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

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

To: The Commission

**REQUEST FOR REVIEW BY US LINK, INC. OF
UNIVERSAL SERVICE ADMINISTRATOR DECISION**

US Link, Inc. (“US Link”), through its undersigned counsel and pursuant to Sections 54.719(c), 54.721, and 54.722 of the Rules of the Federal Communications Commission (“FCC” or “Commission”),¹ respectfully submits this request to review and reverse an audit finding issued by the Universal Service Administrative Company (“USAC”) to US Link on July 30, 2013.

US Link requests the Commission’s review and reversal of USAC’s Audit Finding #1 concerning private line revenue. As US Link proves in the following discussion, USAC’s application of the ten percent rule rests on the erroneous assumptions that circuits are interstate until proven otherwise and that carriers have an obligation to verify the traffic carried over physically intrastate private line circuits. Nothing in the Commission’s Rules or in FCC decisions supports these assumptions. Even though US Link was under no obligation to obtain customer certifications to support its classification of revenue, US Link provided USAC with an adequate sample of customer certifications confirming that the circuits were correctly classified. Finally, even if USAC’s interpretation of the ten percent rule were correct, the ten percent rule applies only to incumbent local exchange carriers (“LECs”) and is therefore inapplicable to US Link.

¹ 47 C.F.R. §§ 54.719(c), 54.721, 54.722.

I. INTRODUCTION

A. Background

US Link, Inc., d/b/a TDS Metrocom is a competitive local exchange carrier certified by the Minnesota Public Utilities Commission to provide facilities-based and resale local exchange and interexchange services.

On April 13, 2012, USAC notified US Link of its intention to conduct an audit of US Link's 2011 FCC Form 499-A filing (reporting revenue for calendar year 2010). The draft detailed audit report was issued on April 15, 2013. US Link prepared and filed a response to the draft detailed audit report on April 29, 2013. The final audit report was issued by USAC on April 29, 2013 (the "Final Audit Report"). USAC's Board of Directors (the "Board") approved the Final Audit Report on July 30, 2013, and USAC notified US Link of the Board's approval the same day.² US Link objects to and requests reversal of USAC's Audit Finding #1 concerning private line revenue.

US Link reported private line revenue totaling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] on Line 406 of its 2011 FCC Form 499-A as 100 percent intrastate. Based on a review of US Link's documentation and discussions with US Link, USAC's Internal Audit Division ("IAD") determined that US Link should have reported reseller revenue totaling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] as interstate on Line 305.1 rather than as intrastate on Line 406 and that US Link therefore should only have reported revenue totaling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] from the private line circuits sold to its end user customers on Line 406.³ With respect to the [BEGIN CONFIDENTIAL] [REDACTED], [END CONFIDENTIAL] which US Link reported as 100 percent intrastate, IAD requested that US Link provide documentation to support the type of traffic (*i.e.*, intrastate or interstate) carried over the end user private line circuits. In response, US

² Relevant excerpts of the Final Audit Report and transmittal letter are attached as **Exhibit A**.

³ US Link does not object to the reclassification of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in private line revenues from end user to wholesale revenue.

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Link provided a list of private lines⁴ documenting the end points (A and Z locations) of those private lines showing that all but one had end points in the same state⁵ and end user customer certifications⁶ from [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its calendar year 2010 customers⁷ representing [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of private line revenue. Because the customer certifications verified that more than 90 percent of the traffic carried over their private line circuits was intrastate, IAD concluded that US Link appropriately reported end user private line revenue totaling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] as 100 percent intrastate on Line 406. However, because US Link did not provide documentation to demonstrate that 10 percent or less of the traffic carried over its remaining end user private lines was interstate, IAD concluded that US Link should have reported all of the remaining [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] as 100 percent interstate on Line 406.⁸

B. The Request for Review Presents a Recurring Issue of Industry-Wide Importance that the Commission Should Resolve Expediently

As discussed in greater detail below, USAC's Audit Finding #1 is based on the mistaken assumptions that physically intrastate circuits are interstate until proven otherwise and that carriers have an obligation to verify with customers the intrastate use of private line circuits connecting two points within a state. These assumptions have been repeatedly challenged, and those challenges show that the industry shares a common understanding of the ten percent rule.⁹

⁴ The private line information US Link provided to USAC is included in Exhibit B.

