In the Matter of
Universal Service Contribution Methodology
Petition for Partial Reconsideration of the
Wholesaler-Reseller Clarification Order by
U.S. TelePacific Corp. d/b/a TelePacific
Communications

WC Docket No. 06-122

COMMENTS OF TW TELECOM INC. AND INTEGRA TELECOM, INC.

Pursuant to the Wireline Competition Bureau’s (“Bureau’s”) December 10, 2012 Public Notice,1 tw telecom inc. (“tw telecom”) and Integra Telecom, Inc. (“Integra”) (collectively, the Joint CLECs), through their undersigned counsel, hereby submit these comments in support of the Petition for Partial Reconsideration (“Petition”) filed by U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) in the above-captioned docket.2

I. INTRODUCTION

As the Bureau recognizes in the Public Notice, TelePacific’s Petition seeks “to ensure that universal service contributions are assessed on [all] broadband Internet access service providers in a competitively neutral and nondiscriminatory manner.”3 The Joint CLECs wholeheartedly support this goal. As discussed herein, the Joint CLECs urge the Commission to


2 Petition for Partial Reconsideration by U.S. TelePacific Corp. d/b/a TelePacific Communications, WC Dkt. No. 06-122 (filed Dec. 5, 2012) (“Petition”).

3 Public Notice at 1.
take immediate action to eliminate the market distortions created by the existing contributions
system’s unequal treatment of broadband Internet access service providers that rely on special
access inputs and facilities-based broadband Internet access service providers.

II. DISCUSSION

A. The Existing USF Contributions System Distorts Competition In The
Broadband Internet Access Service Market.

Under the existing universal service contributions regime, competitive LECs that
purchase special access as inputs to broadband Internet access service are indirectly subject to
universal service contribution obligations. This is because wholesale providers of special access
must contribute directly to the Universal Service Fund (“USF” or “Fund”) on revenues from the
sale of those inputs, and they generally pass those contribution obligations through to their
competitive LEC reseller customers (e.g., Integra, tw telecom, or TelePacific). By contrast,
incumbent LECs that rely on their own facilities to provide broadband Internet access service are
not subject to any universal service contribution obligations. In addition, competitive LECs that
rely on unbundled network elements (“UNEs”) to provide broadband Internet access service are
not subject to any direct or indirect universal service contribution obligations. This regime
directly contradicts several longstanding Commission policies.

4 See, e.g., Universal Service Contribution Methodology, Order, 22 FCC Red. 13780, n.61 (rel.
Nov. 5, 2012) ("Wholesaler-Reseller Clarification Order") (citing 47 C.F.R. § 54.706(a)(4));
Universal Service Contribution Methodology; Request for Review of the Decision of the
Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp.
d/b/a TelePacific Communications, Order, 25 FCC Red. 4652, ¶ 8 (2010) (citing Appropriate
Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and
Classification Order").

5 See Wireline Broadband Classification Order ¶ 104 (holding that “the transmission component
. . . of a facilities-based provider’s offering of wireline broadband Internet access service to end
users using its own transmission facilities . . . is mere ‘telecommunications’ and not a
‘telecommunications service’").
First, in implementing Section 254 of the Act, which requires that contributions be made on an “equitable and nondiscriminatory basis,” the Commission adopted competitive neutrality as a guiding principle for its universal service policies. As the Commission has recognized, “Section 254(d) is grounded on the principle that the contributions system should be fair for contributors.” The Commission summarized its universal service contributions policy as follows:

[S]ince the initial implementation of section 254 after passage of the 1996 Act, the Commission has held that the universal service rules should be competitively neutral and should “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.” Thus in developing the existing contribution methodology in 1997, the Commission endeavored to reduce the “possibility that carriers with universal service obligations [would] compete directly with carriers without such obligations.”

