

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

In the Matter of)
)
Request for Review of PaeTec) WC Docket No. 06-122
Communications, Inc. of Universal)
Service Administrator Decision)
)

**REQUEST FOR REVIEW OF PAETEC COMMUNICATIONS, INC. OF
UNIVERSAL SERVICE ADMINISTRATOR DECISION**

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Dated: April 3, 2012

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Pursuant to Section 54.719(a) of the Federal Communications Commission’s (“Commission’s”) rules,¹ PaeTec Communications, Inc. (“PaeTec”) hereby requests that the Commission reverse an action of the Universal Service Administrative Corp. (“USAC”) entered into on February 3, 2012 – the issuance of the final audit report in Audit No. CR2009CP003 (“Audit Report”).² In particular, PaeTec seeks reversal of USAC’s Audit Report Finding #1 with respect to private line revenue because USAC’s reclassification of a large portion of PaeTec’s private line revenue as jurisdictionally interstate reflects erroneous factual conclusions and errors in the application of Commission regulations and governing law.

I. FACTUAL BACKGROUND

PaeTec is a telecommunications service carrier that provides telecommunications service in 48 states and the District of Columbia. PaeTec’s service offerings, which vary by state, include, among other things, local business calling, toll and toll-free calling, local and long distance private line, conference calling, and various non-telecommunications services.

¹ 47 C.F.R. § 54.719(a).

² The Audit Report is attached in pertinent part and in redacted form hereto as Exhibit A. Also attached hereto as Exhibit B the affidavit of Timothy B. Loken.

PaeTec's private line services provide dedicated connectivity from one location to another location. These services can provide voice and/or data transmissions, but only to the dedicated end point of the service. These services do not access any type of common carrier long distance, local, or data switches that would allow them to reach outside the boundaries of the designated circuit.

USAC's Audit Report concerns PaeTec's operations nationwide for calendar year 2008, as reported on Commission Form 499-A in 2009. PaeTec's 2009 Form 499-A reported PaeTec's 2008 private line revenue as 100 percent jurisdictionally intrastate. In Audit Finding #1, USAC reclassified 67.36 percent of such revenue as jurisdictionally interstate. USAC based its reclassification solely on the fact that PaeTec was unable to produce all requested written certifications from customers, even though such certifications are not legally required. PaeTec did not have certificates from 64 of PaeTec's 100 largest private line customers (as measured by revenue) verifying that the amount of interstate traffic routed over the private line circuit that such customers lease from PaeTec represents less than ten percent of the total traffic routed over such private line circuits. PaeTec informed the USAC auditors that Commission precedent makes clear that absent such certificates, it is appropriate to classify these lines, and the revenue obtained therefrom, as intrastate.

USAC assumed that the fact that PaeTec had not received certifications from 64 of the private line customers in USAC's 100-customer sample meant that the amount of interstate traffic routed over the private line circuits that such customers lease from PaeTec must have represented at least ten percent of the total traffic routed over such private line circuits. Because USAC calculated that these 64 private line customers accounted for 67.36 percent of the private

line revenue in USAC's sample, USAC concluded that 67.36 percent of PaeTec's total private line revenue for 2008 was jurisdictionally interstate.

PaeTec provided two lines of defense against the initial auditor conclusion to USAC. First, PaeTec argued that, for reasons described thoroughly below, Commission precedent does not support a presumption that a lack of written customer certification justifies an automatic conclusion that such customer's leased circuit carries at least ten percent jurisdictionally interstate traffic. Second, based on PaeTec's review of available data, PaeTec explained how, even ignoring Commission precedent discussed below that presumes circuits to be jurisdictionally intrastate absent a certification to the contrary (the opposite of USAC's presumption), applying USAC's flawed methodological assumptions to a larger sample – approximately 80 percent of PaeTec's current customers, yields a conclusion that only 42 percent of PAETEC's private line revenue may be classified as jurisdictionally interstate. USAC rejected PaeTec's defenses.

