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October 1, 2013

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Errata to Deltacom, Inc. Request for Review  
WC Docket No. 06-122

Dear Ms. Dortch:

On September 30, 2013, Deltacom, Inc. submitted via ECFS a Request for Review of a Universal Service Administrator Decision ("Request"), for association with the above referenced docket. Subsequent to filing, we discovered typographical errors in the page numbering format within the Request. Therefore, we are filing a corrected version of the Request for association with the original filing submitted on September 30, 2013.

Any questions regarding this submission may be directed to the undersigned.

Sincerely yours,

*/s/ electronically signed*

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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  
Deltacom, Inc. of Universal Service )  
Administrator Decision )  
 )

To: The Commission

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

Deltacom, Inc. (“Deltacom”), 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”),<sup>1</sup> respectfully submits this request to review and reverse an audit finding issued by the Universal Service Administrative Company (“USAC”) to Deltacom on July 30, 2013.

Deltacom requests the Commission’s review and reversal of USAC’s private line revenue finding, which is included in Audit Finding #1. Deltacom also requests prompt Commission action on USAC’s Other Matter #1 concerning Virtual Private Network (“VPN”) revenue and confirmation that, if the Commission determines any VPN revenue is subject to universal service contribution obligations, any such assessments will be prospective only.

As Deltacom 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 intrastate use of private line circuits. Nothing in the Commission’s Rules or in FCC decisions supports these assumptions. In addition, even though Deltacom was under no obligation to obtain customer certifications to support its classification of revenue, Deltacom provided USAC with information regarding the jurisdictional nature of the

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<sup>1</sup> 47 C.F.R. §§ 54.719(c), 54.721, 54.722.

traffic carried over the private lines and 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 Deltacom.

## I. INTRODUCTION

### A. Background

Deltacom is a competitive local exchange carrier ("CLEC") that offers telecommunications and information services, primarily in the Southeastern United States. On December 2, 2011, USAC notified Deltacom of its intention to conduct an audit of Deltacom's 2011 FCC Form 499-A filing (reporting revenue for calendar year 2010). The draft detailed audit report was issued on April 29, 2013. Deltacom prepared and filed a response to the draft detailed audit report on May 16, 2013. The final audit report was issued by USAC on May 16, 2013 (the "Final Audit Report"). USAC's Board of Directors (the "Board") approved the Final Audit Report on July 30, 2013, and USAC notified Deltacom of the Board's approval the same day. Deltacom objects to and requests reversal of USAC's private line finding. Deltacom also requests prompt Commission action on USAC's Other Matter #1 concerning VPN revenue and confirmation that, if the Commission determines any VPN revenue is subject to universal service contribution obligations, any such assessments will be prospective only.

To determine the audited jurisdiction of Deltacom's end-user private line audited revenues totaling [BEGIN CONFIDENTIAL] [REDACTED], [END CONFIDENTIAL] USAC's Internal Audit Division ("IAD") requested that Deltacom provide documentation to support the type of traffic (*i.e.*, intrastate or interstate) carried over its private line circuits. In response, Deltacom provided IAD with information concerning the design of its customer private lines and end user customer certifications from [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its calendar year 2010 customers representing [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of private line revenue. Because the

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customer certifications verified that 10 percent or less of the traffic carried over their private line circuits was interstate, IAD classified end-user private line revenues totaling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] as intrastate. However, because Deltacom did not provide certifications to demonstrate that 10 percent or less of the traffic carried over its remaining end-user private lines was interstate, IAD concluded that Deltacom should have reported *all* of the remaining [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] as 100 percent interstate.<sup>2</sup>

**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 private line finding is based on the mistaken assumptions that 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.<sup>3</sup> 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 with respect to private line revenue, 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 private lines for purposes of USF reporting.

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<sup>2</sup> Final Audit Report at 27. Relevant excerpts of the Final Audit Report and transmittal letter are attached as **Exhibit A**.

<sup>3</sup> 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).

**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.<sup>4</sup> USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."<sup>5</sup>

This request for review has been filed within sixty days of the date on which Deltacom was notified of the Board's approval of the Final Audit Report and is therefore timely filed in accordance with the Commission's Rules.<sup>6</sup>

**II. ARGUMENT**

**A. USAC's Assumptions 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."<sup>7</sup> Because Deltacom 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 Deltacom should have reported all of the revenue as 100 percent interstate.<sup>8</sup> This conclusion rests on an assumption that circuits are interstate until proven otherwise. Nothing in the Commission's Rules 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 Deltacom's revenue as interstate. Prior to 1989, revenue from private lines carrying both local and interstate traffic was "generally assigned to interstate jurisdiction."<sup>9</sup> 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

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<sup>4</sup> 47 C.F.R. § 54.723.

<sup>5</sup> 47 C.F.R. § 54.702(c).

