

**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)	
)	
_____)	

COMMENTS OF XO COMMUNICATIONS SERVICES, LLC.

XO COMMUNICATIONS SERVICES, LLC

Lisa R. Youngers
Alaine Y. Miller
Teresa K. Gaugler
XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2735

Brad E. Mutschelknaus
Steven A. Augustino
Denise N. Smith
Kelley Drye & Warren LLP
3050 K Street, NW
Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

May 17, 2012

TABLE OF CONTENTS

	Page
I. BACKGROUND	2
II. USAC MISINTERPRETS THE FCC’S 10% RULE WHEN IT CONCLUDES THAT PRIVATE LINE TRAFFIC IS PRESUMPTIVELY INTERSTATE UNLESS PROVEN TO BE INTRASTATE	4
A. USAC Improperly Created a Presumption, Contrary to Commission Precedent, That Private Line Service Revenues Are Interstate Until Proven Otherwise	4
B. The History and Purpose of the 10% Rule are at Odds with USAC’s Presumption	5
C. The Commission Should Act Quickly to Correct USAC’s Error.....	8
III. CONCLUSION.....	11

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)	
)	
)	

COMMENTS OF XO COMMUNICATIONS SERVICES, LLC.

XO Communications Services, LLC (“XOCS”) by its attorneys, and pursuant to the Public Notice issued in the above-captioned proceeding,¹ hereby files these Comments in support of PaeTec Communications, Inc.’s (“PaeTec”) Request for Review of Universal Service Administrator Decision (“Request for Review”).² PaeTec seeks reversal of an audit decision of the Universal Service Administrative Company (“USAC”) reclassifying the jurisdiction of PaeTec’s private line service revenues from intrastate to interstate. Although XOCS lacks information to comment on the classification of PaeTec’s particular private line circuits, XOCS agrees that USAC applied an incorrect standard in the PaeTec audit. Indeed, USAC has misapplied this standard for years, as XOCS noted in its own appeal of a USAC decision that has

¹ *Public Notice: Wireline Competition Bureau Seeks Comment on PaeTec Communications’ Request for Review of a Decision by the Universal Service Administrative Company*, DA 12-609 (rel. April 17, 2012).

² *In re: Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision*, Request for Review of PaeTec Communications, Inc. of Universal service Administrator Decision, WC Docket No. 06-122 (filed April 3, 2012) (“PaeTec Request for Review”).

been pending since December 2010.³ The recurrence of this issue illustrates USAC’s continued misunderstanding and misapplication of the Commission’s 10% Rule when determining the jurisdiction of private line service revenues and underscores the need for prompt Commission action in these appeals.

I. **BACKGROUND**

XOCS is one of the largest facilities-based competitive providers of telecommunications and information services in the country. XOCS delivers a comprehensive array of telecommunications solutions to growing businesses, large enterprises, government customers, information service providers, and other telecommunications carriers. Of relevance to this proceeding, XOCS’s Business Services and Carrier Services units offer government agencies, business customers, and carriers a variety of services including private line services such as point-to-point dedicated circuits and high-capacity metro and intercity dedicated transport circuits.

Private line services typically provide non-switched point-to-point services on a stand alone basis or as part of a private network. The services often are used by businesses, organizations, institutions, and service providers that need to exchange data and other communications traffic between two or more discrete locations. PaeTec described its private line services as providing dedicated connectivity between two locations, being capable of providing voice and/or data transmissions and not providing access to any switches that would permit users

³ See *In re: XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator*, Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 29, 2010) (“XOCS Request for Review”). Madison River Communications, LLC, has had similar problems with USAC misclassification of private line revenues during an audit and Madison River also has an appeal pending before the Commission. See *In re: Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator*, Request for Review, WC Docket No. 06-122 (filed Dec. 12, 2008) (“Madison River Request for Review”).

to access locations other than the endpoints of the circuit.⁴ Like PaeTec's services, XOCS's dedicated transport services connect two customer locations on, or collocated with, XOCS's network and permit the transmission of voice or data traffic. Further, XOCS's geographically intrastate, closed circuits do not connect to other carrier circuits, customer premises equipment that bridge traffic to another location, the public switched telephone network ("PSTN") or the Internet.⁵