⁵ US Link acknowledges that it inadvertently included one interstate circuit among its nearly [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] intrastate private line circuits. The company does not dispute the reclassification of revenue associated with that one circuit as interstate revenue.

⁶ The customer certifications US Link provided to USAC are included in Exhibit C.

⁷ US Link has continued its work with customers to collect certifications supporting the intrastate nature of private line circuits and intends to provide additional certifications to USAC and rely on those certificates to classify the associated private line revenue as intrastate when filing its revised 499-A.

⁸ Final Audit Report at 8,12.

⁹ See Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed Apr. 3, 2012); XO Communication Services, Inc., Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 29, 2010); Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 12, 2008); McLeodUSA Telecommunications Services, Inc. Request for Review of Universal Service Administrator Decision, CC Docket Nos. 96-45 and 97-21 (filed Oct. 1, 2007).

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Each appeal has challenged USAC's finding that the absence of a customer's interstate certification results in the automatic classification of the line as interstate under current FCC rules. Because this request for review presents a recurring issue of industry-wide importance, the Commission should act on this request expeditiously. Specifically, the Commission should reverse USAC's Audit Finding #1, instruct USAC to refer issues regarding lack of documentation to the Commission as "Other Matters," and institute a notice and comment rulemaking to establish the documentation that carriers must collect to establish the jurisdiction of their physically intrastate private lines for purposes of USF reporting.

C. Standard of Review and Timeliness of Request for Review

The Commission's Rules require the Commission to conduct *de novo* review of requests for review of USAC decisions.¹⁰ USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."¹¹

This request for review has been filed within sixty days of the date on which US Link was notified of the Board's approval of the Final Audit Report and is therefore timely filed in accordance with the Commission's Rules.¹²

II. ARGUMENT

A. USAC's Assumption that Circuits are Interstate Until Proven Otherwise and that Carriers Have an Obligation to Verify the Intrastate Use of Private Line Circuits Are Inconsistent with Commission Rules

The Commission's Rules provide 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."¹³ Because US Link did not provide documentation demonstrating that 10 percent or less of the traffic carried over the end user private lines representing [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of revenue was interstate, IAD concluded that US Link should have reported all of the revenue as 100 percent interstate on Line

¹⁰ 47 C.F.R. § 54.723.

¹¹ 47 C.F.R. § 54.702(c).

¹² See 47 C.F.R. § 54.720.

¹³ 2011 FCC Form 499-A Instructions at 22 (citing 47 C.F.R. § 36.154(a)) (emphasis added).

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406.¹⁴ This conclusion rests on an assumption that circuits are interstate until proven otherwise. Nothing in the Commission's Rules or orders supports this assumption.

The history and purpose of the ten percent rule establish the exact opposite of the key assumption that USAC relies on to reclassify US Link's private line revenue as interstate. Prior to 1989, revenue from private lines carrying both local and interstate traffic was "generally assigned to interstate jurisdiction."¹⁵ According to the Joint Board, this classification posed a problem because it "tended to deprive state regulators of the authority over largely intrastate private line systems" that carried only a de minimis amount of interstate traffic.¹⁶ As a result, the ten percent rule was adopted to ensure that a geographically intrastate private line would be treated as jurisdictionally intrastate. Only *if* the customer provides a certification that more than ten percent of the traffic on the line is interstate should the line be classified as interstate. In fact, the Joint Board recommended that "verification of customer representations concerning relative state and interstate traffic levels be carefully circumscribed."¹⁷ The Joint Board made this recommendation recognizing that "[t]his approach may occasionally allow customers to misrepresent their traffic patterns in order to obtain favorable tariff treatment. However, in light of the fact that the typical situation involves physically intrastate systems carrying very small amounts of interstate traffic . . . the risk of tariff shopping is greatly outweighed by the need to avoid the substantial administrative burdens involved in a more precise verification system."¹⁸ The FCC adopted the Joint Board's reasoning as its own, emphasizing that the Joint Board's "carefully circumscribed" verification was necessary "to ensure that the benefits of direct assignment were not lost through burdensome verification requirements."¹⁹ Thus, contrary to USAC's assumption that circuits are interstate until proven otherwise, the FCC and Joint Board

¹⁴ Final Audit Report at 8,12.