Second, the Commission has consistently sought to establish a level playing field among all providers of broadband Internet access service by “regulat[ing] like services in a similar manner.” In the Wireline Broadband Classification Order in particular, the Commission sought to “end[] the regulatory inequities that . . . exist[ed] between cable and telephone

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9 Id. ¶ 8 (emphasis added) (internal citations omitted).

companies in their provision of broadband Internet services.”\textsuperscript{11} In order to advance this objective, the Commission classified wireline broadband Internet access service as an information service (as it had cable modem broadband Internet access service) regardless of the type of wireline facility over which the service was provided\textsuperscript{12} and regardless of whether the service provider owned or leased the underlying transmission facilities.\textsuperscript{13} The Commission reasoned that it “should regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions.”\textsuperscript{14}

By treating broadband Internet access service providers that rely on special access inputs differently from facilities-based broadband Internet access service providers, the existing contributions regime clearly violates the Commission’s well-established principles of competitive neutrality. The existing contributions system blatantly discriminates against competitive LECs and creates exactly the kinds of market distortions that the Commission sought to avoid when it first implemented Section 254 and when it adopted the \textit{Wireline Broadband Classification Order}. 

\textsuperscript{11} \textit{Wireline Broadband Classification Order}, Statement of Chairman Kevin J. Martin.

\textsuperscript{12} See \textit{Wireline Broadband Classification Order} n.15.

\textsuperscript{13} See \textit{id.} ¶ 16 (“There is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities. From the end user’s perspective, an information service is being offered regardless of whether a wireline broadband Internet access service provider self-provides the transmission component or provides the service over transmission facilities that it does not own.”).

\textsuperscript{14} \textit{id.} ¶ 45.
In particular, the existing system essentially imposes a “tax” of 16.1 percent (the current USF contribution factor)\(^\text{15}\) on only a subset of all broadband Internet access service providers (\textit{i.e.}, competitive LECs that rely on special access inputs). And that 16.1 percent tax is applied to special access inputs that are already overpriced due to the lack of adequate regulation governing incumbent LECs’ special access services.\(^\text{16}\) At the same time, incumbent LECs are able to avoid this tax because they possess ubiquitous networks that they inherited as a result of their legacy monopolies. The competitive LECs—whose higher input costs are subject to the 16.1 percent tax—then compete directly against the incumbent LECs in the downstream retail market for broadband Internet access service.\(^\text{17}\) Thus, the existing contributions rules place competitive


\(^{16}\) See, e.g., Special Access for Price Cap Local Exchange Carriers, Report and Order, 27 FCC Rcd. 10557, ¶¶ 5, 22-79 (2012) (finding that the Commission’s pricing flexibility rules have resulted in grants of pricing flexibility where there was insufficient competition to constrain incumbent LEC special access prices). Appropriate regulation of special access services is necessary because incumbent LECs do not face competition in the provision of special access in many product markets (\textit{e.g.}, DS1, DS3 and lower capacity Ethernet) and geographic markets. See, e.g., Special Access for Price Cap Local Exchange Carriers, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, ¶ 25 (rel. Dec. 18, 2012) (explaining that the Commission’s most recent data “suggest that competitive providers may serve a relatively small proportion of all locations that have special access”); Letter from Thomas Jones & Matthew Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 14 (filed Jun. 5, 2012) (noting that “ILECs control the only facility serving the vast majority of commercial locations in the United States”); Letter from Michael J. Mooney, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 5 (filed Jun. 27, 2012) (same).

\(^{17}\) As TelePacific explains in its related request for stay pending reconsideration, the competitive LECs cannot recover the 16.1 percent tax through a line item on retail business customers’ bills because the competitive LECs are not contributing directly to the USF on the underlying special access inputs. See Request for Stay Pending Reconsideration by U.S. TelePacific Corp. d/b/a TelePacific Communications, WC Dkt. No. 06-122, at 11 (filed Dec. 5, 2012). The competitive LECs’ only means of recovery is to charge higher retail prices than the incumbents for a functionally equivalent service. See id.
LECs at a substantial cost disadvantage and thereby cause the Commission to pick the winners and losers in the broadband Internet access services marketplace.

Moreover, the effect of these market distortions is likely to be felt disproportionately by small and medium-sized businesses—the “key drivers of economic growth and job creation” in this country. 18 This is because most competitive LECs that rely on special access inputs to provide broadband Internet access service are providing such service to small and medium-sized business customers.

B. The Commission Should Take Immediate Action To Eliminate The Market Distortions Created By The Existing USF Contributions System.