In its Request for Review, PaeTec explained that it classified the subject private line service revenues as 100% intrastate on its 2009 annual FCC Form 499A filing.⁶ After conducting an audit, USAC reclassified these revenues as 67.36% interstate based on its misunderstanding of the FCC's 10% jurisdiction rule.⁷ Specifically, USAC reclassified the revenues because PaeTec could not provide customer certifications proving that interstate traffic routed over the lines did not exceed 10% of the total traffic.⁸

XOCS has a pending appeal which raises similar issues. In 2009, USAC audited XOCS's Form 499-A. In that audit, USAC concluded that, even though the private lines were geographically intrastate, XOCS's private line services should be treated as jurisdictionally 100% interstate unless XOCS provided evidence that 90% or more of the private line traffic was intrastate.⁹ XOCS submitted a Request for Review of the USAC decision on December 29, 2010. Commenters supported XOCS's argument that USAC had misapplied FCC rules in

⁴ PaeTec Request for Review at 2.

⁵ XOCS Request for Review at 9.

⁶ PaeTec Request for Review at 2.

⁷ PaeTec Request for Review at 2.

⁸ PaeTec Request for Review at 2.

⁹ XOCS Request for Review at 11.

determining the jurisdiction of private line revenues.¹⁰ The record in PaeTec’s appeal similarly shows that USAC is misapplying FCC rules.

II. USAC MISINTERPRETS THE FCC’S 10% RULE WHEN IT CONCLUDES THAT PRIVATE LINE TRAFFIC IS PRESUMPTIVELY INTERSTATE UNLESS PROVEN TO BE INTRASTATE

A. USAC Improperly Created a Presumption, Contrary to Commission Precedent, That Private Line Service Revenues Are Interstate Until Proven Otherwise

In both the PaeTec and XOCS audits, USAC concluded that the companies must prove that the private line traffic at issue was intrastate before the revenue associated with the service could be classified as intrastate for USF reporting purposes. As XOCS explained in greater detail in its Request for Review, USAC adopted a presumption that revenues associated with private line services are interstate (and therefore subject to USF contributions).¹¹ USAC is not permitted to write its own rules, however. USAC’s use of a presumption that revenues from private line services are to be treated as interstate, absent proof from a carrier to the contrary, is wholly inconsistent with Commission precedent. If such treatment were sanctioned, the result would serve to undermine well established state regulatory authority, with adverse consequences for states, the industry, and consumers.

USAC purports to rely on the so-called “10% Rule,” which was developed two decades ago as part of the Commission’s Part 36 cost separations process, to support its reclassification of revenues. The 10% Rule was adopted in the 1980s as part of the separations process as a means to allocate certain special access or private line costs to the intrastate or the

¹⁰ See Reply Comments of XO Communications Services, Inc., at 2-5, WC Docket 06-122 (filed Feb. 22, 2011).

¹¹ XOCS Request for Review at 7-28 (In its Request for Review, XOCS explained in great detail the history of the 10% Rule, USAC’s incorrect presumption regarding the jurisdictional nature of private line services and how USAC misapplied the 10%.)

interstate jurisdictions when such facilities carry both intrastate and interstate traffic. At the time the 10% Rule was adopted, the Part 36 separations process applied to dominant carriers, such as the Bell Operating Companies and other large incumbent local exchange carriers.¹² The separations process has never been applied by the Commission to competitive carriers such as PaeTec and XOCS and even if it were to apply, USAC has the presumption exactly backwards. Private line circuits with endpoints within the same state are intrastate unless the carrier presents evidence (such as through a certification) that more than a *de minimis* amount of traffic on the circuit is interstate. USAC may not require USF contributions on revenues associated with these circuits unless the carrier has evidence that the circuits are, in fact, being used to carry more than a *de minimis* amount of interstate traffic. Absent such evidence, the circuits are properly classified as intrastate and subject to state, not federal, regulation.

B. The History and Purpose of the 10% Rule are at Odds with USAC's Presumption

The history of the 10% Rule demonstrates that USAC's interpretation is incorrect. When considering adoption of the 10% Rule in 1989, the Commission noted that, previously, "the cost of special access lines *carrying both state and interstate traffic* [had been] generally assigned to the interstate jurisdiction."¹³ The Joint Board appointed to study the issue concluded that this approach "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."¹⁴ Consequently, the Joint Board recommended that the Commission adopt separations procedures for private lines and that such

¹² See *In re: Jurisdictional Separations and Referral to the Federal-State Joint Bd.*, 16 FCC Rcd 11382, 11384 (2001).

