

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

**COMPTEL COMMENTS IN SUPPORT OF U.S. TELEPACIFIC CORP.'S
D/B/A TELEPACIFIC COMMUNICATIONS' REQUEST
FOR REVIEW AND REVERSAL OF A
UNIVERSAL SERVICE ADMINISTRATOR DECISION**

COMPTEL¹ and CALTEL² hereby emphatically urge the Commission to grant U.S. TelePacific Corp.'s above-captioned Petition for Review and Reversal of the Universal Service Administrator's ("USAC") decision that TelePacific's wireline broadband Internet Access service is subject to universal service contribution obligations and to stay the effect of that decision pending completion of review. USAC's decision is not only wrong as a matter of law, it also directly violates Section 254 of the Communications Act, as amended, and far exceeds the authority the Commission permits it to exercise.

¹ COMPTEL is the leading industry association representing competitive communications service providers and their supplier partners. COMPTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services.

² CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. CALTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. The majority of CALTEL members are small businesses who help to fuel the California economy through technological innovation, new services, affordable prices and customer choice. A list of all members of CALTEL can be found at <http://www.caltel.org/members2.html>.

**USAC Has Erred By Basing Its Decision Not On The Nature Of The
Service Provided To The End User But On The Nature
Of The Transmission Component Used To Provide The Service**

Pursuant to Section 254(d) of the Act, every telecommunications carrier that provides interstate telecommunications services is required to contribute to the universal service fund on an equitable and nondiscriminatory basis.³ The Commission has previously and decisively ruled that Internet access services are information services and that providers of such service are not required to pay universal service contributions on the revenues from such services.⁴ TelePacific provides an integrated Internet access service over T-1 special access lines that it purchases from incumbent LECs. Despite the Commission’s decision in the *Wireline Broadband Order*, USAC has decided that TelePacific is liable for universal service contributions on the “revenue from its T-1 special access circuits associated with its Internet T-1 product,”⁵ and it is this decision that must be reversed.

The Commission need look no further for the error in USAC’s decision than its statement that

USAC makes no determination whether TelePacific’s product “always and necessarily combines computer processing, information processing, and computer interactivity with data transport, enabling end users to run a variety of applications,” which would result in

³ 47 U.S.C. §254(d).

⁴ *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 (rel. Sep. 23, 2005) (“*Wireline Broadband Order*”).

⁵ December 10, 2009 Letter from USAC to Hage & Hage Law and Consulting at 6. (“USAC Decision”).

its classification as an information service as TelePacific argues. Regardless of TelePacific's classification of its T-1 service, as discussed above, this service, like ATM, frame relay and gigabit Ethernet services, is a basic transmission service that is classified by the FCC as a telecommunications service subject to USF reporting and contribution obligations.⁶

USAC's refusal to evaluate TelePacific's obligation to contribute to the universal service fund based on the nature of the service provided to the end user, rather than on the nature (or name) of the underlying transmission facilities, is directly contrary to the precedent established in the *Wireline Broadband Order*. There, the Commission stated that in determining whether a service is an information service,

what matters is the finished product made available through a service rather than the facilities used to provide it. The end user of wireline broadband Internet access service receives an integrated package of transmission and information processing capabilities from the provider, and the identity of the owner of the transmission facilities does not affect the nature of the service to the end user.⁷

Nor can USAC's refusal to look at the nature of TelePacific's finished retail product, rather than the facilities used to provide it, be reconciled with the directive set forth in a 2009 letter from the Commission⁸ issued less than two months after the Commission inquiry⁹ that apparently initiated this controversy. On April 1, 2009, the Commission, citing the *Wireline Broadband Order*, stated in a letter to USAC:

Accordingly, in determining their universal service contribution obligations, contributors should do so in a manner consistent with the definitions of "information services" and "interstate telecommunications" established under the Communications Act of 1934, as

⁶ USAC Decision at 5-6.

⁷ *Wireline Broadband Order* at ¶16.

