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

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

COMMENTS OF XO COMMUNICATIONS SERVICES, LLC

XO Communications Services, LLC ("XOCS"), pursuant to the Public Notice issued in the above-captioned proceeding,[1] hereby files these Comments in support of Deltacom, Inc.'s ("Deltacom's") Request for Review of Universal Service Administrator Decision ("Request for Review").[2] Deltacom seeks reversal of an audit decision of the Universal Service Administrative Company ("USAC") reclassifying the jurisdiction of Deltacom's private line service revenues from intrastate to interstate. Although XOCS lacks information to comment on the classification of Deltacom's particular private line circuits, XOCS agrees that USAC applied an incorrect standard in the Deltacom audit. Indeed, USAC has misapplied this standard for years, as XOCS (and supporting commenters) noted in its own appeal of a USAC decision that has been pending since December 2010.[3] The recurrence of this issue illustrates USAC's

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1 Public Notice, *Wireline Competition Bureau Seeks Comment on Deltacom, Inc.'s Request for Review of a Decision by the Universal Service Administrative Company*, WC Docket No. 06-122, DA 13-2116 (Nov. 1, 2013).

2 *In re: Request for Review by Deltacom, Inc. of Universal Service Administrator Decision*, WC Docket No. 06-122 (Sept. 30, 2013) ("Deltacom Request for Review").

3 *See In re: XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 29, 2010) ("XOCS Request for Review").

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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.[4] Furthermore, XOCS urges the Commission to promptly resolve the uncertainty surrounding universal service obligations related to revenues for MPLS-enabled services, such as IP-VPN, and to confirm that any affirmative contribution obligations apply prospectively only.

I. USAC MISINTERPRETS THE COMMISSION'S 10% RULE WHEN IT CONCLUDES THAT PRIVATE LINE TRAFFIC IS PREUMPTIVELY 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 its Request for Review, Deltacom explained that it classified the subject private line service revenues as 100% intrastate on its 2011 annual FCC Form 499-A filing and that USAC reclassified the revenues because Deltacom could not provide customer certifications proving that interstate traffic routed over the lines did not exceed 10% of the total traffic.[5] Similar to XOCS' audit, USAC concluded that Deltacom must prove that the private line traffic at issue was intrastate before the revenue associated with the private line could be classified as intrastate for USF reporting purposes.[6] As XOCS explained in its Request for Review, 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,

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4 *See In re: Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision*, WC Docket No. 06-122 (filed Apr. 3, 2012) ("PaeTec Request for Review"); *In re: Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 12, 2008) ("Madison River Request for Review").

5 Deltacom Request for Review at 3.

6 *Id.* at 5.

and service providers that need to exchange data and other communications traffic between two or more discrete locations. Similar to XOCS, Deltacom described its private line services as originating and terminating between two customer end points that are not connected to any other service offered by Deltacom, providing point-to-point pipes and data transmission between sites and/or customer locations.[7]

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 presumption that, as a default, revenues from private lines are to be treated as interstate, absent affirmative evidence to the contrary. 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 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.[8] The separations process has never been applied by the Commission to competitive carriers such as Deltacom and XOCS, and even if it were to apply, USAC has the presumption exactly backwards.

Contrary to USAC's misapplication of the 10% Rule in recent audits, the Joint Board on Jurisdictional Separations ("Joint Board") did ***not*** recommend to the Commission 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*

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7 *Id.* at 8-9.

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

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***.[9] The Joint Board ultimately recommended that absent certification of more than 10% interstate use, the line should be treated as *intrastate* when the end points are located within the same state. 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 instead assigns *federal* jurisdiction to these geographically intrastate private lines absent verification such as customer certification or other reliable evidence.

Moreover, as Deltacom highlights, Commission decisions since adoption of the 10% Rule confirm that carriers have no obligation to verify with customers the intrastate use of private line circuits connecting two points within a state.[10] As XOCS explained in greater detail in its Request for Review, USAC's use of a presumption that revenues from geographically intrastate private line services are to be treated as interstate, absent proof from a carrier to the contrary, is wholly inconsistent with Commission precedent.[11] 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.

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9 *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, 1357, ¶ 32 (1989) (emphasis added) ("Recommended Decision").

10 Deltacom Request for Review at 5.

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%.) *See also* Comments of XO Communications Services, LLC, WC Docket 06-122 (filed May 17, 2012).

The Commission has repeatedly and consistently held that the interstate treatment of a private line requires two conditions to be satisfied.[12] 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 a geographically 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 end points in one state are configured in a manner that may allow for interstate as well as intrastate traffic, the 10% Rule is clear. Geographically intrastate private line circuits are intrastate unless the carrier presents evidence (such as through a certification) that more than a *de minimis* amount (10%) of traffic on the circuit is interstate. In other words, USAC may not require that USF contributions be made on revenues associated with private line circuits with end points within a single state 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.

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[12] *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); *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481 (1998); *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).

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

Deltacom's Request for Review is just one of 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 numerous appealed audits and presumably has applied the same reading to other contributor revenue reports. The industry has been awaiting Commission resolution of this issue for at least five years. While the Commission delays action, the industry is forced to operate in an uncertain regulatory environment, where carriers subjected to USAC audits are forced to comply with USAC's reclassification of private line revenue, usually on a retroactive basis, while other carriers may continue to classify revenues from physically intrastate private line services as intrastate revenues not subject to USF contributions. Even those carriers not currently subject to an audit, however, must consider issues such as the likelihood of being able to recover from their customers USF assessments if their private line service revenues are reclassified as interstate during a later audit.

Moreover, 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.[13] 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

[13] PaeTec Request for Review at 6.

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

Thus, time is of the essence for the Commission to confirm its precedent that where a private line has end points within the same state, the associated service is presumed to be jurisdictionally intrastate, including in instances where a carrier is unable to provide customer certifications of service 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. Accordingly, XOCS urges the Commission to grant the pending requests for review and reverse USAC's private line service audit findings.

II. ANY COMMISSION DETERMINATION THAT REVENUE RELATED TO MPLS-ENABLED SERVICES IS SUBJECT TO USF CONTRIBUTION OBLIGATIONS MUST BE PROSPECTIVE ONLY

XO also echoes Deltacom's request for prompt Commission action on USAC's request for guidance concerning revenue related to services that rely on Multi-Protocol Label Switching ("MPLS"), such as Virtual Private Network ("VPN"),[14] and confirmation that, if the

[14] *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

Commission determines any revenue related to MPLS-enabled services is subject to universal service contribution obligations, any such assessments will be prospective only.[15] There is longstanding confusion among customers, between service providers, and at the Commission regarding the potential contribution obligations of companies offering enterprise data services relying on MPLS.[16] As noted by Deltacom, the Commission has admittedly "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."[17] Thus, as the Commission has determined that only prospective application is appropriate where there was "lack of clarity" in its prior decisions and industry practice, retroactive application of Commission guidance regarding any revenue related to MPLS-enabled services reported to USAC prior to the issuance of the Commission's guidance would be improper and inequitable.[18]

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 possess 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

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(Aug. 19, 2009) (requesting guidance on the classification of VPN and dedicated IP revenue).

15 Deltacom Request for Review at 2.

16 *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).

17 Deltacom Request for Review at 12.

18 *Id.*

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 the private line issue and the contribution obligations of providers of MPLS-enabled services.

Respectfully Submitted,

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December 2, 2013