¹⁵ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets 78-72 and 80-286, Recommended Decision and Order, 4 FCC Rcd 1352, ¶ 1 (1989).

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 32.

¹⁸ *Id.*

¹⁹ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Dockets 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660, ¶ 3 (1989).

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decisions show that the exact opposite is the case.

USAC's conclusion that the revenue in question should have been reported as interstate because US Link provided no documentation to demonstrate that the traffic carried over the lines was intrastate similarly assumes that carriers have an obligation to verify the intrastate use of private lines. To support its intrastate classification, US Link provided USAC private line end point information that showed each private line was physically located within a state. Because the "typical situation involves physically intrastate systems carrying very small amounts of interstate traffic," US Link's reliance on this end point information was consistent with both the rationale and implementation of the ten percent rule. Commission decisions issued since adopting the ten percent rule confirm that carriers have no obligation to verify with customers the intrastate use of private line circuits connecting two points within a state. In 1995, the Commission noted that private lines with mixed traffic will be "deemed to be interstate in nature for cost allocation purposes *if the customer certifies* that ten percent or more of the calling on that line is interstate."²⁰ In its review of GTE's DSL service, the Commission found the service should be governed by a federal tariff "where the service will carry more than a de minimis amount of inseparable interstate traffic," which GTE would establish by "ask[ing] every ADSL customer to certify that ten percent or more of its traffic is interstate."²¹ In 2001, the Commission again affirmed that "mixed-use special access lines would be treated as interstate *if the customer certifies* that more than 10 percent of the traffic on those lines consists of interstate calls."²² As the decisions make clear, private line circuits connecting two points within a state are correctly classified as intrastate circuits and only when customers provide certification to the contrary are the otherwise intrastate circuits to be reclassified.

²⁰ *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 (1995) (emphasis added).

²¹ *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 27 n.95 (1998).

²² *MTS WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Order, 16 FCC Rcd 11167, ¶ 2 (2001) (emphasis added).

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As noted above, the USAC assumption underlying this finding has been repeatedly challenged, and those challenges show that the industry shares a common understanding of the ten percent rule.²³ Each appeal has challenged USAC's finding that the absence of a customer's interstate certification results in the automatic classification of the line as interstate under current FCC rules. USAC argues that customer certifications, or other documentation showing the intrastate nature of traffic carried over the private lines, are necessary to determine the jurisdictional classification of private lines and that the "Joint Board's recommendation, adopted by the Commission, does not permit a carrier to assume intrastate jurisdiction of its private lines."²⁴ But USAC can point to no FCC authority supporting its contrary assumption that assumes interstate jurisdiction. Nothing in the Commission's Rules, the 1998 Joint Board's recommendation, or subsequent Commission orders requires carriers to collect jurisdictional certifications from their customers who purchase physically intrastate private lines. Requiring US Link to verify its customers' intrastate usage contradicts the Joint Board and FCC findings that verification of customer certifications should be carefully circumscribed. Moreover, nothing in the Commission's Rules, the Joint Board's recommendation, subsequent Commission orders, or the 2011 FCC Form 499-A Instructions permits USAC to classify private lines as interstate absent a customer certification of interstate usage.

The Commission's Rules provide that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress" and require USAC to seek guidance from the Commission "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation."²⁵ In practice, USAC classifies an issue as an "'other matter'

²³ See Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed Apr. 3, 2012); XO Communication Services, Inc., Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 29, 2010); Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 12, 2008); McLeodUSA Telecommunications Services, Inc. Request for Review of Universal Service Administrator Decision, CC Docket Nos. 96-45 and 97-21 (filed Oct. 1, 2007).

²⁴ Final Audit Report at 14 (emphasis added).