⁸ April 1, 2009 Letter from Jennifer McKee, Acting Chief, Telecommunications Access Policy Division to Michelle Tilton, Director of Financial Operations, USAC, DA 09-748.

⁹ USAC Decision at 2.

amended, and the Commission's rules and orders. For example, contribution obligations must be consistent with Commission precedent concerning the services for basic transmission purposes or transmissions inextricably intertwined with information-processing capabilities.¹⁰

If contributors are required to determine their universal service contribution obligations in a manner consistent with the definitions of "information services" and "interstate telecommunications" established under the Act, Commission orders and Commission precedent, how can USAC possibly determine a contributor's universal service contribution obligations without regard to whether the transmission component of an information service is inextricably intertwined with information processing capabilities? Quite clearly, it cannot.

USAC's contention that TelePacific's contribution liability stems from its use of a T-1 special access line to provide its Internet access service¹¹ is both specious and unsustainable. The *Wireline Broadband Order* classified wireline broadband Internet Access service as an information service under the Act and explicitly concluded that the "the transmission component of wireline broadband Internet access is *not* a telecommunications service."¹² 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, transmission facilities purchased from a third party.¹³ And the information service classification applies regardless of the capacity of the broadband transmission facility. The Commission's conclusion is consistent with its finding that the Act's "definition of telecommunications, which 'only includes

¹⁰ April 1, 2009 Letter from Jennifer McKee to Michelle Tilton at 1-2.

¹¹ USAC Decision at 3-5.

¹² *Wireline Broadband Order* at ¶4 (emphasis added).

¹³ *Id.* at ¶¶14, 16.

transmissions that do not alter the form or content of the information sent,’ *excludes Internet access services*, which ‘alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.’”¹⁴

Although the Commission defined wireline broadband Internet access service as “a service that uses *existing* or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities,” and held that the transmission component is not a telecommunications service,¹⁵ USAC inexplicably asserts that a T-1 special access transmission facility used to provide subscribers with Internet access capabilities *is* a telecommunications service subject to USF contribution obligations “as evidenced by its long tenure in the telecommunications industry” and the fact that it “is viewed as commonly used for basic transmission purposes.”¹⁶ Neither the long tenure of T-1 special access transmission services in the telecommunications industry nor the fact that they may be used for basic transmission purposes is dispositive for determining TelePacific’s contribution liability. On the contrary, the existence of T-1 special access transmission facilities at the time of the *Wireline Broadband Order* demonstrates that they are the very type of existing wireline facilities which the Commission determined did not fit within the definition of telecommunications service when they are used to provide Internet access.

¹⁴ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report To Congress, FCC 98-67 (rel. Apr. 10, 1998) at ¶33 (emphasis added); *Wireline Broadband Order* at ¶¶12, 16.

¹⁵ *Wireline Broadband Order* at ¶4, 9 (emphasis added).

¹⁶ USAC decision at 5.

More importantly, the fact that a T-1 special access facility *may* be used for basic transmission purposes does not mean that it is a telecommunications service subject to universal service contribution obligations when it is *not* used for basic transmission purposes. The Commission has explicitly so ruled:

The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, “between or among points selected by the user, of information of the user’s choosing without change in the form or content of the information as sent and received.” Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude it falls within the class of services identified in the Act as “information services.” The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service . . . and whether every wireline broadband Internet access service provider offers each function and capability that could be included in the service. Indeed, as with cable modem service, an end user of wireline Broadband Internet access service cannot reach a third party’s web site without access to the Domain Naming Service (DNS) capability “which (among other things) matches the Web site address the end user types into his browser (or ‘clicks’ on with his mouse) with the IP address of the Web page’s host server.” The end user therefore *receives more than transparent transmission* whenever he or she accesses the Internet.¹⁷

USAC’s insistence that revenues from the transmission component of TelePacific’s Internet access service are subject to universal service assessment and must be reported on Line 406 of FCC Form 499-A, rather than on Line 418, is also inconsistent with the instructions to the Telecommunications Reporting Worksheet, Form 499-A, issued by the Commission. In the instructions for line 418, the Commission states that revenues from information services are not

