Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink") submits the following comments[1] in support of the Request by US Link, Inc. ("US Link") for Review of a Universal Service Administrator Decision.[2] EarthLink agrees that the Commission should reverse the private line revenue audit finding of the Universal Service Administrative Company ("USAC") that is described in the Request. As it did in the audit of Deltacom, Inc., an EarthLink affiliate, USAC erroneously concluded that US Link should have reported as interstate all private line revenue for which it did not provide documentation demonstrating that ten percent *or less* of the traffic carried over the private lines was interstate.[3] USAC's interpretation of the ten percent rule mistakenly assumes that circuits are interstate until proven otherwise and that carriers have an obligation to verify the intrastate use of private line circuits.

Contrary to USAC's assumption that circuits are interstate in nature until proven otherwise, FCC and Joint Board decisions show that the exact opposite is the case. Commission Rules and precedent require customer certifications only when *more than* ten percent of the

[1] *See* Public Notice, *Wireline Competition Bureau Seeks Comment on US Link, Inc.'s Request for Review of a Decision by the Universal Service Administrative Company*, WC Docket No. 06-122, DA 13-2095 (Oct. 30, 2013).
[2] Request for Review by US Link, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (Sept. 30, 2013) ("US Link Request").
[3] *See* US Link Request at 4.

traffic carried over a physically intrastate line consists of interstate calls.[4] Prior to 1989, revenue from private lines carrying both local and interstate traffic was "generally assigned to interstate jurisdiction."[5] 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,[6] and 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. According to the FCC, such "carefully circumscribed" verification was necessary "to ensure that the benefits of direct assignment were not lost through burdensome verification requirements."[7]

Commission decisions issued since adoption of 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 2001, for example, the Commission 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."[8] 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.

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[4] *See, e.g.*, *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) (noting 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" (emphasis added)).
[5] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, 4 FCC Rcd 1352, ¶ 1 (1989).
[6] *Id.* at ¶ 32.
[7] *Id.*
[8] *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).

Although US Link was under no obligation to obtain customer certifications to support its intrastate classification of revenue from private line circuits connecting two points within a state, US Link provided USAC with end user customer certifications from a sample of its calendar year 2010 customers confirming that the circuits were correctly classified. USAC's conclusion that the sample was not indicative of the traffic carried over US Link's intrastate private line circuits wrongly suggests that nothing less than certifications for 100% of the private lines would be acceptable.

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."[9] Neither current FCC rules nor the FCC Form 499-A instructions 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. Instead of making up a rule that defaults physically intrastate private lines to the interstate jurisdiction, USAC must seek guidance from the Commission. 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.[10]

Finally, 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

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[9] 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).

[10] 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).

because it is a separations rule contained in Section 36.154(a) of the Commission's Rules[11] that does not apply to non-incumbent LECs such as US Link. As the Bureau recently held, "the Commission's formal separation process that governs how ILECs assign their costs to intrastate and interstate jurisdictions"[12] does not apply to CLECs. Because the separations process does not apply, CLECs must allocate and report revenues "for USF contribution reporting purposes, in a manner that is consistent with their supporting books of accounts and records, or the Commission's good faith estimate requirement."[13] US Link is under no obligation to obtain and retain certifications from customers regarding the jurisdiction of its private lines.

For all of the foregoing reasons, the Commission should reverse USAC's private line revenue audit finding, 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, if any, that carriers must collect to establish the jurisdiction of their physically intrastate private lines for purposes of USF reporting.

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[11] 47 C.F.R. § 36.154(a).

[12] *Universal Service Contribution Methodology; Petition for Declaratory Ruling by the Rural Independent Competitive Alliance; Request for Review of a Decision of the Universal Service Administrative Company by Blackfoot Communications, Inc.*, Declaratory Ruling and Order, WC Docket No. 06-122, DA 13-2254, at ¶ 12 (2013).

[13] *Id.* at ¶ 13.

Respectfully submitted,

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Dated: November 27, 2013

CERTIFICATE OF SERVICE

I, M. Renee Britt, hereby certify that on this 27th day of November 2013, I have caused a copy of the foregoing Comments of **EarthLink, Inc.** to be served upon the parties below via electronic mail:

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/s/ M. Renee Britt
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