Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.	)	CC Docket No. 97-21
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Request for Review by McLeodUSA Telecommunications Services, Inc. Universal Service Administrator Decision	)	
	)	
XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator	)	
	)	
Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision	)	
	)	
Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator	)	
	)	
Request for Review by US Link, Inc. of Universal Service Administrator Decision	)	
	)	
Request for Review by Deltacom, Inc. of Universal Service Administrator Decision	)	

ORDER

Adopted: March 30, 2017 **Released: March 30, 2017**

By the Acting Chief, Wireline Competition Bureau:

1. In this Order, we deny several pending requests for review of audit findings related to whether certain revenues associated with specific mixed-use special access lines (also referred to as private lines)[1] should be considered interstate for the purpose of assessing contributions to the universal

[1] For purposes of this order only, we use the terms "special access" and "private line" interchangeably, consistent with how the Commission has treated these terms in the past in the context of the "ten percent rule" discussed herein. *See, e.g., MTS and WATS Market Structure*, *Amendment of Part 36 of the Communications Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660, 5660-61

(continued….)

service fund (USF or Fund).[2] Although the facts underlying these requests for review vary, each contends that the Universal Service Administrative Company (USAC), during audits concerning mandated contributions filings, misapplied the "ten percent rule."

2. Based on the facts before us, we find that USAC appropriately relied on the ten percent rule to determine the jurisdictional nature of the revenues. We further find that under the rule, the nature of the traffic carried on a private line, not whether a certification has been completed, is the primary determinant of the proper jurisdictional assignment of the line and the associated revenues. We do, however, find that USAC may have failed to consider other relevant evidence that particular private lines were properly classified as intrastate. We therefore remand the requests for review to USAC for further consideration consistent with this Order.

I. BACKGROUND

A. The Ten Percent Rule

3. The Commission established a method for determining the proper allocation of mixed-use private or WATS line costs for purposes of jurisdictional separations almost thirty years ago.[3] In the *Ten Percent Rule Order*, the Commission adopted the recommendation of the Federal-State Joint Board on Separations (Separations Joint Board) that the costs of mixed-use private or WATS lines be directly assigned to the intrastate jurisdiction when interstate traffic amounts to ten percent or less of total traffic on the line, and to the interstate jurisdiction when interstate traffic exceeds ten percent.[4] Section 36.154 of the Commission's rules codifies the ten percent rule for purposes of jurisdictional separations.[5] The Commission also agreed with the Separations Joint Board's recommendation that the best method for verifying private line traffic was through customer certifications.[6]

4. In the 1997 *Universal Service First Report and Order*, the Commission repurposed the jurisdictional separations ten percent rule to define "interstate" telecommunications under the new contributions framework. Specifically, the Commission stated that, in instances where over ten percent of the traffic carried by a private or WATS line is interstate, the revenues and costs generated by the entire

(Continued from previous page)
para. 1 & Appendix (1989) (*Ten Percent Rule Order*) (referring to subject of proceeding as "special access lines," but adopting rule that refers to "private lines" and "WATS [Wide Area Telephone Service] lines"). Mixed-use lines are special access lines carrying both (intra)state and interstate traffic.

[2] Request for Review by McLeodUSA Telecommunications Services, Inc. of Universal Service Administrator Decision, CC Docket Nos. 96-45 and 97-21 (filed Oct. 1, 2007) (McLeodUSA Request for Review); 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); 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); Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator, WC Docket Nos. 08-71 and 06-122, CC Docket Nos. 97-21 and 96-45 (filed June 25, 2012) (PRTC Request for Review); Request for Review by US Link, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed Sept. 30, 2013) (US Link Request for Review); Request for Review by Deltacom, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed Sept. 30, 2013) (Deltacom Request for Review). *Ten Percent Rule Order at* 5661 n. 1. Some of these Requests for Review raised issues other than the ten percent rule. This Order is limited to the ten percent rule issue.

[3] *Ten Percent Rule Order*, 4 FCC Rcd 5660.

[4] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, para. 1 (1989) (*Ten Percent Rule Recommended Decision*).

[5] 47 CFR § 36.154(a).