The Commission should act quickly to address the disparate treatment of broadband Internet access providers that rely on special access inputs and all other broadband Internet access service providers under the existing contributions regime. As discussed below, the Commission could do so in one of several ways. 19 The Commission could take such action either by immediately issuing an order addressing TelePacific’s Petition or by immediately adopting rules in the ongoing USF contribution reform rulemaking proceeding. 20


19 The Commission should not, however, require wholesalers to make universal service contributions on the sale of UNEs that are used by resellers to provide only broadband Internet access service (and thus, effectively require resellers to make indirect contributions on those UNEs). Such action would only exacerbate the inequity in the existing contributions system by expanding the class of carriers subject to discriminatory treatment.

20 There is no question that rules to address the unequal treatment of broadband Internet access service providers that rely on special access inputs and all other broadband Internet access service providers under the existing contributions system would constitute a “logical outgrowth” of the ongoing USF contribution reform rulemaking. See, e.g., Pub. Serv. Comm’n of D.C. v. FCC, 906 F.2d 713, 717 (D.C. Cir. 1990) ( “It is well established that the exact result reached after a notice and comment rulemaking need not be set out in the initial notice for the notice to
First, the Commission could—and ideally, it should—expand the contribution base to include all providers of broadband Internet access service.\textsuperscript{21} If the Commission broadens the contribution base in this way, then all providers of broadband Internet access service—regardless of whether they rely on their own facilities, on UNEs, or on special access inputs to provide such service—would be required to contribute (and could pass those contribution obligations through to their end-user customers).

Second, the Commission could cease requiring wholesale carriers to contribute directly to the Fund on revenues derived from the sale of special access inputs used only to provide broadband Internet access service. For purposes of implementing this policy, the Commission would (1) require wholesalers to accept certifications from their reseller customers indicating that they are exempt from contributing directly or indirectly on the special access inputs they purchase because those inputs are used to provide only broadband Internet access service; and (2) prohibit wholesalers from imposing any pass-through charges (or, in the Commission’s parlance, “end user” charges) for the purchased special access inputs that are used to provide only broadband Internet access service. Under this approach, the reseller customer would be required to indicate on the certification form which circuits are used to provide only broadband Internet access service and which are not (because, otherwise, the wholesaler would not know be sufficient. Rather, the final rule must be ‘a logical outgrowth’ of the rule proposed.”) (internal citations omitted).

\textsuperscript{21} Expanding the contribution base to include broadband Internet access service providers would not only eliminate the inequity between those providers that rely on special access inputs and those that rely on their own facilities and UNEs, but it would also help the Commission achieve its goals of limiting the overall contribution burden, establishing a stabilized and sustainable contribution base, and simplifying administration of the current contributions system. \textit{See} Comments of EarthLink, Integra, and tw telecom, WC Dkt. No. 06-122, at 5-7 & 13-15 (filed July 9, 2012).
which special access inputs are used by the reseller to provide only broadband Internet access service and which are not).

Third, the Commission could (1) require wholesalers to accept certifications from reseller customers on an entity-by-entity basis in which the reseller indicates that it is exempt from any pass-through charges from the wholesaler because it contributes directly to the Fund for any resold services subject to contributions (a practice followed by most wholesalers and resellers today); and (2) prohibit wholesalers from requiring their reseller customers to specify which of the purchased special access circuits are used to provide only broadband Internet access service and which are not. In so doing, the Commission would effectively prevent wholesalers from imposing pass-through charges on special access circuits used by contributors to the Fund to provide only broadband Internet access service and effectively prevent wholesalers from having to contribute directly to the Fund on those circuits (because the wholesaler would not know which special access circuits are used by the reseller to provide only broadband Internet access service and which are not).

Under the second and third options discussed above, there would be a reduction in contributions to the Fund resulting from the decrease in contributions on special access inputs sold to providers of broadband Internet access service. One way in which the Commission could

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22 The third option, while preferable to the status quo, is not optimal because it would not eliminate contributions on special access inputs sold to providers of broadband Internet access services that do not contribute directly to the Fund (e.g., de minimis telecommunications providers and qualifying systems integrators). Some modest distortions to the market would therefore remain under the third option. Because this is not true of the first and second options discussed above, those options are preferable to the third option.
make up for this shortfall is by utilizing a portion of the approximately $185 million of Connect America Fund Phase I funding that was not accepted by price cap carriers.\(^{23}\)

III. CONCLUSION

For the foregoing reasons, the Commission should take immediate action to eliminate the competitive distortions in the broadband Internet access service market created by the existing USF contributions regime.

Respectfully submitted,

\(\textit{/s/ Thomas Jones} \)

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