseller Clarification Order* at ¶42.

⁴⁰ See Public Notice, *Wireline Competition Bureau Seeks Comment On Proposed Changes To FCC Form 499-A, Form 499-Q and Accompanying Instructions*, WC Docket No. 06-122, DA 12-1872 (rel. Nov. 23, 2012) at page 24 of the 2013 Form 499-A Instructions.

⁴¹ *Contribution Methodology FNPRM* at ¶169.

the rulemaking proceeding without regard to the comments of interested parties despite its protestation to the contrary.

V. The Commission Must Grant TelePacific's Request For Stay

TelePacific has persuasively shown that it meets all four criteria for a stay⁴² of the implementation of the service-by-service reseller certification requirement adopted in the *Wholesale-Reseller Clarification Order* pending resolution of its Petition For Partial Reconsideration.⁴³ First, both TelePacific and COMPTTEL have demonstrated that there is nothing equitable, nondiscriminatory or competitively neutral about the Commission's determination that universal service contribution charges should be assessed on special access broadband transmission facilities used to provide Internet access service but not on self-provisioned broadband transmission facilities or broadband transmission facilities provided on a private carriage basis. The Commission's determination provides an unwarranted financial advantage to carriers that own last mile transmission facilities as well as to those that lease transmission facilities on a non-common carrier basis by relieving them of any obligation to pay universal service charges on the transmission component of their Internet access services while ensuring that carriers that use common carrier transmission facilities pay a double digit percentage increase in the price of those facilities to cover the wholesaler's universal service contribution.

Second, TelePacific and all other carriers that use leased special access transmission facilities to provide integrated Internet access service will suffer irreparable harm absent a stay

⁴² See, *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F. 2d 841. 844 (D.C. Cir. 1958) (a stay is warranted where a party shows that (1) it is likely to prevail on the merits of its appeal; (2) it will suffer irreparable injury absent a stay; (3) a stay will not injure any other party; and (4) a stay will serve the public interest.

⁴³ See TelePacific's Request For Stay Pending Reconsideration.

because they will be put at a tremendous business disadvantage vis a vis the carriers with whom they are competing for customers that are relieved of the obligation to pay universal service contribution on the transmission component of their Internet access services. Absent a stay, the customers of carriers that lease special access transmission components to provide Internet access service will be subject to a 16.1% increase in their monthly charges – an increase to which the customers of carriers that self-provision transmission facilities or that lease transmission facilities on a private carriage basis will not be subject. In these difficult economic times, customers are likely to vote with their feet possibly causing the affected carriers to lose business to competitors that they may never recover.⁴⁴

Third, no party is likely to be injured by a stay. The Commission's decision benefits no one but negatively impacts all carriers that use special access broadband transmission facilities to provide Internet access service and their customers. A stay of the service-by-service reseller certification requirement will appropriately maintain the status quo pending reconsideration.

Finally, a stay will serve the public interest. It is in the public interest and consistent with Congressional intent that universal service contributions be assessed in an equitable and nondiscriminatory manner as required by Section 254(d) of the Act. Assessing universal service contributions on the transmission component of broadband Internet access service provisioned by one class of carriers but not others will neither promote broadband competition nor competitive choice for consumers. Maintaining the status quo will ensure that no carriers are forced to increase their end user prices and possibly lose customers due to the increased prices while the Commission reconsiders its erroneous rulings.

⁴⁴ TelePacific Request for Stay at 11.

CONCLUSION

For the foregoing reasons and those stated by TelePacific, the Commission should grant TelePacific's Petition for Partial Reconsideration and Request for Stay of the implementation of the service by service reseller certification requirement.

January 9, 2013

Respectfully submitted,

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