

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

In the Matter of)

Request for Review by)
XO Communications Services, LLC)
of Decision of the Universal Service)
Administrator)

WC Docket No. 06-122

**XO COMMUNICATIONS SERVICES, LLC REQUEST FOR REVIEW OF DECISION
OF THE UNIVERSAL SERVICE ADMINISTRATOR**

Pursuant to 47 C.F.R. § 54.719 of the rules of the Federal Communications Commission (“Commission”), XO Communications Services LLC (“XOCS”)¹ respectfully requests that the Commission reverse the August 15, 2019 decision of the Universal Service Administrative Company (“USAC”) that addressed the appropriate jurisdictional classification of XOCS’ revenues derived from certain intrastate private lines.² USAC issued the Final Determination Letter on remand from the Wireline Competition Bureau after its 2017 *Private*

¹ In 2008, when USAC initiated the audit that was the subject of this appeal, XOCS was known as XO Communications Services, Inc. XOCS appealed the USAC audit in 2010 under that name. *See XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 9, 2010). After the initial appeal was filed in 2010, XOCS converted its corporate form to a limited liability company (“LLC”). In 2017, Verizon Communications, Inc. acquired the fiber-optic network business of XO Communications, including XOCS. XOCS is now a subsidiary of Verizon Communications.

² Letter from USAC to Robert Mutzenback, VP, Taxes, XO Communications, Inc. [sic] re Final Determination: *Ten Percent Rule Clarification Order* and USAC Audit of XO Communications Services, Inc., August 15, 2019 (Attached as Exhibit 1) (“Final Determination Letter”).

Line Order.³ XOCS seeks review of the *Final Determination Letter* because the decision is in conflict with the Commission's Ten Percent Rule for determining the jurisdiction of intrastate private line services⁴ and, alternatively, because to the extent that the *Final Determination Letter* does not contradict the Ten Percent Rule, the rule's requirements should be waived as they apply to XOCS' 2007 private line revenues due to widespread confusion at the time as to the rule's certification requirement. XOCS requests *de novo* review of the *Final Determination Letter*.⁵

I. BACKGROUND

XOCS, like many telecommunications carriers, offers a variety of private line services to customers to satisfy their networking needs. These services often are high capacity services that enable business customers to exchange files and data among company offices, backup storage facilities and other locations. XOCS classifies the jurisdiction of these services using the best available information, including the "A and Z" locations of the end points, customer certifications of interstate traffic, and the configuration of the circuits.

Since 2008, XOCS has been involved in an inquiry from USAC regarding the proper jurisdictional classification of these services on XOCS' 2008 Form 499-A. In the initial audit, USAC rejected XOCS's intrastate classification of physically intrastate circuits (that is, for

³ See *In the Matter of XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator et al.*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122, Order, 32 FCC Rcd 2140 (rel. March 30, 2017) ("Private Line Order"). In the *Final Determination Letter*, USAC refers to this order as the *Ten Percent Rule Clarification Order*.

⁴ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision, 4 FCC Rcd 1352, 1357-58 (1989) ("Recommended Decision").

⁵ See 47 C.F.R. § 54.723 (requiring *de novo* review of USAC actions).

circuits where both end points are located within the same city or state), because XOCS could not produce evidence that the traffic on the circuit was not interstate. XOCS disagreed with USAC's presumption and requirement to prove a negative (no interstate traffic) and, consequently, appealed to the Commission.⁶

On March 30, 2017, the Wireline Competition Bureau resolved this portion of XOCS' appeal, along with several other appeals involving similar issues, in the *Private Line Order*.⁷ On May 1, 2017, XOCS filed an application for review of the Bureau's decision because the decision is in conflict with case precedent and established Commission policy.⁸ XOCS also challenged the *Private Line Order* because the Bureau erred in the instructions that it provided in remanding the case to USAC by creating new evidentiary standards that XOCS must satisfy with respect to its private line services.⁹ XOCS' Application for Review remains pending.

On June 4, 2019, XOCS submitted a letter to the Commission providing additional information in support of the Application for Review.¹⁰ In that letter, XOCS argued

⁶ *XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 9, 2010).

⁷ *See In the Matter of XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator et al.*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122, Order, 32 FCC Rcd 2140 (rel. March 30, 2017) ("Private Line Order").

⁸ *XO Communications Services, LLC. Application for Review of Decision of the Wireline Competition Bureau*, at 6-13, WC Docket No. 06-122, CC Docket Nos. 96-45 and 97-21 (filed May 1, 2017) (Attached as Exhibit 2).

⁹ *Id.* at 13-18.

¹⁰ Letter from Steven A. Augustino, counsel for XOCS, to Marlene H. Dortch, FCC, WC Docket No. 06-122 et al., June 4, 2019 ("Letter in Support of Application for Review") (Attached as Exhibit 3).

that there was widespread confusion in the industry regarding application of the private line rule prior to the *Private Line Order*. Specifically, prior to the *Private Line Order*, the Commission's consistent and repeated statements regarding customer certifications under the Ten Percent Rule created a widespread and reasonable understanding within the industry that carriers need only obtain customer certifications when more than ten percent of traffic on their private lines are interstate.¹¹ XOCS argued in the alternative that, if the Commission does not overturn the *Private Line Order*, it should follow its precedent in *InterCall* or *Anda* and order that the new evidentiary standards created in the *Private Line Order* be applied only prospectively, to services provided on or after the date of the order.¹²

While the XOCS Application for Review was pending, however, USAC proceeded with its inquiry into XOCS' 2007 private line services pursuant to the *Private Line Order* remand. On October 5, 2017, USAC sent a letter to XOCS requesting documentation XOCS would rely upon to demonstrate the nature of the traffic carried on XOCS' private line

¹¹ *Id.* at 5-8; see *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, 10731, 10732 (2008) ("*InterCall Order*"); *Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278 and 05-338, Order, 29 FCC Rcd 13998, 14000 (2014) ("*Anda Order*").