II. ARGUMENT

A. USAC Misapplied and Incorrectly Utilized the Ten Percent Rule.

USAC improperly interpreted and incorrectly applied the “ten percent rule” to support its classification of intrastate revenue as interstate revenue. That rule simply states that “[i]f over ten percent of the traffic carried over a private or WATS line is interstate, then the revenues and costs generated by the entire line are classified as interstate.”³ Contrary to USAC's application of the rule, the ten percent rule does not create the presumption that such usage is interstate unless proven otherwise. Instead, the rule creates exactly the opposite presumption – that usage in intrastate unless proven otherwise.

³ March 2009 Form 499-A, Instructions at 21.

The standard practice within the telecommunications industry is not to assume that geographically intrastate private lines are interstate in nature. Carriers often obtain regulatory authority to offer such services through state commissions, and intrastate private lines, such as PaeTec's, are normally tariffed, marketed, and sold as intrastate services.

A review of the historic jurisdictional treatment of private lines confirms the error of USAC's position. Prior to 1989, "the cost of special access lines carrying both state and interstate traffic [was] generally assigned to the interstate jurisdiction."⁴ The problem with this approach, according to a Joint Board appointed to study the issue, was that it "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."⁵ The Joint Board recommended that the Commission adopt separations procedures for private lines – specifically, that such lines be allocated to the interstate jurisdiction only "through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic."⁶ Because the only certification mentioned by the Joint Board was to validate whether the line carried more than a certain amount of interstate traffic, and because the problem the Joint Board sought to solve was excessive interstate allocation, it was clear that the Joint Board recommended that absent certification of interstate use, a line should be considered intrastate when the A and Z locations are in the same state.

⁴ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Recommended Decision and Order, 4 FCC Rcd 1352, ¶ 1 (1989) (emphasis added).

⁵ *Id.*

⁶ *Id.* at 1357, ¶ 32 (emphasis added).

The Commission adopted the Joint Board’s recommendations without modification a few months later.⁷ In doing so, the Commission expressly took note of the “administrative benefits” of a rule requiring certification by customers where “each of their special access lines carries more than a de minimis amount of interstate traffic.”⁸ Since then, the Commission has reaffirmed that certification is required to establish the interstate jurisdiction of a dedicated circuit that would otherwise appear to be intrastate in nature. For example, in 1995 the Commission summarized its rule regarding the jurisdiction of mixed-use private lines as follows: “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.”⁹ In 1998, the Commission relied on the ten percent rule to conclude that GTE’s DSL services were interstate, because “GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate.”¹⁰ And in 2001, the Commission upheld continued use of the ten percent rule, noting that under the rule, “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.”¹¹

Thus, the Commission has not wavered in its interpretation that a geographically intrastate private line should be considered jurisdictionally interstate only if the customer

⁷ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660 (1989).

⁸ *Id.* at 5660, ¶ 3 (emphasis added).

⁹ *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 4153, ¶ 17 (1994) (emphasis added).

¹⁰ *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, n.95 (1998).

¹¹ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, CC Dockets Nos. 78-72 and 80-286, Order, 16 FCC Rcd 11167, ¶ 2 (2001)(emphasis added).

certifies that more than ten percent of the traffic on that line is interstate in nature. Since 1989, the “more than ten percent” certification has been necessary to “convert” what appears to be an intrastate line into an interstate line. By contrast, the Commission has never indicated that this rule (or certification thereunder) was meant to achieve the opposite – to confirm that a geographically intrastate line really is intrastate. Indeed, if USAC’s position on the ten percent rule were correct, GTE would never have needed to collect customer certifications in 1998 regarding the interstate use of DSL; by USAC’s view, those lines already would have been considered interstate unless GTE or its customer could prove that they were being used for intrastate purposes. USAC’s position turns the ten percent rule on its head and erroneously shifts the presumptive jurisdiction of geographically intrastate private lines contrary to Commission precedent.