¹⁷ *Wireline Broadband Order* at ¶15 (emphasis added); *see also* ¶9 (“providers of wireline broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition. These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as *stand-alone* ATM service, frame relay, gigabit Ethernet service and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information processing capabilities.”). (Emphasis added).

included in the universal service or other fund contribution bases. The Commission further instructs that carriers should use Line 418.3 to report all non-common carrier wireline broadband Internet access service revenues,¹⁸ as TelePacific has done. In contrast, revenue from broadband service (including the transmission component of broadband Internet access service) provided on a common carrier basis is to be reported on Line 406.¹⁹ TelePacific has informed USAC that it does *not* provide the transmission component of its integrated Internet access products on a common carrier basis and USAC has not challenged that assertion.²⁰ Accordingly, the revenues should not have been reported on Line 406.

USAC's decision that a carrier's universal service contribution obligation depends not on the nature of the service provided to the end user (*i.e.*, information or telecommunications service), nor on the manner in which the service is provided (common carrier vs. non-common carrier basis) but on the name of the transmission facility (*i.e.*, T-1 special access) used to provide that service conflicts with the Communications Act and Commission precedent and must be reversed. There is absolutely no basis under Commission orders or precedent for USAC to selectively require TelePacific to pay universal service fees on revenues from the T-1 special access transmission component of its Internet access service.

USAC's Decision Reaches Beyond The Authority Granted In The Commission's Rules

Section 54.702(c) of the Commission's Rules, 47 C.F.R. §54.702(c), prohibits USAC from making policy, interpreting unclear provisions of the statute or rules or interpreting the

¹⁸ Instructions to the Telecommunications Reporting Worksheet, Form 499-A, at 29.

¹⁹ Instructions to the Telecommunications Reporting Worksheet, Form 499-A, at 26.

²⁰ USA Decision at 1 (“TelePacific offers Internet access services on an non-common carrier basis under the names ‘Internet T-1’ and ‘Bonded T-1.’”)

intent of Congress. In directing TelePacific to report revenues “from its T-1 special access circuits associated with its Internet T-1 product”²¹ as assessable telecommunications revenues, USAC has not only improperly made policy, it has also improperly overruled the Commission’s prior determination that the “the transmission component of wireline broadband Internet access is not a telecommunications service”²² subject to assessment for universal service contributions.

As the *Wireline Broadband Order* confirms, the underlying transmission facilities are an integral part of wireline broadband Internet access service. If allowed to stand, USAC’s determination that it is irrelevant whether a transmission facility is actually used for basic transmission purposes or is inextricably intertwined with information processing capabilities for purposes of calculating universal service liability will nullify the impact of the Commission’s decision to relieve wireline broadband Internet access service providers from the obligation to contribute to the universal service fund based on their information service revenues.²³ It has been over four years since the Commission committed to comprehensively address “[t]he question of ‘whether and under what circumstances the public interest would require us to exercise our permissive authority over wireline broadband Internet access providers’ and whether such providers ‘may, as a legal matter, or should, as a policy matter, be required to contribute’” to universal service, noting that the issue was pending before it in both the *Wireline Broadband* proceeding and the *Universal Service Contribution Methodology* proceeding.²⁴ Nonetheless, the Commission has not yet exercised its permissive authority to require wireline

²¹ USAC Decision at 6.

²² *Wireline Broadband Order* at ¶4.

²³ *Id.* at ¶113.

²⁴ *Wireline Broadband Order* at ¶112.

broadband Internet access providers to contribute to the universal service fund. In the absence of such Commission action, USAC has no authority to compel wireline broadband Internet access providers, like TelePacific, to contribute to the universal service fund based on the revenues received from the transmission component of their Internet access services.

Perhaps USAC's overreaching stems from a misunderstanding of the difference between a basic transmission facility and one that is inextricably intertwined with information processing capabilities. Perhaps USAC's overreaching is motivated by the need to find new revenue sources to compensate for the shrinking universal service contribution base. Whatever USAC's motivation, its *ultra vires* action underscores the need for the Commission to follow through on its commitment to comprehensively overhaul the universal service contribution methodology. Until the Commission does so, however, it must restrain USAC from attempting to selectively collect universal service contributions on information services provided over T-1 special access transmission facilities.

