

Tamar E. Finn
tamar.finn@bingham.com

May 28, 2013

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: WC Docket No. 06-122 - Universal Service Contribution Methodology
Ex Parte Communication**

Dear Ms. Dortch:

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) by its undersigned counsel, submits this *ex parte* communication in the above-referenced docket.

This letter follows up TelePacific’s February 14, 2013, meeting with the Office of the General Counsel and representatives of the Wireline Competition Bureau. The purpose of this letter is to provide further legal analysis in support of the position taken by TelePacific in its Petition for Partial Reconsideration and at the February 14 meeting.

I. TELEPACIFIC’S COMMENTS AND ITS PETITION FOR PARTIAL RECONSIDERATION WERE NOT AN UNTIMELY REQUEST FOR RECONSIDERATION OF THE WIRELINE BROADBAND ORDER.

In comments leading up to the *2012 Wholesaler-Reseller Clarification Order*,¹ TelePacific showed that a proposed interpretation of the *Wireline Broadband Order*² would create for the first time a situation that would be unlawfully discriminatory under Section 254(d) of the Communications Act 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 *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”).

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

A/75405580

1934, as amended (“Act”). And in its Petition for Partial Reconsideration,³ TelePacific showed that the measures adopted by the Commission in the *2012 Wholesaler-Reseller Clarification Order* had turned out to create in fact the very situation foretold in its Comments.

The unlawful situation described by TelePacific arises because the *2012 Wholesaler-Reseller Clarification Order* would force broadband Internet access providers who are USF contributors and purchase special access services from a telecommunications carrier to contribute indirectly to the Universal Service Fund (“USF”). This results from the new service-by-service requirement in the *2012 Wholesaler-Reseller Clarification Order*, under which the underlying provider must now pay USF contributions on its revenue from the special access services when used by the purchaser to provide broadband Internet access to its customers, even when the purchaser is a USF contributor. This is contrary to the previous approach, embodied in the Commission’s original Form 457 and Form 499, in which the reseller would certify that it was a USF contributor as an *entity*, whereupon the underlying carrier would not be liable for USF contributions on services provided to that reseller.

Like other USF contributions, under a service-by-service certification requirement, the underlying provider of a special access service would be allowed to, and would routinely, pass that contribution through to the Internet access provider, who therefore would be making an indirect contribution to the USF. Yet the *same* underlying carrier could use the *identical* special access services to provide *identical* broadband Internet access without paying a USF contribution, direct or indirect, on the special access services. These differing treatments would thus impose a substantial cost on one class of providers that other providers using identical facilities would not face. This disparity would violate the requirement of Section 254(d) of the Act 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.”⁴

In a footnote to the *2012 Wholesaler-Reseller Clarification Order*, the Commission summarily dismissed TelePacific’s argument, stating: “If TelePacific

³ See TelePacific’s Petition for Partial Reconsideration (“Petition for Partial Reconsideration”), WC Docket No. 06-122, filed Dec. 5, 2012.

⁴ 47 U.S.C. § 254(d) (emphasis added). This analysis is further detailed in TelePacific’s Petition for Partial Reconsideration at 7, 9, 11-12 and in the Request for Stay Pending Reconsideration at 8-11.

Marlene H. Dortch, Secretary
May 28, 2013
Page 3

is seeking reconsideration of the decisions adopted in the *Wireline Broadband Internet Access Order* and the *2006 Contribution Methodology Order*, that request is untimely.”⁵

In its Petition for Partial Reconsideration, TelePacific has shown that the *2012 Wholesaler-Reseller Clarification Order* enforced the *Wireline Broadband Order* against TelePacific, and that the agency cannot escape a substantive challenge to that enforcement action merely because the time for review of the *Wireline Broadband Order* has passed.⁶ As TelePacific pointed out, the standard on this has been clear for more than fifty years, at least since *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959).