Subsequently, on June 26, 2019, XOCS cited the Consumer and Governmental Affairs Bureau's decision in *Bebe Stores and ViSalus, Inc.* as further support for granting a retroactive waiver in the case of private line revenues. Letter from Steven A. Augustino, counsel for XOCS, to Marlene H. Dortch, FCC, WC Docket No. 06-122 et al., June 26, 2019 (Attached as Exhibit 4); see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement*, CG Docket No. 02-278, DA 19-562 (rel. June 13, 2019).

¹² *Letter in Support of Application for Review*, at 8.

services in 2007.¹³ XOCS responded to this request on January 18, 2018 and March 12, 2018.¹⁴ On August 15, 2019, USAC issued the *Final Determination Letter*, in which it concluded that the information on which XOCS relied was insufficient to demonstrate that the circuits did not carry more than 10% interstate traffic and, as a result, USAC drew a negative inference that all of the subject revenue was interstate in nature.¹⁵

II. REQUEST FOR REVIEW

XOCS now seeks review of USAC's *Final Determination Letter*. In support of its Request for Review, XOCS incorporates in full, its May 1, 2017 Application for Review, which is attached as Exhibit 2, and its June 4, 2019 and June 26, 2019 supplemental letters in support of the Application for Review, which are attached as Exhibits 3 and 4, respectively. These Exhibits demonstrate that the *Final Determination Letter* is contrary to Commission precedent or, alternatively, that application of the Ten Percent Rule should be waived.

The *Final Determination Letter* purports to apply the Ten Percent Rule as interpreted in the *Private Line Order* (which XOCS has appealed). For example, USAC dismissed a declaration that XOCS prepared in 2008 that discussed private line services in detail as “not sufficient to support XOCS’s proposed reclassification of the relevant revenues ... based on Commission guidance in the *Ten Percent Rule Clarification Order* [i.e., the *Private Line Order*].”¹⁶ To the extent that USAC relied upon the *Private Line Order* to reach its conclusions,

¹³ See *Final Determination Letter*, at 3-4.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 6 (discussing the declaration of Matthew Alexander).

USAC's decision is flawed for the same reason that the *Private Line Order* is flawed.¹⁷ The Commission should grant XOCS' Application for Review and, consequently, reject USAC's evaluation of the evidence supporting XOCS' private line revenue classifications.

Alternatively, to the extent that the *Final Determination Letter* properly tracks the Ten Percent Rule, the Commission should waive application of the rule in this instance. As explained in the June 2019 supplemental letters, waiver (or application of the *Private Line Order* prospectively) is appropriate because of the widespread confusion regarding the private line rule that preceded the Bureau's order. Prior to the *Private Line Order*, the Commission's consistent and repeated statements regarding customer certifications under the Ten Percent Rule created a widespread and reasonable understanding within the industry that carriers need only obtain customer certifications when more than ten percent of traffic on their private lines are interstate. It would impose a manifest injustice on XOCS if the *Private Line Order* were applied to XOCS' classification decisions made in the audit under question. XOCS acted consistent with the widespread industry understanding of customer certifications when, in 2007, it assessed the jurisdiction of its private line services for purposes of the USF reporting requirements. XOCS' assessment was in good faith, was consistent with the Commission's statements to date, and its determination that these lines were wholly intrastate was to the best of its knowledge and belief.

USAC's failure to find "sufficient" documentation during the 2018 remand process only confirms the folly of the endeavor in the first place. Given that neither USAC, the Bureau, nor the Commission had articulated these standards before the *Private Line Order*, XOCS could not have reasonably expected in 2007 that it would need to collect and maintain

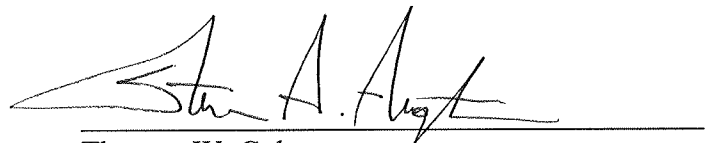
¹⁷ See XOCS Application for Review, at 6-13.

evidence beyond customer certifications for interstate lines and that it would need to later provide this evidence to prove certain private lines are wholly intrastate. Further, it was not feasible for XOCS to identify, twelve years later, the specific customers and to obtain either certifications as to the nature of their traffic on the circuits or to develop other information that would be consistent with the *Private Line Order*. Therefore, in order to avoid manifestly unfair results, the Commission should waive application of the Ten Percent Rule as it applied to XOCS' 2007 private line revenues.

III. CONCLUSION

For the above reasons, XOCS respectfully requests that the Commission reverse USAC's decision regarding the proper interpretation of the Ten Percent Rule and applying new standards of evidence on remand. The Commission should reject the *Final Determination Letter* as contrary to law, or, in the alternative, grant a waiver of the Ten Percent Rule as it applied to XOCS' 2007 private line services.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas W. Cohen", is written over a horizontal line.

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