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July 8, 2016

VIA ETFS AND HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554
Attention: Wireline Competition Bureau


Re: Petition to Reject or Suspend and Investigate Pacific Bell Telephone Company Transmittal No. 539 and Southwestern Bell Telephone Transmittal No. 3428

Dear Secretary Dortch:

On behalf of U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") and Alpheus Communications, LLC ("Alpheus"), enclosed for filing is an original and four (4) copies of a Joint Petition to Reject or Suspend and Investigate Proposed Tariff Revisions of Pacific Bell Telephone Company filed under Transmittal No. 539 and of Southwestern Bell Telephone Company filed under Transmittal No. 3428, on July 1, 2016.

Please date-stamp and return the enclosed copy of this filing. Should you have any questions, please do not hesitate to contact the undersigned at (202) 373-6000.

Respectfully submitted,



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Counsel for U.S. TelePacific Corp. d/b/a TelePacific Communications and Alpheus Communications, LLC

Attachment
cc: See Certificate of Service

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

In the Matter of)	
)	
Pacific Bell Telephone Company)	Transmittal No. 539
Tariff F.C.C. No. 1)	
)	
Southwestern Bell Telephone Company)	Transmittal No. 3428
Tariff F.C.C. No. 73)	

**PETITION OF U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC
COMMUNICATIONS AND ALPHEUS COMMUNICATIONS, LLC
TO REJECT OR SUSPEND AND INVESTIGATE
PROPOSED TARIFF REVISIONS**

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Dated July 8, 2016

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TO REJECT OR SUSPEND AND INVESTIGATE
PROPOSED TARIFF REVISIONS**

U.S. TelePacific Corp., d/b/a TelePacific Communications (“TelePacific”) and Alpheus Communications, LLC (“Alpheus”), petition the Federal Communications Commission (“FCC” or “Commission”), pursuant to Section 204(a)(1) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 204(a)(1), and Section 1.773 of the Commission’s Rules, 47 C.F.R. § 1.773, to reject or suspend and investigate Pacific Bell Telephone Company (“PacBell”) Transmittal No. 539 and Southwestern Bell Telephone (“SWBT”) Transmittal No. 3428, submitted on July 1, 2016. (PacBell and SWBT will be referred to collectively herein as “AT&T.”) AT&T’s transmittals fail to comply with the Commission’s *Tariff Investigation Order*,¹ requiring changes in shortfall and early termination penalties.²

¹ *In the Matter of Business Data Services in an Internet Protocol Environment, Investigation of Certain Business Data Services in Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Tariff Investigation Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd 4723 (“*Tariff Investigation Order* or “*Business Data Services FNPRM*”).

² While the *Tariff Investigation Order* was directed to PacBell and SWBT, among other ILECs, it did not address the tariffs of Nevada Bell Telephone Company (“Nevada Bell”), an

I. Introduction and Summary

The Commission's *Tariff Investigation Order* found the early termination and shortfall penalties in AT&T's DS1 Term pricing plan ("TPP") to be unjust and unreasonable in violation of Section 201(b) of the Communications Act (as amended).³ Because AT&T's filing does not correct those problems, it should be rejected or suspended while being investigated.

TelePacific is a Competitive Local Exchange Carrier ("CLEC") that is one of the leading broadband providers in California, Nevada and Texas to small and medium sized businesses. It is the largest CLEC competitor to PacBell in its major network areas. TelePacific leases "last mile" facilities of AT&T and other ILECs to serve locations not on its network. Specifically, it leases DS1 services pursuant to special access tariffs and contracts or as unbundled network elements. It combines these leased last mile facilities with TelePacific's vast network consisting of nearly 40,000 fiber strand miles and 20 switches, to provide cost effective customized broadband and communications solutions throughout California, Nevada, and Texas.⁴ Alpheus is a CLEC providing telecommunications and data center services for enterprises and carriers throughout Texas. Alpheus provides wholesale services to other carriers and serves enterprise customers in a broad range of industries including healthcare, energy, banking, and IT. Alpheus' fiber infrastructure is a leading Texas network for delivering metro access, regional transport and

affiliate of PacBell and SWBT. Nevada Bell's TPP is identical to PacBell's. Nevada Bell Tariff FCC No. 1 § 7.11.5.2(E)(3)(b)(i) (specifying that DS1 TPP Channel Termination shortfall liability is calculated using Nevada Bell's "current nonrecurring channel termination rate" of \$900 (Nevada Bell Tariff FCC No. 1, § 7.11.5.3(F)(5)) and § 7.11.5.2(E)(4)(e) (DS1 portability commitment early termination liability is calculated using the "prevailing Month-to-Month recurring rate" which is currently \$124.55 (Nevada Bell Tariff FCC No. 1, § 7.11.5.3(A)). It would be appropriate for the Commission to impose the same requirements on Nevada Bell as it has imposed on PacBell and SWBT.