Further examination of *Functional Music* and subsequent cases puts to rest any lingering notion that TelePacific’s argument is untimely. In *Functional Music*, to begin with, the Court of Appeals explained the principle in terms that are patently applicable here:

As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the

⁵ *2012 Wholesaler-Reseller Clarification Order* at para. 39 n. 109. In the same footnote, the Commission also denied that the argument could have been a request for clarification because in the Commission’s view “[n]othing in the *Wireline Broadband [] Order* or the *2006 Contribution Methodology Order* relieved a provider of special access circuits of the obligation to contribute on the revenues derived from the sale of such transmission on a common carrier basis to providers of retail broadband Internet access service.” On the other hand, of course, nothing in the *Wireline Broadband [] Order* or the *2006 Contribution Methodology Order* required a provider of special access circuits to contribute on the revenues derived from the sale of such transmission on a common carrier basis to providers of retail broadband Internet access service where the downstream provider was itself a USF contributor. Hence, the Commission’s dismissal of the need for clarification was a *non sequitur*.

⁶ See TelePacific’s Petition for Partial Reconsideration at 5-6.

underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.⁷

In *Functional Music*, the Commission had adopted a rule in 1955 requiring that “functional music” -- i.e., subscription music provided to restaurants, stores and the like -- transmitted to subscribers using frequencies licensed under a broadcast license be transmitted on a secondary basis by emission on a multiplexed transmission system, but postponed implementation of the multiplexing requirement for a year. Additional postponements followed. The appellant did not seek reconsideration of, or appeal, the 1955 order. Just before the expiration of the last postponement in 1957, however, the appellant petitioned the Commission to reconsider the multiplexing requirement, a request the Commission denied in December 1957. Then, when the Commission finally ended the postponements in a 1958 order, the appellant appealed that order.

The Court expressly rejected the notion that the appeal was untimely because the appellant had failed to seek reconsideration of or to appeal the 1955 order: “The rules here attacked were promulgated in 1955. ... [A]s to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed. Nevertheless, we are persuaded that judicial examination is now permissible.”⁸

In *Functional Music*, there had been no argument that the rules initially promulgated were less than clear -- in 1955 the rule then adopted would require multiplexing on its face and it was that requirement that the appellant attacked in 1958. In this proceeding, by contrast, the rule that was put into place in the *Wireline Broadband Order* did *not*, as TelePacific has pointed out, clearly require the result that arises from the Commission’s new “clarification.” Indeed, the Commission’s implementation of the previous per-entity rule and the industry’s understanding of it were the exact *opposite* of what the Commission now seems to say was implicit in the rule all along. Thus, if anything, the appellant in *Functional Music* had far better notice in 1955 of what would be required in 1958 than TelePacific had in 2005 of what the Commission now finds that *Wireline Broadband Order* required. But the Court held, rightly, that the appellant in

⁷ *Functional Music*, 274 F. 2d at 546. Nor was the rule new at the time of *Functional Music*, for the Court there cited an earlier Supreme Court case, *Columbia-Broadcasting System v. United States*, 316 U.S. 407, 421, 62 S.Ct. 1194, 86 L.Ed. 1563 (1941), noting that there, “the Supreme Court clearly contemplated the continuing availability of review of Communications Commission rules and regulations.” 274 F. 2d at 546-47.

⁸ *Functional Music*, 274 F.2d at 546.

Functional Music was entitled to appeal the validity of the rule in 1958. A *fortiori*, then, TelePacific is entitled to challenge the new “clarification” of the 2005 *Wireline Broadband Order* when the effect of this “clarification” has dramatically tilted the competitive playing field to disfavor TelePacific in a manner that the *Wireline Broadband Order* had not -- in violation of the Act’s requirement of nondiscrimination and the Commission’s stated competitive neutrality principles.