¹³ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, ¶1 (1989) (emphasis supplied) ("Recommended Decision").

¹⁴ *Id.*

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.*”¹⁵ Accordingly, contrary to USAC’s misapplication of the 10% Rule in both PaeTec’s and XOCS’s audits, the Joint Board did *not* recommend that there be a presumption that a private line was interstate in nature unless there was a clear demonstration to the contrary. Rather, the Joint Board recommended quite the opposite, namely that, *where a private line carried both intrastate and interstate traffic, the line be allocated to the interstate jurisdiction only if there was a certification or other basis to conclude that the line carried more than a certain amount of interstate traffic.* The Joint Board ultimately recommended that absent certification of more than 10% interstate use, the line should be treated as *intrastate* when the endpoints are located within the same state. The Commission adopted the Joint Board’s recommendations later that same year without modification to the recommended 10% Rule.¹⁶

The Commission has consistently reaffirmed this rule. 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.*”¹⁷ Three years later, when faced with the question of whether GTE’s DSL line service should be tariffed before the Commission or at the state level, the

¹⁵ *Id.* at 1357, ¶32 (emphasis added).

¹⁶ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, ¶ 3 (1989).

¹⁷ *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) (emphasis added). In this case, the Commission articulated the 10% Rule as requiring a showing that “10% or more” of the traffic is interstate rather than “more than 10%” of the traffic is interstate. The distinction is not relevant in resolving XOCS’s and PaeTec’s appeals, and XOCS asserts a reasonable summarization of the rule as requiring a showing that more than 10% of the traffic is interstate as do the Form 499-A Instructions.

Commission applied the 10% Rule to conclude that these services were interstate.¹⁸ Critical to this conclusion was the Commission's finding that "GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate."¹⁹ In other words, GTE configured the lines to carry more than a *de minimis* share of interstate traffic and intended to require corroborating certifications.

Most recently, in 2001, the Commission reaffirmed the continued use of the 10% Rule in the context of Part 36 based on an affirmative certification of *more than 10% interstate use*. The Commission explained 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.*"²⁰

This history demonstrates that USAC's standard for classifying private line revenues is plainly wrong. If USAC's presumption of interstate treatment were correct, the Joint Board's 1989 recommendation, which the Commission adopted, would be inexplicable. The goal of the Joint Board recommendation was to preserve *state* regulatory authority over physically intrastate private lines absent evidence that more than a *de minimis* amount of interstate traffic was being carried. USAC's presumption assigns *federal* jurisdiction to these intrastate private lines absent verification such as customer certifications or other reliable evidence. Furthermore, GTE, in the tariff decision discussed earlier, would not have needed to collect customer certifications regarding the interstate use of DSL. Instead, were USAC's application of the 10% Rule correct, the Commission would have explained that the

¹⁸ *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481 (1998).

¹⁹ *Id.* n.95.

²⁰ *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) (emphasis added).

jurisdictional nature of the line, by default, is interstate and certifications would be required only in order to classify the service as subject to state regulation. However, as noted above, the Commission instead underscored that GTE obtained certifications that more than 10% of the traffic was *interstate* and, on that basis, concluded that GTE's DSL product was interstate.

As the foregoing makes clear, the Commission has repeatedly and consistently held that the interstate treatment of a private line requires two conditions to be satisfied. First, the 10% Rule only comes into play if a private line carries *both* intrastate and interstate traffic. Second, under the 10% Rule, a line may be considered jurisdictionally interstate *only if* the customer has certified that more than ten percent of the traffic on that line is interstate in nature. Significantly, the Commission has never indicated that under the 10% Rule there is a presumption that a private line is interstate in the absence of a certification or other circuit-specific affirmative evidence that 90% or more of the traffic is intrastate.

The 10% Rule, then, is more properly read as creating a presumption that the revenues from an intrastate private line are to be treated as intrastate absent evidence that the traffic carried over the line is more than 10% interstate. Even where private line facilities with endpoints in one state are configured in a manner that may allow for interstate as well as intrastate traffic, the 10% Rule is clear. Only where there is customer certification or proof that more than 10% of the traffic is interstate will the facility be considered interstate in jurisdiction.