³ 47 U.S.C. § 201(b).

⁴ For more information concerning TelePacific, see <http://www.telepacific.com/>.

sophisticated networking solutions. For over a decade, Alpheus has been providing wholesale services to the nation's largest telecommunications providers and Texas businesses with a network covering Dallas-Fort Worth, Houston, San Antonio, Austin, and the Rio Grande Valley. In each metro market, Alpheus has extensive fiber networks and broad reach, connecting over 300 ILEC Central Offices/Carrier POPs and major data centers. Alpheus complements its deep Metro fiber presence with special access services and unbundled network elements leased from ILECs in order to serve customer locations where deployment of fiber is not economic.

In the *Designation Order*,⁵ the Wireline Competition Bureau initiated an investigation into terms and conditions imposed by ILECs in tariffs for special access services.⁶ The *Tariff Investigation Order* concludes that ILECs impose anti-competitive lock up provisions in their contracts for access services to “forestall the day when a more efficient entrant is able to provide customers with better prices.”⁷

Of the most concern to TelePacific and Alpheus are the Commission's findings with respect to PacBell's TPP, in section 7.4.18 of its Tariff FCC No. 1 and section 7.2.22 of SWBT Tariff FCC No. 73. Under AT&T's TPP, CLECs “can obtain special access services at ‘discounted’ rates off of AT&T's excessively high month-to month rates only by committing to purchase circuits for a fixed term, and ...can obtain critical ‘benefits’ such as ‘circuit portability’ only by committing to maintain 80 percent of their historic special access purchase volumes with

⁵ *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd 11417 ¶ 34 (Wireline Comp. Bur. 2015) (“*Designation Order*”).

⁶ *Tariff Investigation Order*, ¶ 86.

⁷ *Id.*, ¶ 92.

AT&T for three years.”⁸ The Commission acknowledges, this portability affords CLECs the “flexibility to disconnect circuits and replace them with others to meet their commitments and thereby not incur early termination penalties.”⁹

AT&T’s terms combine portability with multi-year discounts. A customer must specify a commitment level, for example the total number of DS1 channel terminations, during a three year period. If the CLEC falls short of that commitment level, it must pay a shortfall fee for each circuit below its commitment level for each month it remains under that commitment level. AT&T’s existing TPP illogically calculates the shortfall penalty for each month of shortfall using the DS1 channel termination nonrecurring rate.¹⁰

The Commission found this unreasonable and concluded that “a reasonable shortfall fee should be set at a level no greater than the amount of revenue a customer would have paid had it met its minimum commitment.”¹¹ The Commission further concluded that ILECs are not permitted to set punitive shortfall penalties and could readily estimate their “expectation damages.”¹² Consistent with this determination, the *Tariff Investigation Order* establishes that “the shortfall rate applied to the calculation [of shortfall penalties] will be no higher than the discounted or lowest rate in the plan.”¹³

Applying this principle to AT&T’s TPP, the *Tariff Investigation Order* found that the “use

⁸ *Designation Order*, 31 FCC Rcd at 11463, ¶ 87, *quoting* Letter from Angie Kronenberg, General Counsel, Comptel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 3-4 (filed Sep. 10, 2014).

⁹ *Designation Order*, 31 FCC Rcd at 11433, ¶ 34.

¹⁰ SWBT Tariff No. 73, § 7.2.22(E)(4)(b)(i); PacBell Tariff FCC No. 1, § 7.4.18(E)(4)(b)(i).

¹¹ *Tariff Investigation Order*, ¶ 132.

¹² *Id.*, ¶¶ 133-134

¹³ *Id.*, ¶ 135.

[of] an excessive non-recurring charge” results in shortfall penalties that are “several times the monthly discounted rate,”¹⁴ and were thus “unjust and unreasonable.”¹⁵ The Commission directed AT&T to “remove such provisions from [its] tariffs” and allowed it to revise its tariffed shortfall penalties so they “are no greater than the amount of revenue that a customer would have paid had it met its minimum commitment.”¹⁶

AT&T’s TPP circuit portability provision also contains an early termination penalty that is assessed when the customer terminates a circuit before the end of the service term.¹⁷ The early termination penalty is calculated by multiplying the decreased number of channel terminations by the prevailing month-to-month recurring rate and the number of months remaining in the commitment.¹⁸

The Commission determined that an early termination penalty “should be set at a level no greater than the amount of revenue a customer would have paid had it met its minimum commitment.” The Commission referred to this as “expectation damages.”¹⁹ The *Tariff Investigation Order* found two possible methods, consistent with this principle, for ILECs to calculate early termination penalties: (1) calculate the revenues the customer committed to purchase per month and assess that amount for the months remaining in the term commitment;²⁰ or (2) calculate the difference between the discounted rates the customer paid and the higher rates

¹⁴ *Id.*, ¶ 138.