The rule in *Functional Music* has been applied numerous times, in a variety of contexts, when questions have arisen regarding the timeliness of challenges to Commission rulemakings. For example, in *Graceba Total Communications, Inc., v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997), the Court ruled that Graceba was entitled to raise in 1995 constitutional challenges to the Commission’s minority billing credit rule, notwithstanding that the rule had been adopted in a 1994 order and the time for seeking reconsideration or filing an appeal of the 1994 order had expired more than a year before the filing of Graceba’s petition challenging the billing credits. The Court stated unequivocally that, for the reasons set forth in *Functional Music*, “we permit both constitutional and 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.”⁹

The same Court upheld in 1992 an AT&T challenge to the Commission’s tariff forbearance policies notwithstanding that the policies had been adopted in a Commission Order issued in 1983 and AT&T’s challenge appeared only in a 1989 complaint. *American Telephone and Telegraph Company v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *aff’d sub nom. MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994). Here, the Court allowed the Commission to rely neither on the age of the order adopting the policy, on the one hand, or the Commission’s promise that it would address AT&T’s statutory question in a then-pending rulemaking, on the other. Calling the Commission’s procedural approach an “administrative shell game,” the Court stressed again, citing *Functional Music*, that “[i]t is well established that a rule may be reviewed when it is applied in an adjudication -- an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review.”¹⁰

⁹ *Graceba Total Communications*, 115 F.3d at 137 (emphasis added).

¹⁰ *American Telephone and Telegraph Company v. FCC*, 978 F.2d at 732, 734.

Similarly, the Court in *Midtec Paper Corp. v. U.S.*, 857 F.2d 1487, 1496 (D.C. Cir., 1988) held that the appellant could appeal the dismissal of an administrative complaint based on an agency rule even though the time for appeal of the underlying rulemaking order had long since expired. The Court stated: “The amici in support of the Commission go one step further; they suggest that this court lacks jurisdiction to consider Midtec's challenge because the company failed to seek judicial review of the [rules] within the 60–day statutory time period for doing so. ... The latter argument need not detain us. Midtec does not attack the [rules] on their face, but only the manner in which the Commission interpreted and applied them in this case.”

Indeed, the courts have expressly held that the same principle applies not merely in a formal adjudication but anytime the rule is amended or interpreted in a manner that creates a new issue. In *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 824 F.2d 1146, 1150 (D.C. Cir. 1987), the Court upheld as timely an appeal filed after the withdrawal of a proposed amendment to a rule, though again the time for appealing the order promulgating the original rule had passed. And in *State of Ohio v. U.S.E.P.A.*, 838 F.2d 1325, 1328 (D.C. Cir. 1988), the Court even applied the principle where the agency had repromulgated the same rule without change, stating: “the period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection.” The *2012 Wholesaler-Reseller Clarification Order* specifically applies the *Wireline Broadband Order* to TelePacific and similarly situated carriers, and thus review of the *2012 Wholesaler-Reseller Clarification Order* is not only permissible but is warranted. Indeed, the fact that the *2012 Wholesaler-Reseller Clarification Order* did not merely apply or repromulgate, but also *changed* the rule established in the earlier order is all the more reason that it is reviewable now.

The *Functional Music* rule has been routinely followed, both in appeals from actions of the Commission,¹¹ and by courts examining the actions of other agencies.¹² It is settled law. Under it, TelePacific is entitled to raise its challenge

¹¹ See, e.g., *Alvin Lou Media, Inc. v. F.C.C.*, 571 F.3d 1, 8 (D.C. Cir. 2009).

¹² See, e.g., *Terran ex rel. Terran v. Sec’y of Health and Human Services*, 195 F.3d 1302, 1311 (Fed. Cir. 1999); *N.L.R.B. Union v. Federal Labor Relations Authority*, 834 F.2d 191, 195-96 (D.C. Cir. 1987) (noting that the *Functional Music* court applied the principle in the context of the Commission’s “refusal to reconsider its denial of a petition for rescission of the disputed regulations” -- which is analogous to the relief TelePacific seeks here -- but it could also be raised in defending an adjudication based on the offending rule).

now and the Commission's dismissal of its challenge as an untimely request for reconsideration of the *Wireline Broadband Order* is clear error.