<sup>6</sup> See 47 C.F.R. § 54.720.

<sup>7</sup> 2011 FCC Form 499-A Instructions at 22 (citing 47 C.F.R. § 36.154(a)) (emphasis added).

<sup>8</sup> Final Audit Report at 27.

<sup>9</sup> *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).

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systems” that carried only a de minimis amount of interstate traffic.<sup>10</sup> 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.”<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> Thus, contrary to USAC’s assumption that circuits are interstate in nature until proven otherwise, the FCC and Joint Board decisions show that the exact opposite is the case.

USAC’s conclusion that the revenue in question should have been reported as interstate because Deltacom 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. However, 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*

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 32.

<sup>12</sup> *Id.*

<sup>13</sup> *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, Order, 4 FCC Rcd 5660, ¶ 3 (1989).

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customer certifies that ten percent or more of the calling on that line is interstate.”<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> As the precedent makes 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.

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.<sup>17</sup> 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.”<sup>18</sup> But USAC can point to no FCC authority for USAC’s contrary assumption that

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<sup>14</sup> *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).

<sup>15</sup> *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 27 n.95 (1998).

<sup>16</sup> *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).

<sup>17</sup> 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).

<sup>18</sup> Final Audit Report at 36 (emphasis added).

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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 Deltacom 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."<sup>19</sup> In practice, USAC classifies an issue as an "other matter" if... the Commission's rules do not specifically address the situation."<sup>20</sup> 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.<sup>21</sup> 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"<sup>22</sup> and that it would review "any documentation the Carrier could provide," not just customer

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<sup>19</sup> 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).

<sup>20</sup> *Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, 27 FCC Rcd 13780, 13792 at n. 76 (2012) ("2012 Wholesaler-Reseller Clarification Order").

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

<sup>22</sup> Final Audit Report at 37.

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. 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.<sup>23</sup> If the Commission wishes to require carriers to collect customer certifications of jurisdictional usage, it must adopt any such new rule through a notice and comment rulemaking.<sup>24</sup> Given the weight of the law contrary to the assumptions underlying this finding and the growing dispute within the industry, Audit Finding #1 concerning private line revenue should be reversed and the Commission should instruct USAC to refer issues regarding lack of documentation to the Commission as "Other Matters."

**B. Deltacom Provided USAC with Information Regarding the Jurisdictional Nature of the Traffic Carried over the Private Lines and an Adequate Sample of Customer Certifications Confirming that the Circuits Were Correctly Classified**

During the audit, Deltacom provided IAD with information concerning the design of its customer private lines.<sup>25</sup> Specifically, Deltacom asked its relationship managers, who oversee the company's relationships with its largest customers, to review available data and provide information about the design of each 2010 customer's private line. The relationship managers identified many private line circuits as point-to-point pipes, data transmission between sites, and transmission of data between customer locations. IAD unreasonably rejected these circuit descriptions as unrelated to the jurisdictional nature of the traffic carried over the private lines.

In addition, although Deltacom was under no obligation to obtain customer certifications

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<sup>23</sup> 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>.

<sup>24</sup> 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).

<sup>25</sup> The information Deltacom provided to USAC is included in **Exhibit B**.

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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 Deltacom provided USAC with end user customer certifications from [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its calendar year 2010 customers representing [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of private line revenue.<sup>26</sup> USAC concluded that this sample was not representative of Deltacom's private line customer base and its Final Audit Report implies that nothing less than certifications for 100% of the private lines would be acceptable.<sup>27</sup> 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."<sup>28</sup> Deltacom provided sample certifications from a set of customers who purchased private lines that shared the characteristic of originating and terminating between two customer end points. Although individual relationship managers may have described these using slightly different terms (point-to-point pipes, data transmission between sites, and transmission of data between customer locations), they all fall within the set of private lines that originate and terminate between two customer end points that are not connected to any other service offered by Deltacom. *See* Affidavit of Donald Keith Owens, attached as **Exhibit D**. These certifications were sufficient as a sample to confirm that all such circuits were correctly classified. USAC was therefore incorrect to conclude that the sample was not indicative of the traffic carried over Deltacom's private line circuits.<sup>29</sup>

**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 Deltacom and cannot form the basis for reclassification of the revenue in

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<sup>26</sup> Relevant excerpts of the information Deltacom provided to USAC is included in **Exhibit C**.

<sup>27</sup> Final Audit Report at 38-39, 42.

<sup>28</sup> Available at <http://www.businessdictionary.com/definition/representative-sample.html>.

<sup>29</sup> Final Audit Report at 38-39.