²⁵ 47 C.F.R. § 54.702(c). See also *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Third Report and Order, 13 FCC Rcd 25058, ¶ 16 (1998).

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if... the Commission's rules do not specifically address the situation."²⁶ Although the FCC Form 499-A Instructions impose general record keeping obligations, they do not impose any specific obligation to obtain traffic data for private lines. Where the FCC requires carriers to collect certifications or conduct traffic studies, the 2011 FCC Form 499-A Instructions set forth these requirements quite clearly.²⁷ Thus, current FCC rules and worksheet instructions do not address this situation and USAC may not make policy to (1) require carriers to collect jurisdictional use certificates for private lines in the first instance or (2) default private line revenue to the interstate jurisdiction in the absence of a customer certification. USAC claims in its Final Audit Report that it was merely applying "existing FCC precedent and regulations"²⁸ and that it would review "any documentation the Carrier could provide," not just customer certifications. However, as described above, no Commission rules or precedent support USAC's assumptions that circuits are interstate until proven otherwise and that carriers must obtain documentation to verify the jurisdiction of their private line circuits. Even if the Form 499-A's general record keeping obligations apply to private lines as USAC contends, the Instructions to the 2011 FCC Form 499-A may not supersede or contravene the FCC's established regulations, which as shown above carefully circumscribe customer verifications.²⁹ Instead of making up a rule that defaults physically intrastate private lines to the interstate jurisdiction, USAC must seek guidance from the Commission. USAC has sought guidance in similar scenarios concerning the audit implications of missing documentation.³⁰ If the Commission wishes to require carriers to collect customer certifications of jurisdictional usage, it must adopt any such new rule through a

²⁶ *Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, 27 FCC Rcd 13780, 13792 at n. 76 (2012) ("*2012 Wholesaler-Reseller Clarification Order*").

²⁷ See 2011 FCC Form 499-A Instructions at 21 (requiring filers to obtain reseller certifications), 24 (discussing wireless and VoIP traffic study requirements).

²⁸ Final Audit Report at 15.

²⁹ The Administrative Procedure Act requires notice and comment on any new rules or revisions to existing rules. See 5 U.S.C. § 553(b), (c).

³⁰ Letter to Julie Veach, Acting Chief, Wireline Competition Bureau, FCC from Richard A. Belden, COO, USAC, Re: Policy Guidance Regarding Universal Service Fund Matters Previously Submitted to Commission Staff, at p.3 (Aug. 19, 2009) (requesting guidance on what "remedial actions should be initiated against carriers that did not maintain documentation for periods being audited . . ."), available at <http://apps.fcc.gov/ecfs/document/view?id=7020141451>.

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notice and comment rulemaking.³¹ Given the weight of the law contrary to the assumptions underlying this finding and the growing dispute within the industry, Audit Finding #1 should be reversed and the Commission should instruct USAC to refer issues regarding lack of documentation to the Commission as “Other Matters.”

B. US Link Provided USAC with an Adequate Sample of Customer Certifications Confirming that the Circuits Were Correctly Classified

Although US Link was under no obligation to obtain customer certifications to support the classification of revenue from private line circuits connecting two points within a state to the intrastate jurisdiction, during the course of the audit US Link provided USAC with end user customer certifications from [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of its calendar year 2010 customers representing [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of private line revenue. These certifications represented over [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the circuits and were therefore sufficient as a sample to confirm that the circuits were correctly classified. USAC concluded that this sample was not representative of US Link’s private line customer base and its Management Response implies that nothing less than certifications for 100% of the private lines would be acceptable.³² BusinessDictionary.com defines a “representative sample” as “A small quantity of something such as customers, data, people, products, or materials, whose characteristics represent (as accurately as possible) the entire batch, lot, population, or universe.”³³ US Link provided sample certifications from a set of customers who purchased private lines that shared the characteristic of originating and terminating in the same state. USAC was therefore incorrect to conclude that the sample was not indicative of the traffic carried over US Link’s intrastate

³¹ The Administrative Procedure Act requires notice and comment on any new rules or revisions to existing rules. See 5 U.S.C. § 553 (b), (c).

