

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**WASHINGTON HARBOUR, SUITE 400**

**3050 K STREET, NW**

**WASHINGTON, DC 20007**

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

STEVEN A. AUGUSTINO

DIRECT LINE: (202) 342-8612

EMAIL: saugustino@kelleydrye.com

NEW YORK, NY  
CHICAGO, IL  
HOUSTON, TX  
LOS ANGELES, CA  
SAN DIEGO, CA  
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STAMFORD, CT  
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August 28, 2019

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, XO Communications Services, LLC,  
*Application for Review by XO Communications Services, LLC of Decision*  
*of the Wireline Competition Bureau*, CC Docket Nos. 96-45 and 97-21,  
WC Docket No. 06-122

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, XO Communications Services, LLC ("XOCS")<sup>1</sup> provides notice that on August 27, 2019, its counsel, Steven A. Augustino of Kelley Drye & Warren, LLC, met with Preston Wise, Special Counsel in the office of FCC Chairman Ajit Pai. The following summarizes XOCS' presentation.

Twelve years ago, XOCS provided private line services to its enterprise customers. In determining the jurisdiction of those services, XOCS applied the "Ten Percent Rule" as it understood it, from the Commission's 1989 *Separations Order* and various statements by the Commission after that order.<sup>2</sup> For the circuits now relevant, XOCS determined that the

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<sup>1</sup> 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.

<sup>2</sup> See, e.g., *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, 1357, ¶ 32 (1989) (adopting

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services were physically intrastate, were not interconnected by XOCS to any other circuits and lacked any characteristics that suggested the circuits would carry 10% or more interstate traffic. XOCS therefore did not request a customer certification that the traffic was at least 10% interstate and classified the circuits as intrastate for USF and other purposes.

Two years ago, the Wireline Competition Bureau, responding to the petitions of XOCS and five other entities, issued the *Private Line Order* concluding that a customer certification is not required to classify a circuit as interstate and remanding certain questions to USAC for further review.<sup>3</sup> In October 2018, USAC asked for circuit-specific information about the services that XOCS provided in 2007 and were the subject of the 2008 USAC audit.

At the meeting, XOCS argued that it is unreasonable to apply the 2017 *Private Line Order*'s standards to XOCS' actions in 2007. XOCS argued that, if the Bureau does not overturn its March 30, 2017 *Private Line Order*, as XOCS requested in its May 1, 2017

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the Ten Percent Rule with a recommendation of the Federal-State Joint Board on Universal Service that so-called "mixed use" private lines be allocated to the intrastate jurisdiction unless there is a showing "through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic") (emphasis added); *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, 10 FCC Rcd 4153, 4161, ¶ 17 (1995) (summarizing the Ten Percent Rule and stating that "a subscriber line is deemed to be interstate *if the customer certifies* that ten percent or more of the calling on that line is interstate.") (emphasis added); *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481, n. 95 (1998) (concluding that DSL services were interstate in part because GTE configured its lines to carry more than a *de minimis* share of interstate traffic and said that it would "ask every ADSL customer to certify that ten percent or more of its traffic is interstate."); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 16 FCC Rcd 11167, ¶ 2 (2001) (reaffirming the continued use of the Ten Percent Rule for Part 36 jurisdictional separations and stating that "mixed-use lines would be treated as interstate *if the customer certifies* that more than ten percent of the traffic on those lines consists of interstate calls.") (emphasis added).

<sup>3</sup> *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).

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application for review,<sup>4</sup> it should follow the precedent of the Federal Communications Commission (“FCC” or “Commission”) by granting a retroactive waiver or applying the *Order* only prospectively. Waiver or prospective relief are appropriate because of the widespread confusion regarding the private line rule that preceded the Bureau’s order.

XOCS explained that at least three times after the 1989 *Separations Order*, Commission orders described the Ten Percent Rule in ways that 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.<sup>5</sup> XOCS highlighted the prior Commission orders that created this reasonable expectation.<sup>6</sup>

XOCS also explained that the Commission has recently granted retroactive waivers to parties in similar situations, based on confusion about application of Commission rules.<sup>7</sup> XOCS argued that the industry confusion surrounding the Commission’s Ten Percent

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<sup>4</sup> *XO Communications Services, LLC Application for Review of Decision of the Wireline Competition Bureau*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122 (May 1, 2017) (“*Application for Review*”).