**The Commission Must Stay USAC's Decision
Pending Resolution of TelePacific's Appeal**

TelePacific has persuasively shown that it meets all four criteria for a stay: (1) it is likely to prevail on the merits of its appeal; (2) it will suffer irreparable injury absent a stay of USAC's decision instructing it to file revised Form 499-As to report the revenues from its integrated Internet access products as telecommunications revenues by February 8, 2010; (3) a stay will not injure any other party; and (4) a stay will serve the public interest. For these reasons, the Commission should grant TelePacific's request for a stay of USAC's decision pending resolution of the appeal. *See, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F. 2d 841, 844 (D.C. Cir. 1958).

Although the Commission's rules provide that the Commission (or the Wireline Competition Bureau) "shall issue a written decision in response to a request for review" of a USAC decision within 90 days, which period may be extended for an additional 90 days,²⁵ it appears that this rule is honored more in the breach than in the observance. According to the Commission's website, a number of written decisions were issued in calendar year 2009 in response to requests for review of USAC decisions. The written decisions resolved well over a hundred appeals, but in only two cases were the decisions issued within 90 days of the filing of the appeal.²⁶ In many cases, the appeals had been pending for years.²⁷ USAC's directive that

²⁵ 47 C.F.R. §54.724.

²⁶ See, *In the Matter of Iosco Regional Educational Service Agency*, File Nos. SLD-108653, *et al.*, Order, DA 09-2248 (rel. Oct. 20, 2009) (resolving appeals pending since 2004); *In the Matter of Hancock County School District*, File Nos. SLD-459271, *et al.*, Order, DA 09-2247 (rel. Oct. 20, 2009) (resolving appeals filed in 2001, 2003, 2005, 2006 and 2007); *In the Matter of Hemet Unified School District*, File No. SLD-295589, Order, DA 09-2246 (rel. Oct. 20, 2009) (resolving appeal filed in July 2008); *In the Matter of Exigent Technologies*, File Nos. SLD-239449, *et al.*, Order, DA 09-2245 (rel. Oct. 20, 2009) (resolving appeal filed in 2004); *In the Matter of Eagle Hill School*, SLD-84941, *et al.*, Order, DA 09-2244 (rel. Oct. 20, 2009) (resolving appeals filed in 2001, 2006 and 2007); *In the Matter of Clark County School District*, File Nos. SLD-423200, *et al.*, Order, DA09-2243 (rel. Oct. 20, 2009) (resolving appeals filed in 2003, 2005, 2006, 2008 and June 2009); *In the Matter of Keyport School District*, File No. SLD-388346, Order, DA-09-2241 (rel. Oct. 20, 2009) (resolving appeal filed in 2006); *In the Matter of Hazelwood School District*, File No. SLD-297140, Order, DA 09-2240 (rel. Oct. 20, 2009) (resolving appeal filed in 2003); *In the Matter of Integrity Communications, Ltd*, CC Docket No. 02-6, Order, DA 09-1946 (rel. Aug. 28, 2009) (resolving appeal filed in 2007); *In the Matter of Request for Review of a Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, USAC Audit Report No. CR2005CP007, Order, DA 09-1821 (rel. Aug. 17, 2009) (resolving appeal filed in 2007); *In the Matter of Centennial Michigan RSA 6 Cellular Group*, CC Docket No. 96-45, Order, DA 09-1308 (rel. June 10, 2009)(resolving appeal filed in 2005); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 09-1251 (rel. June 2, 2009) (resolving appealed filed in 2006); *In the Matter of Albert Lea Area Schools*, File No. SLD-517274. Order, DA 09-825 (rel. Apr. 14, 2009) (resolving appeals filed in 2004, 2005, 2006, 2007, 2008, and February 2009); *In the Matter of Lazo Technologies, Inc., et al.*, File Nos. SLD-360412, Order, DA 09-1797 (rel. Aug. 12, 2009) (resolving appeal filed May 11, 2009).