¹⁵ *Id.*, ¶ 140.

¹⁶ *Id.*

¹⁷ *Id.*, ¶ 142.

¹⁸ *Id.* See also PacBell Tariff FCC No. 1, § 7.4.18(E)(4)(e); SWBT Tariff FCC No. 73, § 7.2.22(E)(4)(e).

¹⁹ *Tariff Investigation Order*, ¶ 152.

²⁰ *Id.* at ¶ 156.

it would have paid had it signed up for a shorter term.²¹ Because AT&T's early termination penalty for portability was not consistent with either method, AT&T must revise its tariffs.²²

Rather than elect one of the two options identified by the Commission, AT&T proposes to grandfather its DS1 TPP and prohibit renewals at the expiration of current plans.²³ At the conclusion of these plans, customers will be forced to pay AT&T's excessive month-to-month rates.²⁴ This conflicts with the Commission's finding in the *Business Data Services FNPRM* that automatic conversion to month-to-month rates at the conclusion of a discount plan is an unreasonable practice that violates Section 201(b).²⁵

Further, the replacement shortfall and early termination penalties proposed by AT&T are inconsistent with the *Tariff Investigation Order*. Instead of calculating the shortfall and early termination penalties using the discounted rate that would have applied had the customer met its commitment level, PacBell imposes an arbitrarily selected \$126 per /month rate, which is the current monthly rate for the 2-Year Zone 1 DS1 TPP.²⁶ SWBT proposes to use an even higher rate, \$145/month.²⁷ These rates, are significantly higher than other rates, such as SWBT's Zone 1 7-year channel termination rate of \$90/month²⁸ and PacBell's Zone 1 7-year channel termination rate of \$110/month.²⁹ More importantly, the vast majority of CLECs never pay these TPP DS1

²¹ *Id.*

²² *Id.*, ¶ 158.

²³ PacBell Justification at 5; SWBT Justification at 5.

²⁴ PacBell Tariff FCC No. 1, § 7.4.18(D); SWBT Tariff No. 73 § 7.2.22 (D).

²⁵ *Business Data Services FNPRM*, ¶ 486.

²⁶ PacBell Justification at 5.

²⁷ SWBT Justification at 5.

²⁸ SWBT Tariff FCC No. 73 § 7.3.10(F)(10.4)(1).

²⁹ PacBell Tariff FCC No. 1, § 7.5.9(I).

Channel Termination rates but instead receive further discounts under contract tariffs.³⁰

The Commission should reject or suspend and investigate PacBell's Transmittal No. 539 and SWBT's Transmittal No. 3428 because they fail to comply with the requirements in the *Tariff Investigation Order* and are unjust, unreasonable and unlawful and pose substantial questions regarding their lawfulness. TelePacific and Alpheus will be irreparably harmed, because if these rates are allowed to take effect, they will be deemed lawful under § 204(a)(3) and refunds will be unavailable.

II. Legal Standard

The Commission rejects a tariff when it is prima facie unlawful, conflicting with the Communications Act or a Commission rule, regulation or order.³¹ Under § 201(b),³² a common carrier, such as AT&T, acts unlawfully if it assesses unjust or unreasonable rates in its tariffs. Moreover, the Commission has the authority to reject a proposed tariff modification or suspend and investigate if substantial cause justifies doing so.³³ Here, moreover, the Commission must reject or suspend and investigate the tariff revisions because they do not comply with the specific directions in the *Tariff Investigation Order*.

³⁰ If the Commission were to (as it should) preclude AT&T and other ILECs from imposing confidentiality provisions in their special access/BDS agreements, the Commission would have greater visibility into the effective rates customers pay, and the onerous terms and conditions with which such customers must comply in order to obtain "discounts." See *Business Data Services FNPRM*, ¶¶ 313-20.

³¹ See e.g., *American Broadcasting Companies, Inc. v. AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI v. AT&T*, 94 F.C.C.2d 332, 340-341 (1983).

³² 47 U.S.C. § 201(b).