<sup>5</sup> *See XOCS Letter in Support of Application for Review*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122 (filed June 4, 2019) (“*Letter*”).

<sup>6</sup> *See Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, 10 FCC Rcd 4153, 4161, ¶ 17 (1995) (summarizing the Ten Percent Rule and stating that “a subscriber line is deemed to be interstate *if the customer certifies* that ten percent or more of the calling on that line is interstate.”) (emphasis added); *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481, n. 95 (1998) (concluding that DSL services were interstate in part because GTE configured its lines to carry more than a *de minimis* share of interstate traffic and said that it would “ask every ADSL customer to certify that ten percent or more of its traffic is interstate.”); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, 16 FCC Rcd 11167, ¶ 2 (2001) (reaffirming the continued use of the Ten Percent Rule for Part 36 jurisdictional separations and stating that “mixed-use lines would be treated as interstate *if the customer certifies* that more than ten percent of the traffic on those lines consists of interstate calls.”) (emphasis added).

<sup>7</sup> *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)*

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Rule was as widespread or more than in these cases. Therefore, XOCS urged the Bureau to grant a retroactive waiver to XOCS because the Ten Percent Rule could have been reasonably interpreted by the industry to only require certifications when more than ten percent of traffic on their private lines are interstate. In light of this confusion, a retroactive waiver to XOCS of the private line rule as applied to the services it provided in 2007 (ten years before the Bureau's clarification) is the most just and reasonable resolution of this proceeding.

In response to a question, XOCS stated that it had submitted information regarding its classification of private line services in the form of a declaration from Matthew Alexander, Senior Product Manager at XOCS at the time. In the declaration, Mr. Alexander explains that the circuits at issue (those classified as intrastate) do not include circuits used by Internet Service Providers ("ISPs").<sup>8</sup> Those circuits were classified as interstate circuits by XOCS (and also were classified as reseller services) and therefore the Commission's conclusions that Internet access is an interstate service is not implicated.

Moreover, in the meeting XOCS noted that USAC recently completed its review of the documentation XOCS relied upon in 2007 but concluded that it did not satisfy the standards set forth in the 2017 *Private Line Order*. Speaking specifically of XOCS' Alexander declaration, USAC found the declaration insufficient, because it did not "provide any documentation (e.g., engineering or networking reports) to demonstrate that its private lines are not linked by the customer to other network facilities that, in combination, would cause interstate traffic to be carried on the private lines at issue."<sup>9</sup> In other words, USAC found the XOCS

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*Regarding the Commission's Prior Express Written Consent Requirement*, CG Docket No. 02-278, DA 19-562 (rel. June 13, 2019); *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*"); cf. *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*").

<sup>8</sup> See Alexander Declaration at ¶ 17 (attached as Exhibit 1); see also Request for Review of Decision of the Universal Service Administrator (XOCS Appeal), at 8-11 (filed Dec. 29, 2010) (describing the circuits at issue in the case).

<sup>9</sup> Letter from USAC to Mr. Robert Mutzenback, XO Communications Services, Inc., August 15, 2019, at 6. USAC alternatively explained its conclusion on the ground that

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remand response insufficient because, in 2018, it did not have circuit-specific information about services it provided in 2007.

Finally, in the meeting, XOCS referred Mr. Wise to comments that XOCS submitted in the USF contribution reform proceeding in July 2012. See Comments of XO Communications Services, LLC, In the Matter of Universal Service Contribution Methodology, WC Docket No. 06-122, filed July 9, 2012 (available in ECFS at <https://www.fcc.gov/ecfs/filing/6017095089>). At pages 45-48, XOCS suggested ways that the FCC could make USF appeals more predictable, including adopting a “deemed granted” rule for appeals that have been pending after a certain time period (such as one-year). Adopting such a rule would reduce the potential for recurrence of situations such as this, where a decade or more had passed between the relevant service period and a ruling from the FCC on the appeal.

For the reasons discussed above and in XOCS prior submissions, XOCS respectfully requested that the Bureau act promptly to grant a retroactive waiver or prospective relief of the new standards in the Commission’s *Private Line Order*. Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Augustino", with a stylized flourish at the end.

Steven A. Augustino

*Counsel to XO Communications Services, LLC*

cc: Preston Wise

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the declaration “did not substantiate that *all circuits* with end points within the same state are closed circuits.” *Id.* (emphasis added).