II. THE POSSIBLE AVAILABILITY OF A WAIVER DOES NOT SAVE A RULE, LIKE THIS ONE, THAT IS OTHERWISE UNLAWFUL.

It was suggested in the February 14, 2013, meeting that even if the new rule imposing a discriminatory USF requirement on providers like TelePacific otherwise violated Section 254(d), it might nevertheless be upheld because TelePacific could seek a waiver of the rule to mitigate its anticompetitive effects. But this is a non-starter. If an otherwise invalid rule could be saved by the possibility that the rule could be waived for individual entities, then no rule, no matter how broadly unlawful, could be invalidated so long as the agency had a waiver procedure in place. But waivers, by definition, are intended to provide relief from *otherwise valid* rules where hardship or other individualized circumstances make application of the rule unwarranted.

And so the courts have consistently held. Here again, there is a leading case arising from an action by this Commission. In *ALLTEL Corp. v. FCC*, 838 F.2d 551 (D.C. Cir. 1988), appellants challenged the Commission's rules regarding use by local exchange carriers of an average schedule method for allocating costs to interstate services. Among the Commission's arguments for denying the relief sought was that "it would entertain waiver requests from holding companies subject to the [rule's] requirement if they could demonstrate that application of the rule would impose an unreasonable burden."¹³ But the Court rejected the notion that this was adequate:

The FCC cannot save an irrational rule by tacking on a waiver procedure. "The very essence of waiver is the assumed validity of the general rule...." *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C.Cir.1969). The deference that we accord administrative action on waiver applications depends upon this assumption. Only because of this assumption does "[a]n applicant for waiver face[] a high hurdle even at the starting gate." *WAIT Radio*, 418 F.2d at 1157. ... If the Commission's argument were accepted, no rule, no matter how irrational, could be struck down, provided only that a waiver provision was attached. A rule with no rational basis -- at

¹³ *ALLTEL Corp. v. FCC*, 838 F.2d at 561.

least none that the FCC has so far been able to reveal -- cannot be saved in this fashion.¹⁴

Similarly, the Court of Appeals held in 2004: “While a rational rule that would otherwise be impermissibly broad can be saved by ‘safety valve’ waiver or exception procedures, the mere existence of a safety valve *does not cure* an irrational rule.” *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004) (emphasis added).

The Commission must focus its attention on whether the rule’s creation of discrimination *against* broadband internet access providers who are USF contributors buying special access service from others and *in favor of* broadband internet access providers who are USF contributors buying special access service from themselves is lawful under Section 254(d). If it is not otherwise lawful the rule cannot be saved by the possibility of waivers. As TelePacific has shown, this rule is unlawful because it discriminates against one class of telecommunications carriers. *See* Section IV.

III. THE “CLARIFIED” RULE SET FORTH IN THE 2012 WHOLESALER-RESELLER CLARIFICATION ORDER IS RIPE FOR REVIEW.

It was also suggested in the February 14, 2013, meeting that even if the new rule violates Section 254(d), it will not be ripe for review until USAC invoices the underlying carrier for its contribution on the special access services and the underlying carrier in turn invoices TelePacific for its pass-through of the contribution. Presumably, TelePacific would then have to contest the bill and seek a ruling from the Commission that the underlying USF contribution charge by USAC was improper.