³³ *RCA American Comms., Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

III. The Commission Should Reject Or Suspend and Investigate The Transmittal Because PacBell's Proposed Charges for Shortfall and Early Termination Penalties Do Not Comply with the *Tariff Investigation Order*

PacBell's rates in Transmittal No. 539 and SWBT's in Transmittal No. 3428 should be rejected or suspended and investigated because they conflict with the requirements in the *Tariff Investigation Order* and are not just and reasonable, as Section 201(b) of the Act requires.

TelePacific and Alpheus object to the \$126/\$145 per month and per circuit charges in AT&T's tariffs for shortfall and early termination because they do not comply with the Commission's *Tariff Investigation Order*. That order established that "the shortfall rate applied to the calculation [of shortfall penalties] will be no higher than the *discounted or lowest rate* in the plan."³⁴ The *Tariff Investigation Order* requires AT&T to remove from its DS1 TPPs the existing shortfall and early termination provisions.³⁵ The Commission allowed AT&T to file new tariffs containing shortfall provisions, providing they require the customer with a shortfall to pay "no greater than the amount of revenue that a customer would have paid had it met its minimum requirements."³⁶ In the case of early termination, the *Tariff Investigation Order* provided that AT&T could lawfully recover the "opportunity cost" that it "incur[red] as a result of the breach."³⁷

AT&T attempts to comply with these requirements by imposing a \$126 per circuit per month penalty in PacBell territory and \$145 in SWBT territory, for both shortfall and early termination. AT&T explains that it selected these rates because they are the current monthly rate for the 2-Year Zone 1 DS1 TPP, which it used because "it is not possible to identify the specific

³⁴ *Tariff Investigation Order*, ¶ 135 (emphasis added).

³⁵ *Id.*, ¶¶ 541-542.

³⁶ *Id.*, ¶ 140.

circuit that caused the shortfall or early termination.”³⁸

The \$126/\$145 per month per circuit charges do not comply with paragraph 140 of the *Tariff Investigation Order* or paragraph 158 regarding early terminations. First, with regard to shortfalls, the Order limits the amount to be paid to the amount the customer “would have paid had it met its minimum requirements.”³⁹ Nor is the \$126/\$145 per month per circuit charge the “discounted rate or lowest rate in the plan.”⁴⁰ Even accepting *arguendo* AT&T’s assertion that it is impossible “to identify the specific circuit that caused the shortfall,” there is no logic to approximating the amount the customer “would have paid” by arbitrary reference to the 2-Year TPP.⁴¹ PacBell could establish the average monthly rate per circuit by customer. For example, AT&T could divide the revenue for the previous month by the number of circuits for that month to obtain an average monthly rate per customer circuit. In many cases, it is likely that customers are paying less than \$126/\$145 per month per circuit. As noted above, the SWBT Zone 1 7-year channel termination rate is \$90/month,⁴² and the PacBell rate is \$110.⁴³ And even these rates are higher than CLECs pay under the pricing flexibility contract tariffs they use to purchase special access. Using the inflated rates proposed by AT&T rather than the rates the customer actually pays is in conflict with the principle of “expectation damages.” By tailoring the shortfall amount to the rate that the customer was actually paying — as opposed to an arbitrary 2-Year rate — the

³⁷ *Id.*, ¶ 158.

³⁸ PacBell Justification at 5; SWBT Justification at 5.

³⁹ *Tariff Investigation Order*, ¶ 140.

⁴⁰ *Id.*, ¶ 135.

⁴¹ PacBell Justification at 5; SWBT Justification at 5.

⁴² SWBT Tariff FCC No. 73 § 7.3.10(F)(10.4)(1).

⁴³ PacBell Tariff FCC No. 1 § 7.5.9(I).

tariff would come much closer to measuring damages by what the customer “would have paid.”⁴⁴

Similar reasoning applies to the early termination fee. The *Tariff Investigation Order* limits the reasonable charge to the “opportunity cost” that AT&T “incur[red] as a result of the breach.”⁴⁵ This too, would be measured in the first instance by the revenue that AT&T lost because of the early termination. That revenue is best measured by the average amount per circuit that the customer was paying in the month before the early termination. In both cases, allowing AT&T to charge a customer that has bargained for a 7-year rate for the balance of the 7-year term on the basis of a 2-year monthly rate unjustly enriches AT&T. AT&T would receive the benefit of being paid for the remaining portion of the entire 7-year duration. At the same time it would receive the benefit of collecting at the higher 2-year rate, and making AT&T better off than had the customer had complied with its contract. This is the punitive result that the *Tariff Investigation Order* sought to avoid. TelePacific and Alpheus therefore request that the Commission reject or suspend and investigate PacBell Transmittal No. 539 and SWBT Transmittal No. 3428 since AT&T has failed to conform its shortfall and early termination provisions to the requirements of the *Tariff Investigation Order*.