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question. Contrary to IAD's response,<sup>30</sup> Deltacom did not rely on the jurisdictional separations rule alone to support its position. In the context of revising the 2013 FCC Form 499-A instructions, the Commission 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."<sup>31</sup> Because those rules do not apply to non-incumbent LECs, the Commission revised the worksheet instruction that had formerly required non-incumbent LECs to allocate a portion of local service revenue to an interstate subscriber line-type category.<sup>32</sup> Although USAC is correct that the 2011 FCC Form 499-A references application of the ten percent rule to private lines without distinguishing between incumbent and non-incumbent LECs, like the former subscriber-line type instruction, the ten percent rule is predicated on Section 36.154(a),<sup>33</sup> 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,<sup>34</sup> 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 Deltacom. And because the ten percent rule is not applicable to non-incumbent LECs, Deltacom is under no obligation to obtain and retain certifications from customers regarding the jurisdiction of private lines. The Commission should therefore reverse USAC's private line finding and direct USAC not to apply the ten percent rule to non-incumbent LECs.

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<sup>30</sup> Final Audit Report at n.69.

<sup>31</sup> Wireline Competition Bureau Releases 2013 Telecommunications Reporting Worksheets and Accompanying Instructions, Public Notice, WC Docket No. 06-122, DA 13-306, 6 (rel. Mar. 1, 2013) ("2013 Revisions PN"). See also *Jurisdictional Separations and Referral to the Federal State Joint Board*, 16 FCC Rcd 11382, ¶ 3 (2001).

<sup>32</sup> 2013 Revisions PN at 6.

<sup>33</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 778 n.1998 (1997); 2011 FCC Form 499-A Instructions at 22 n.43.

<sup>34</sup> 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).

### III. REQUEST FOR PROSPECTIVE CLASSIFICATION OF VPN REVENUE (OTHER MATTER)

Deltacom requests prompt Commission action on USAC's Other Matter #1 concerning VPN revenue and confirmation that, if the Commission determines any VPN revenue is subject to universal service contribution obligations, any such assessments will be prospective only. Although the second sentence of the draft Other Matter #1 implies that any FCC guidance on VPN revenues would apply prospectively, the Final Audit Report states that "IAD defers to the FCC regarding whether a carrier would be required to report its VPN revenues on a prospective or retrospective basis."<sup>35</sup> It is unreasonable for USAC to state it may issue a recommendation on this matter at some unspecified date in the future after receiving a response from the FCC. Unless and until the FCC issues guidance, Deltacom does not know how this revenue, or other VPN revenue it reports in the interim, will be treated. This uncertainty is unreasonable and negatively impacts both carriers who do not know how to classify revenue for the referred product during the interim and customers who purchase the product.

The Commission must act now to clarify the appropriate treatment of VPN and direct USAC that such services are not — even in part — assessable services for purposes of USF contributions. In 2009, the Commission sought comment<sup>36</sup> on a request from USAC seeking guidance regarding the appropriate USF treatment of Virtual Private Networks ("VPNs"), ATM, Frame Relay, and Dedicated IP transmission.<sup>37</sup> Three years after USAC's request for formal

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<sup>35</sup> Final Audit Report at 56.

<sup>36</sup> See *Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administration Company*, Public Notice, 24 FCC Rcd 12093, WC Docket Nos. 05-337 and 06-122 and CC Docket No. 96-45, DA 09-2117 (rel. Sept. 28, 2009) ("2009 Public Notice").

<sup>37</sup> See e.g., 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, WC Docket No. 06-122, at 2-3 (Aug. 19, 2009) (requesting guidance on the classification of VPN and dedicated IP revenue).

guidance, the Commission's *USF Contribution Methodology Reform and Modernization Further Notice*<sup>38</sup> explained that the Commission has "not formally addressed enterprise communications services such as Dedicated IP, VPNs, WANs, and other network services that are implemented with various protocols such as Frame Relay/ATM, MPLS and PBB for purposes of determining USF contribution obligations."<sup>39</sup> As USAC's Other Matter #1 makes plain, the Commission has failed to respond to USAC's request fostering further disputes between USAC and contributors and creating more uncertainty in the industry.

Retroactive application of the FCC guidance to the revenue subject to this audit or any VPN revenue reported to USAC prior to the issuance of the FCC's guidance would be improper under the FCC's precedent.<sup>40</sup> The FCC has held that only prospective application is appropriate where there was "lack of clarity" in its prior decisions and industry practice.<sup>41</sup> In this case, the "lack of clarity" is apparent. USAC has admitted that FCC guidance is necessary "[d]ue to the complexity of the VPN product."<sup>42</sup> Confusion within the industry as to the proper allocation of VPN revenue is also readily discernible based on the numerous filings seeking clarification of the treatment of VPN revenues.<sup>43</sup> As a group of providers noted, although there is widespread

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<sup>38</sup> *Universal Service Contribution Methodology*, WC Docket No 06-122, Further Notice of Proposed Rulemaking, FCC 12-46, 27 FCC Rcd 5357 (2012) ("*USF Contribution Reform Further Notice*").