To the contrary, the issue of whether the new rule complies with the statute is clearly ripe. On its face, the new rule will result in USAC, and then the underlying carrier, billing for the contribution that is the subject of TelePacific’s Petition here. There is no need for further factual development; the issue posed is the strictly legal one of whether a scheme which requires indirect contributions from one class of carriers that includes TelePacific but not from another class of carriers violates the Act’s command that “Every telecommunications carrier that

¹⁴ *ALLTEL Corp. v. FCC*, 838 F.2d at 561-62. Of course, where here, as in this proceeding, the rule contravenes the authorizing statute, it is likewise not “of general validity” and so the presence of a waiver procedure cannot save it.

provides interstate telecommunications services shall contribute, *on an equitable and nondiscriminatory basis*,” to the universal service fund.

Thus, TelePacific’s Petition for Partial Reconsideration “poses ... essentially legal questions or, at least, questions not contingent on future possibilities,” and therefore is ripe without having to wait for the inevitable invoicing and re-invoicing of the contribution. *Farm-to-Consumer Legal Defense Fund v. Sebelius*, 734 F.Supp.2d 668, 693-94 (N.D. Iowa 2010); *see also, e.g., Columbia Broadcasting System v. United States*, 316 U.S. 407, 418-19 (1942) (“Such regulations have the force of law before their sanctions are invoked as well as after. When as here they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of [appellate] attack....”), *cited, quoted and followed in Abbott Laboratories v. Gardner*, 387 U.S. 136, *Nader v. CAB*, 530 F.2d 453, 455 (D.C. Cir. 1976) (even “policy statements” are ripe for review where they in fact narrowly circumscribe the agency’s discretion to act, in a manner that prejudices appellant); *Nebraska Public Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000).

IV. THE “CLARIFIED” RULE SET FORTH IN THE 2012 WHOLESALER-RESELLER CLARIFICATION ORDER VIOLATES BOTH THE PROHIBITION OF DISCRIMINATION IN SECTION 254(d) OF THE ACT AND THE COMMISSION’S LONGSTANDING AND IMPORTANT COMPETITIVE NEUTRALITY PRINCIPLES.

As shown in detail in TelePacific’s Petition for Reconsideration, requiring underlying carriers to make USF contributions on special access services provided to TelePacific and similarly situated carriers as the Commission suggested in the *2012 Wholesaler-Reseller Clarification Order* violates the principle of competitive neutrality and Section 254 of the Act, creates an unlevel playing field, and unfairly disadvantages TelePacific and other similarly situated carriers vis-à-vis their competitors that provide broadband Internet access over their own facilities. It also disadvantages TelePacific vis-à-vis its competitors that provide broadband Internet access using inputs sold on a private carriage basis.¹⁵ Such a requirement directly contradicts the Commission’s goal of fostering competition and ensuring affordable broadband Internet access to every American.

¹⁵ *See* Petition for Partial Reconsideration at 10-11. This discrimination cannot be remedied by TelePacific ordering a T-1 circuit on a private carrier basis. Under the Commission’s *Wireline Broadband Order*, carriers may not offer the same broadband transmission service on both a common and private carrier basis. *Id.* at ¶ 95.

As noted above, Section 254(d) requires that carriers' contributions to USF must be assessed on an "equitable and nondiscriminatory basis."¹⁶ Likewise, Section 254(b) of the Act sets down, as one of the guiding principles for establishing USF policies, that "All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."¹⁷ In its very first *Report and Order* implementing this statute, exercising its authority to do so under Section 254(b)(7) of the Act, the Commission established "competitive neutrality" as an additional explicit principle to govern its implementation of USF rules and policies. The Commission defined competitive neutrality unequivocally:

[C]ompetitive 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.¹⁸

While provider neutrality is self-evidently part of any competitive neutrality program, the Commission explained that technological neutrality is also essential to furthering the purposes of Section 254:

Technological neutrality will allow the marketplace to direct the advancement of technology and all citizens to benefit from such development. By following the principle of technological neutrality, we will avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective. The Joint Board correctly recognized that the concept of technological neutrality does not guarantee the success of any technology supported through universal service support mechanisms, but merely provides that universal service support should not be biased toward any particular technologies.¹⁹

¹⁶ 47 U.S.C. §254(d).