Further, AT&T ignored the Commission’s directive that AT&T remove from its TPP “language requiring customers to aggregate all their purchases under a single plan.”⁴⁶ Instead, AT&T proposes to discontinue its TPP plans while grandfathering existing customers (while prohibiting renewals). This contravenes the *Tariff Investigation Order*, and thus should be rejected as unlawful.

As an alternative, suspension and investigation is warranted. AT&T’s failure to comply

⁴⁴ *Tariff Investigation Order*, ¶ 140.

⁴⁵ *Id.* ¶ 158.

⁴⁶ *Tariff Investigation Order*, ¶ 110.

with the *Tariff Investigation Order* shows that there exists a strong likelihood that AT&T's proposed shortfall and early termination penalty provisions in PacBell Transmittal No. 539 and SWBT Transmittal No. 3428 would be found unlawful after a Commission investigation. Allowing these provisions to be deemed lawful and to go into effect irreparably harms customers such as TelePacific and Alpheus, subjects them to excessive shortfall and early termination penalties and precludes them from obtaining refunds of these overcharges. Nor would suspension harm other interested parties or be contrary to the public interest.

IV. The Commission Should Reject or Suspend and Investigate AT&T's Discontinuance of its DS1 TPP

AT&T's tariff changes include the elimination of the TPP, effective July 16, 2016, (with grandfathering for existing customers) which means that upon the expiration of the current TPPs under which TelePacific, Alpheus and others are purchasing circuits, customers' current term rates will convert to much higher month-to-month rates.⁴⁷ In the *Business Data Services FNPRM*, the Commission asserted that "any provision that enables a provider to increase its rates upon the expiration of [] a tariff ... for TDM... service in areas without sufficient competition is unreasonable under section 201 of the Act."⁴⁸ In light of the Commission's conclusion that "competition remains stubbornly absent from ...low bandwidth services" such as the DS1s subject to AT&T's TPP,⁴⁹ the Commission should not allow AT&T to preclude existing customers from renewing their TPPs, particularly while the Commission's broader reforms of the

⁴⁷ Section 7.4.18(D) of PacBell Tariff FCC No. 1 and Section 7.2.22 (D) of SWBT Tariff No. 73 provides that the "DS1 TPP is not available for renewal. At the expiration of the DS1 TPP term, the customer may select a new DS1 TPP term at the prevailing DS1 TPP rates. If a customer does not wish to purchase a new DS1 TPP at the expiration of the term, the customer's service will automatically convert to the current month-to-month rates."

⁴⁸ *Business Data Services FNPRM*, ¶ 486.

⁴⁹ *Tariff Investigation Order*, ¶ 3.

special access/BDS market remain pending.

AT&T's justification is not persuasive for barring renewals. As the Commission understands, the combination of AT&T's excessive month-to-month rates allow AT&T to condition discounts on very long circuit terms such as seven years. Portability thus is necessary to avoid early termination liability since TelePacific and Alpheus' customer contracts are typically much shorter and rarely, if ever, correspond to the terms of their special access plans. In other words, portability is tightly integrated with the multi-year circuit terms in TelePacific's and Alpheus' respective special access agreements. It is unreasonable for AT&T to eliminate portability while it maintains a rate structure that forces customers to order circuits under very long term multi-year commitments. AT&T's complaint that there is too much uncertainty given the Commission's pending Business Data Services rulemaking,⁵⁰ rings hollow when compared to the massive windfall it would accrue from the predictable flood of early terminations once TPP subscribers lose circuit portability.

V. Conclusion

For the reasons discussed, TelePacific and Alpheus request that the Commission reject or suspend and investigate PacBell's Transmittal No. 539 and SWBT's Transmittal No. 3428 and their respective proposed rate increases for shortfall and early termination penalties.

⁵⁰ PacBell Justification at 2-3; SWBT Justification at 2-3.

Respectfully submitted,

/s/ Joshua M. Bobeck

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TelePacific Communications and Alpheus
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July 8, 2016

CERTIFICATE OF SERVICE

I, M. Renee Britt, certify that a copy of the foregoing Joint Petition of U.S. TelePacific Corp. d/b/a TelePacific Communications and Alpheus Communications, LLC to Reject or Suspend and Investigate Proposed Tariff Revisions of Pacific Bell Telephone Company and Southwestern Bell Telephone Company was served by hand-delivery, electronic mail or by facsimile and U.S. first-class mail on this 8th day of July, 2016, to the following:

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