USAC’s position recreates the problem that the Joint Board and the Commission sought to solve in 1989 and creates new challenges for state regulators, the industry, and consumers. Private lines that in all respects appear intrastate would now be allocated by default to the interstate jurisdiction absent customer confirmation. States would be forced to cede regulatory authority over all private lines for which certification is not provided that are nevertheless sold within their boundaries. This would, in turn, result in a dramatic decrease in the reporting of – and regulatory payments for – intrastate revenues associated with these private lines. The implications from a historical perspective could be even more severe: Those carriers that have reasonably relied for years on a “more than ten percent interstate” certification could face the prospect of having many (if not all) of their intrastate private lines suddenly reclassified retroactively as interstate and subject to Universal Service Fund (“USF”) contribution assessment. Such a finding would have ripple effects throughout the telecommunications

industry. For example, if PaeTec were liable for USF contribution for years past because such private lines are now deemed interstate, it would be entitled to refunds from state authorities for prior state universal service contributions and other state regulatory fees and surcharges paid with respect to the affected private lines (since the revenues from those lines turned out not to be intrastate after all). Thus, not only would USAC's position usurp jurisdiction over services that have been subject to state regulatory authority for at least two decades, but it could also result in significant sums being transferred – both retroactively and on a going-forward basis – from state to federal coffers at a time when states can least afford the loss of those funds.

Finally, even if the Commission were to agree with USAC's position regarding private line certification, it should find that such "less than" certification (that is, a circuit will be classified as intrastate only if the customer certifies that there is ten percent or less interstate usage) will govern and be required only on a going-forward basis. Given the Commission's prior reference only to customer certifications indicating that the amount of interstate traffic is "more than *de minimis*"¹² (that is, greater than ten percent), it was not foreseeable that the certification rule could possibly apply in the manner now apparently advocated by USAC, and applying liability retroactively based on such a new interpretation would be both inequitable and unlawful.¹³ Because USAC has implemented this new interpretation in USF audits, its retroactive application would be by definition arbitrary and inequitable, applying only to carriers subjected to audits. The market for private line services is highly competitive, and a piecemeal, audit-based approach to implementing this unlawful reclassification and resulting USF

¹² *Id.*

¹³ See, e.g., *Retail, Wholesale & Dep't Store Union*, 466 F.2d 380, 390 (DC Cir. 1980); see also *Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, ¶ 24 (2008)(finding that prospective application of a decision requiring USF contribution was appropriate "because of the lack of clarity" in prior decisions and industry practice).

assessment would mean that USAC, and not the market, determines which members of the industry are the most competitive and whether certain limited groups of private line customers are required to fund a greater portion of the federal interstate programs supported by the USF assessments.

Moreover, USAC's interpretation would mean that PaeTec, which voluntarily established a customer certification process, would be punished for the failure of its customers to provide responses.¹⁴ Contrary to USAC's apparent position, no obligation exists for private line service providers to ensure, either initially or on a continuing basis, that customers which purchase intrastate private line services actually use the services for intrastate purposes. As discussed above, the Commission could have created a presumption that the default jurisdictional treatment of private line circuits, absent a certification to the contrary, is interstate, but chose not to do so – instead creating the opposite presumption. Thus, USAC's conclusion that a lack of customer response to a request for certification means that traffic must be interstate is completely contrary to Commission precedent.

Further, USAC's presumption that all private line customers that did not return certifications that the amount of interstate traffic routed over the private line circuit that such customers lease from PaeTec represents less than ten percent of the total traffic routed over such private line circuits is also flawed from a logical perspective. PaeTec's customer certification program was relatively new in 2008 (the audit period). At that time, PaeTec faced the task of collecting certifications not only from new customers, but also from its embedded customer base. As time passed between PaeTec establishing its program and the USAC audit in 2011, some of

¹⁴ “Moreover, the Carrier did have an intrastate certification procedure in place during 2008 to determine the jurisdiction of its private line revenues and it was this procedure that IAD audited and found lacking.” Audit Report at 20.