<sup>39</sup> *Id.* at 5382 ¶ 44.

<sup>40</sup> Explicit statutes of limitation, which play a critical role in business and financial planning, are sorely lacking in the context of federal USF contribution obligations. Deltacom agrees with those who have urged the FCC to make explicit the statute of limitations that applies to USAC contribution audits and USF contributor revenue reporting requirements. *See, e.g.*, Comments of AT&T, WC Docket No. 06-122, at 5 (filed Sept. 16, 2013) (arguing that the Commission should "clarify that the applicable USF contributor statute of limitations is no greater than five years" and that "[a]ll parties would benefit by the Commission resolving this discrepancy and ensuring that contributors abide by the same statute of limitations"); Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, attachment at 2 (filed Oct. 25, 2012) (arguing that "the federal default four-year statute of limitations already applies to civil actions to enforce USF contribution obligations").

<sup>41</sup> *See Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, 24 (2008).

<sup>42</sup> Final Audit Report at 50.

<sup>43</sup> *See e.g.*, Comments of Masergy Communications Inc., WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, at 1 (filed Oct. 29, 2009) (arguing that "clarification is needed with regards to the proper regulatory classification of VPN"); Comments of National Exchange Carrier Association, Inc., WC Docket No. 05-334, 06-122, CC Docket No. 96-45 (filed Oct. 28, 2009); Comments of Verizon and Verizon Wireless, WC Docket Nos. 05-337, 06-122, CC

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confusion in the industry about the classification of enterprise data services, such as VPNs, that rely on MPLS, “[f]or the most part, MPLS-enabled service providers consider all or some portion of these services to be non-assessable information services.”<sup>44</sup> Furthermore, any contribution to USF is required to be “equitable and nondiscriminatory” and based upon “predictable and sufficient mechanisms.”<sup>45</sup> Retroactive application of any FCC clarification on reporting VPN revenue would not be predictable or equitable. Given the confusion both at USAC and within the industry as to the proper treatment of this revenue, only prospective application would be proper.

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Docket No. 96-45 (filed Oct. 28, 2009); Request for Review of a Decision by the Universal Service Administrator and Petition for Declaratory Ruling by IVANS, Inc., WC Docket No. 06-122 (filed Aug. 6, 2013); Comments of Sprint Nextel Corporation, WC Docket No. 06-122, at 2, 3 (filed Sept. 16, 2013) (criticizing the Commission for offering only “opaque guidance” and arguing that “[f]ailure to resolve this question has resulted in regulatory confusion and uncertainty, as the industry implements inconsistent approaches, and even USAC has reversed course over time”); Comments of U.S. TelePacific Corp. d/b/a TelePacific Communications, WC Docket No. 06-122, at 2 (filed Sept. 16, 2013) (arguing that “[t]he Commission must act now to clarify the appropriate treatment of VPN and other enterprise dedicated Internet services and direct USAC that such services are not—even in part—assessable services for purposes of USF contributions”).

<sup>44</sup> See Ex Parte Letter filed by XO Communications, Sprint Nextel Corp., NTT America, TechNet Group and Verizon, Universal Service Contribution Methodology, WC Docket No. 06-122 (filed March 29, 2012).

<sup>45</sup> 47 U.S.C. § 153(d).

**IV. CONCLUSION**

For the foregoing reasons, Deltacom respectfully requests that the Commission reverse USAC's Audit Finding #1 concerning private line revenue and act promptly on USAC's Other Matter #1 concerning VPN revenue. If the Commission determines any VPN revenue is subject to universal service contribution obligations, it should confirm that any such assessments will be prospective only.

Respectfully submitted,



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*Counsel for Deltacom, Inc.*

Dated: September 30, 2013

**AFFIDAVIT OF PAULA FOLEY**

Paula Foley, being first duly sworn according to law, does hereby state as follows:

1. My name is Paula Foley. I am Senior Counsel for EarthLink, Inc. ("EarthLink"). I have been employed with EarthLink, and its predecessor company, One Communications Corp., for six years. My business address is 5 Wall Street, Burlington, MA 01803.

2. Including working at EarthLink, I have worked in the telecommunications industry for thirteen years.

3. As Senior Counsel for EarthLink, I am responsible, among other things, for managing regulatory compliance initiatives for EarthLink affiliates, including Deltacom, Inc.

4. The facts set forth in the foregoing Request for Review by Deltacom, 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.

  
Paula Foley

September 27, 2013

**REDACTED - FOR PUBLIC INSPECTION**

**List of Exhibits**

- Exhibit A USAC Final Audit Report - **REDACTED**
- Exhibit B Private Line Descriptions - **REDACTED**
- Exhibit C Deltacom Customer Certifications - **REDACTED**
- Exhibit D Affidavit of Donald Keith Owens - **REDACTED**