C. The Commission Should Act Quickly to Correct USAC's Error

PaeTec's Request for Review is just the latest in a series of carrier requests for the Commission to instruct USAC as to the proper understanding and application of the 10% Rule when assigning a jurisdictional classification to private line services. USAC has applied this

erroneous reading to at least three appealed audits, in the PaeTec,²¹ XOCS²² and Madison River²³ audits. Presumably, USAC has applied the same reading to other contributor revenue reports in the past several years.

The time has come for the Commission to confirm its precedent that private line circuits with endpoints within the same state are presumed to be jurisdictionally intrastate, except where the carrier has reliable evidence demonstrating more than a *de minimis* amount of interstate usage. The lack of action on these long-pending appeals is causing actual harm to those carriers whose revenues were erroneously misclassified and to the industry as a whole.

Madison River has been waiting nearly four years for Commission resolution of its Review Request and XOCS has been waiting nearly a year and a half. During this time, Petitioners and the telecommunications industry in general are forced to operate in an uncertain regulatory environment. Carriers appropriately rely on FCC precedent in classifying their private line services as jurisdictionally intrastate. However, absent the Commission reining in USAC's repeated misinterpretations of Commission precedent, industry participants must make numerous operational decisions with no guarantee that USAC will correctly understand and apply the FCC's holdings. PaeTec succinctly identified the problems when it noted:

[P]rivate 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 the FCC 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.²⁴

²¹ PaeTec Request for Review, Exhibit A at 10.

²² *See, e.g.*, XOCS Request for Review at 12.

²³ Madison River Request for Review, Appendix A at 4.

²⁴ PaeTec Request for Review at 9.

Carriers must consider issues such as the likelihood of being able to recover from their customers USF assessments if their private line service revenues are later reclassified as interstate. In most instances, it is highly unlikely that a carrier would be able to recover USF surcharges (at this time, approaching 18%) retroactively. Thus, carriers must either assess USF at the risk of creating a cost disadvantage in the market or risk having to pay retroactive USF surcharges months or years later with no opportunity to pass the costs through to customers. The Commission can and should resolve this dilemma by promptly ruling on the pending appeals.

Moreover, as PaeTec correctly noted in its Request for Review, USAC's insistence on classifying geographically intrastate private lines for which customer certifications are not provided as jurisdictionally interstate could result in the usurpation of state regulatory authority.²⁵ States would have no regulatory authority over such private line services despite the fact that those facilities are sold within a state's boundaries and, most likely, used solely to carry traffic within the state boundaries. Consequently, states would lack the authority and ability to protect the interests of those state subscribers that utilize private line services. In addition, states would experience a significant decrease in the regulatory payments and state taxes previously attributable to those intrastate revenues. In the current economic climate few states can afford to lose such revenues. USAC's unilateral reclassification of private line revenues as interstate also could have a potentially dramatic impact on states and carriers as those carriers that had made regulatory payments to states based on those reclassified revenues could be entitled to refunds of amounts previously paid to the states. Concomitantly, states could be required to make difficult choices regarding the allocation of scarce resources as they revise their budgets to account for these refunds. The decision to reclassify physically intrastate services as interstate would have

²⁵ PaeTec Request for Review at 6.

far reaching impact and should not be made without careful analysis of the potential benefits and harms and the broad participation of industry participants.

Accordingly, XOCS agrees with PaeTec that the potential harm of USAC's actions are significant and XOCS urges the Commission to grant the pending requests for review and reverse USAC's private line service audit findings.

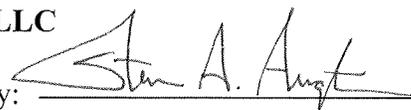
III. CONCLUSION

For the foregoing reasons, Commission precedent demonstrates that private line services with end points in the same state are presumptively classified as jurisdictionally intrastate unless the carrier possesses reliable evidence to show that 10% or more of the traffic is interstate in nature. USAC's misunderstanding and misapplication of the 10% Rule has resulted in reclassification of revenues from intrastate to interstate and significant harm to contributors to the USF. Moreover, until the Commission acts, these private line misclassifications will continue to occur and continue to harm all contributors. XOCS urges the Commission to act swiftly to resolve these issues.

Respectfully Submitted,

**XO COMMUNICATIONS SERVICES,
LLC**

By: _____



Brad E. Mutschelknaus
Steven A. Augustino
Denise N. Smith
Kelley Dyre & Warren LLP
3050 K Street, NW
Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Lisa R. Youngers
Alaine Y. Miller
Teresa K. Gaugler
XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2735

May 17, 2012