³² Final Audit Report at 16 (“IAD may not assume, in the absence of a statistical sample, that the traffic carried over the [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] private line circuits is indicative of the traffic carried over the Carrier’s [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] other end user private line circuits”), 18 (“whether a particular line is interstate must be determined based on the interstate percentage of traffic specific to each individual line”).

³³ Available at <http://www.businessdictionary.com/definition/representative-sample.html>.

private line circuits.³⁴

C. The Ten Percent Rule Does Not Apply to Non-Incumbent Local Exchange Carriers

Even if USAC's interpretation of the ten percent rule were correct, the rule is inapplicable to US Link and cannot form the basis for reclassification of the revenue in question. The Commission has stated that its Part 36 "formal separations process that governs how incumbent local exchange carriers (LECs) assign their costs to intrastate and interstate jurisdictions" does not "apply to non-incumbent LEC contributors."³⁵ Although both the Universal Service First Report and Order and the Instructions to the 2011 FCC Form 499-A reference application of the ten percent rule to private lines, they are predicated on Section 36.154(a),³⁶ which only applies to incumbent LECs. The Instructions to the 2011 FCC Form 499-A, which are not subject to notice and comment, may not supersede or contravene the FCC's established regulations,³⁷ and in this case the private line instruction is meant to be read in tandem with Part 36. Because the ten percent rule is a separations rule contained in Section 36.154(a), it does not apply to non-incumbent LECs such as US Link. And because the ten percent rule is not applicable to non-incumbent LECs, US Link is under no obligation to obtain and retain certifications from customers regarding the jurisdiction of private lines.

³⁴ *Id.*

³⁵ Wireline Competition Bureau Releases 2013 Telecommunications Reporting Worksheets and Accompanying Instructions, Public Notice, WC Docket No. 06-122, DA 13-306 (rel. Mar. 1, 2013), at 6. *See also Jurisdictional Separations and Referral to the Federal State Joint Board*, 16 FCC Rcd 11382, ¶ 3 (2001).

³⁶ *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 778 n.1988 (1997); 2011 FCC Form 499-A Instructions at 22 n.43.

³⁷ The Administrative Procedure Act requires notice and comment on any new rules or revisions to existing rules. *See* 5 U.S.C. § 553(b), (c).

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III. CONCLUSION

For the foregoing reasons, US Link respectfully requests that the Commission reverse USAC's Audit Finding #1 concerning private line revenue.

Respectfully submitted,

Tamar E. Finn | DPB

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Counsel for US Link, Inc.

Dated: September 30, 2013

AFFIDAVIT OF SARA COLE

Sara Cole, being first duly sworn according to law, does hereby state as follows:

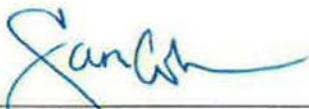
1. My name is Sara Cole. I am Regulatory Counsel for TDS Telecommunications Corp. ("TDS"). I have been employed with TDS for over 8 years. My business address is 525 Junction Road in Madison Wisconsin.

2. Prior to joining TDS, I worked in the telecommunications industry for nearly 10 years.

3. As Regulatory Counsel for TDS, I am responsible, among other things, for ensuring compliance with regulatory requirements for all the TDS companies, including US Link, Inc. d/b/a TDS Metrocom.

4. The facts set forth in the foregoing Request for Review by US Link, Inc. of Universal Service Administrator Decision are true and correct to the best of my knowledge, information, and belief.

I affirm under penalty of perjury that the foregoing is true and correct.



Sara Cole

September 30, 2013

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List of Exhibits

- Exhibit A USAC Final Audit Report - **REDACTED**
- Exhibit B US Link Private Line Information - **REDACTED**
- Exhibit C Customer Certifications - **REDACTED**

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CERTIFICATE OF SERVICE

I, M. Renee Britt, certify that on this 30th day of September 2013, a copy of the foregoing "Request for Review by US Link, Inc. of Universal Service Administrator Decision" in WC Docket No. 06-122 was served as specified below to the following parties.

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