PaeTec's 2008 private line customers cancelled their service. PaeTec reasonably prioritized obtaining certifications from then-current customers, not customers that had ceased to subscribe to PaeTec's private line service. Therefore, there is no logical reason to assume that PaeTec's lack of certification from former customers included in USAC's 100-customer sample means that such customers were using their private line service for interstate purposes. In addition, USAC's assumption also does not hold for customers in USAC's sample that were current customers. Customers may fail to return a certificate for any number of reasons: inadvertent omission, lack of knowledge of the actual ten percent rule as written, or misunderstanding of the request.

Irrespective of what inference USAC (or any other entity) wishes to draw from the lack of a certificate from PaeTec's customers, USAC's factual assumptions do not alter Commission precedent and its clear statement that there is a preference for intrastate jurisdiction when no certificate from a customer is available. USAC's approach is clearly incorrect; yet, given the high USF contribution rate, private line providers like PaeTec are faced with a precarious Hobson's Choice: the carrier can follow Commission precedent and report traffic as state commissions and this Commission would expect, and potentially be liable for excess USF contributions should USAC apply its approach, or use USAC's approach and be subject to penalties from state commissions for under-reporting intrastate revenue. That PaeTec has tried both to follow the law and protect itself from USAC's errors is hardly evidence of USAC's correctness. As such, USAC's response contained in the Audit Report has no probative value as to the actual jurisdiction of the circuits in question.

B. Even if USAC Were Permitted to Turn Commission Precedent on Its Head, USAC Improperly Rejected PaeTec's Alternate Calculation.

Assuming, for the sake of argument, the applicability of USAC's position regarding private line certification, PaeTec proposed to USAC an alternative calculation. Because PaeTec could not produce many of the customer certifications that USAC requested (again, certifications not required by Commission rules), PaeTec proposed an analysis of a much larger, albeit current, sample of PaeTec's customers.¹⁵ Such sample, PaeTec explained, yields a more reasonable measurement of the customer response rate to certification requests for the purposes of determining the amount of PaeTec's private line revenue that may be classified as interstate. USAC's sole response to this reasonable proposition was that PaeTec's 2011 private line customer base "may be substantially different" than PaeTec's 2008 customer base.¹⁶

USAC's rejection of PaeTec's proposal was improper for multiple reasons. First, USAC failed to acknowledge that USAC was seeking three-year-old documentary evidence that would have been collected and maintained by PaeTec solely on a voluntary basis, as it is not specifically required by law. Further, as acknowledged by USAC, PaeTec's alternative calculation was based on a sample of 80 percent of PaeTec's then-current customers.¹⁷ USAC fails to explain how the value of a sample of such a high percentage of PaeTec's customers does not outweigh USAC's speculative concerns about the relative vintage of PaeTec's data. In addition, as discussed above, because PaeTec would not have focused on obtaining certifications from former private line customers as PaeTec implemented its customer certification program,

¹⁵ Id. at 16-17.

¹⁶ Id. at 17.

¹⁷ Id. at 14.

PaeTec will lack certifications from certain 2008 private line customers regardless of the jurisdictional nature of such customer's usage.

Therefore, even if a lack of customer certifications may be interpreted to create a presumption that the customers' leased circuits carry at least ten percent jurisdictionally interstate traffic, USAC's reclassification of PaeTec's private line revenue was still overblown by a substantial amount – 66.37 percent as opposed to 42 percent.

III. CONCLUSION

For the foregoing reasons, PaeTec respectfully requests that the Commission review and reverse USAC's Audit Report Finding #1 with respect to private line revenue.

Respectfully submitted,

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Dated: April 3, 2012

Its Attorney

Certificate of Service

I, Edward B. Krachmer, do hereby certify that I have on this 3rd day of April 2012 caused a copy of the foregoing "Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision" to be served upon the following by the means described:

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