TelePacific contribute to the universal service fund based on its information services revenues puts TelePacific at a tremendous business disadvantage because the carriers with whom it is competing for customers are not required to contribute on such revenues. Absent a stay, TelePacific's Internet access customers will be subject to a 14.1%²⁸ increase in their monthly charges, but the Internet access customers of the incumbent LECs and the cable companies will not be subject to such fees. In these difficult economic times, customers are likely to vote with their feet possibly causing TelePacific to lose business to competitors that it may never recover.

Allowing USAC to treat TelePacific in such a blatantly discriminatory fashion violates Section 254 of the Act. Section 254 requires telecommunications carriers to contribute to the universal service fund on an equitable and nondiscriminatory basis. There is nothing equitable or nondiscriminatory about USAC's singling TelePacific out to contribute to the fund based on revenues from its information services provided over special access T-1s when all other carriers are specifically exempt from contribution on the basis of such revenues. Such discriminatory treatment alone is sufficient to demonstrate irreparable harm. The harm will only be compounded if the Commission lets TelePacific's appeal gather dust on a shelf for years with no action, as it has done with so many other appeals of USAC decisions.

USAC's decision has implications for all providers of broadband Internet access services, especially those that provide the services using special access T-1s.²⁹ The public interest will be

²⁷ *Id.*

²⁸ The current USF contribution factor is 14.1%. FCC Public Notice, "Proposed First Quarter 2010 Universal Service Contribution Factor," DA 09-2588 (rel. Dec. 11, 2009).

²⁹ Interestingly, USAC has taken a different, but equally misguided tack, with other competitive carriers. *See e.g., Grande Communications' Request for Review of a Decision of the Universal Service Administrator*, filed in WC Docket No. 06-122 on December 28, 2009

far better served by the Commission acting quickly to reverse USAC's plain error and to stay the effectiveness of USAC's decision until it does so, than by requiring TelePacific to revise its Form 499-As to report information service revenues as telecommunications revenues and to pay universal service fees on such revenues on a going forward basis while awaiting Commission action on its appeal.³⁰ Because of the clear conflict with the *Wireline Broadband Order*, USAC's decision cannot help but create confusion in the industry. If the Commission determines that USAC's decision is correct, which it should not, all carriers should be put on notice as soon as possible that the Commission *sub silentio* has reversed course on universal service liability for integrated information services, and all carriers should be required to contribute on such revenues in an equitable and nondiscriminatory manner. USAC should not, however, be permitted to selectively target only certain Internet access service providers for contribution as it has done here.

(appealing USAC's determination that Grande must report as telecommunications services broadband Internet Access DSL services, but only for the period prior to August 13, 2006, the end of the 270 day period during which facilities-based wireline Internet access service providers were required to maintain their then current level of contribution obligations on the transmission component of their Internet access services. USAC apparently concedes that DSL revenues are not subject to universal service contribution after August 13, 2006). *See also, In re Request For Review by Madison River Communications, LLC of Decision of the Universal Service Administrator*, filed in WC Docket No. 06-122 on December 12, 2008) (appeal of USAC's determination that Madison River owes USF on DSL revenues for calendar year 2005). COMPTEL is unaware of other instances where USAC has based a determination of universal service liability only on the nature (or name) of the transmission component (*i.e.*, T-1) without reference to the nature of the service provided to the end user for any time after August 13, 2006.

³⁰ See nn. 27, 29, *supra*. Madison River's appeal has been pending for over a year already with no action.

Conclusion

For the foregoing reasons, and those stated in TelePacific's Request for Review and Reversal of Universal Service Administrator Decision and its Emergency Petition For Stay Pending Commission Review, the Commission should reverse USAC's December 10, 2009 decision directing TelePacific to pay universal service fees on its broadband wireline Internet access products and stay the effect of that decision pending completion of its review.

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Respectfully submitted,

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