¹⁷ 47 U.S.C. § 254(b).

¹⁸ *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997)* ("First Report and Order"), at ¶ 47.

¹⁹ *Id.* at ¶ 49.

The Commission further noted that the principle of competitive neutrality both implicitly and explicitly underlies other operative provisions of the Act²⁰ and rejected the notion of a potential conflict between competitive neutrality and the goals of universal service.²¹

As noted above, the Commission's recent "clarification" creates a situation in which (i) a USF contributor which provides broadband Internet access using special access services purchased from another carrier must make a substantial indirect USF contribution on such special access, while (ii) the *same* underlying carrier could use the *identical* special access services to provide *identical* broadband Internet access without paying *any* USF contribution, direct or indirect, on those same special access services. On its face, this places one class of providers, who choose one technological solution (buying special access from common carriers to incorporate into their broadband services), at a severe disadvantage vis-à-vis the class of providers taking another technological approach (using their own special access facilities). This facially violates both the provider-neutrality and technology-neutrality prongs of the competitive neutrality principle. And TelePacific showed in greater detail in its Petition for Reconsideration how this severe competitive *disparity* is contrary both to the Commission's bedrock competitive neutrality principle²² and to the explicit nondiscrimination requirement of Section 254(d). There is no need to retrace those steps here.

It should be noted that TelePacific is *not* here seeking a new rule; rather TelePacific is urging the Commission to return to the entity certification rule established by the *First Report and Order*, and memorialized further in Forms 457 and 499 as they were adopted to implement that *Order*. To be sure, even the prior rule may tilt the playing field against non-carrier entities that offer no service other than broadband Internet access service using special access inputs. And indeed, TelePacific has urged the Commission to redress this imbalance in the rulemaking. But those ISPs are not the providers of telecommunications services whom the statute explicitly protects under the non-discriminatory contribution requirement. Section 254(d) requires only that "Every telecommunications carrier *that provides interstate telecommunications services*

²⁰ *Id.* at ¶ 48.

²¹ *Id.* at ¶ 50.

²² TelePacific notes that the Commission has not purported to abandon its competitive neutrality principle and submits that nothing in the record would enable the Commission to reach a reasoned conclusion that such an abandonment is appropriate.

Marlene H. Dortch, Secretary
May 28, 2013
Page 12

shall contribute, *on* an equitable and nondiscriminatory basis....” The prior rule, which created a level playing field as between providers of telecommunications services that also offered broadband Internet access services, satisfied at least this bedrock requirement. But the *2012 Wholesaler-Reseller Clarification Order* tilts the playing field *between* providers of telecommunications services, in favor of those who are owners of last mile facilities. It is that last move which changes the problem from one of simple equity to outright violation of the express statutory command, and it is that move that TelePacific asks the Commission to reverse here.²³

V. CONCLUSION

The Commission’s dismissal of TelePacific’s concerns as untimely is wrong as a matter of law. And under clear precedent, the mere possibility of a waiver is not sufficient to save this patently unlawful rule. The Commission should grant TelePacific’s Petition and eliminate the violation of the statute and fundamental policies that the *2012 Wholesaler-Reseller Clarification Order* has created.

Sincerely,

/s/ electronically signed

Tamar E. Finn

*Counsel for U.S. TelePacific, Corp. d/b/a
TelePacific Communications*

Enclosure

cc: (via E-Mail)

Sean Lev
Diane Griffin Holland
Marcus Maher

²³ It was suggested in the February 14, 2013, meeting that a Commission regulation need not be “perfect” to withstand review. The issue here, however, is not whether the new rule is “perfect” but whether it directly contravenes express statutory requirements. In such a case, the rule must fall, for “the agency[] must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Marlene H. Dortch, Secretary
May 28, 2013
Page 13

Suzanne Tetreault
Maureen Flood
Carol Matthey
Vickie Robinson
Chin Yoo