[6] *Ten Percent Rule Recommended Decision* at 1357, para. 32.

line should be classified as interstate.[7] In implementing the *Universal Service First Report and Order*, the FCC Form 499-A instructions have quoted the order without further discussion.[8] This requirement has been in the FCC Form 499-A Instructions since they were first released in 1997.[9]

B. Requests for Review

5. In each of the requests for review currently before us, USAC has cited the ten percent rule as its basis for reclassifying as interstate private line revenues that had been reported by the petitioners as intrastate on their FCC Form 499-A filings.[10] Specifically at issue are revenues associated with private line circuits that have physical end points located in the same state.[11] The petitioners generally contend that their services are designed as closed circuits that transport the end user's internal communications and that the traffic on the lines is exclusively intrastate.[12]

6. USAC requested supporting documentation from each filer to prove that ten percent or less of the traffic on the private line circuit at issue was interstate. According to the petitioners, USAC's interpretation of the ten percent rule is that private line traffic is presumed to be jurisdictionally interstate unless the carrier is able to provide sufficient proof that ten percent or less of the traffic is interstate; thus, USAC is inaccurately interpreting the ten percent rule to include a presumption that private line revenues are *inter*state in the absence of a certification to the contrary.[13] They argue that the Separations Joint Board intended the ten percent rule to presume the exact opposite, that revenues from geographically intrastate private line circuits are presumed to be *intra*state unless the customer certifies that more than ten percent of the traffic on the private line is interstate.[14]

7. This order addresses arguments raised in the following requests for Commission action:

- *McLeodUSA Telecommunications Services, Inc.*: On October 1, 2007, McLeodUSA Telecommunications Services, Inc. (McLeod) filed a request for review appealing several findings from USAC's audit of McLeod's 2006 FCC Form 499-A, including the reclassification of private line revenues as interstate.[15] McLeod argues that it provided USAC with information demonstrating that its private line service is exclusively intrastate, but that USAC unreasonably dismissed these statements and documentation as inconclusive and unpersuasive.[16]
- *XO Communications Request for Review*: On December 29, 2010, XO Communications Services, Inc. (XOCS) filed a request for review challenging several conclusions from

[7] *See Universal Service First Report and Order,* 12 FCC Rcd at 9173, para. 778. The Commission cited to the separations rule – 47 CFR § 36.154(a) – without further discussion. *Id.* at 9173, n. 1988.

[8] *See Universal Service Second Order on Reconsideration,* 12 FCC Rcd at 18512, Appx. A; 2015 Form 499-A at 26. The relevant language in the instructions has not changed since 1997.

[9] *Universal Service Second Order on Reconsideration*, 12 FCC Rcd, App. A at 18512 (*citing* 47 CFR §36.154(a)).

[10] *See, e.g.,* McLeodUSA Request for Review, PaeTec Request for Review.

[11] *See* XOCS Request for Review at 8-11; PRTC Request for Review at 3; PaeTec Request for Review at 2; McLeodUSA Request for Review at 2-3; USLink Request for Review at 6; DeltaCom Request for Review at 2-3.

[12] *See e.g.* XOCS Request for Review at 10, PRTC Request for Review at 3-4.

[13] *See e.g.* PRTC Request for Review at 11; McLeodUSA Request for Review, PaeTec Request for Review

[14] *See* XOCS Request for Review at 17;; McLeodUSA Request for Review at 10-11; PaeTec Request for Review at 3-4, PRTC Request for Review at 10; USLink Request for Review at 5-7; DeltaCom Request for Review at 5.

[15] McLeodUSA Request for Review.

[16] *Id*. at 6-9.

USAC's audit of XOCS's 2008 FCC Form 499-A.[17] The USAC audit reclassified revenues from XOCS's private line Dedicated Transport Services as interstate.[18] XOCS explains that its Dedicated Transport Services typically consist of closed networks with intrastate end points that do not connect to outside networks or the PSTN.[19]

- *PaeTec Request for Review*: On April 3, 2012, PaeTec Communications, Inc. (PaeTec) filed a request for review of a USAC audit that reclassified a portion of the private line revenues reported as intrastate on PaeTec's 2009 FCC Form 499-A as interstate.[20] PaeTec argues that USAC misapplied the ten percent rule and Commission precedent by presuming private line revenues to be interstate absent customer certifications.[21]
- *Puerto Rico Telephone Company Request for Review:* On June 25, 2012, the Puerto Rico Telephone Company, Inc. (PRTC) filed a request for review seeking reversal of USAC's decision to reclassify private line revenues reported as intrastate on PRTC's 2008 FCC Form 499-A as interstate.[22] PRTC argues that USAC incorrectly applied the ten percent rule, which was intended to preserve state jurisdiction over intrastate private lines, to create a presumption that private lines are interstate.[23]
- *US Link Request for Review*: On September 30, 2013, US Link filed a request for review seeking reversal of USAC's decision to reclassify private line revenues reported as intrastate on US Link's 2010 FCC Form 499-A as interstate.[24] US Link argues that USAC incorrectly reclassified the revenues because the ten percent rule creates a presumption that private line revenues are intrastate in the absence of a certification that they are interstate.[25]
- *Deltacom Request for Review:* On September 30, 2013, Deltacom filed a request for review seeking reversal of USAC's decision to reclassify private line revenues reported on Deltacom's 2010 Form 499-A as interstate.[26] Deltacom argues that USAC incorrectly reclassified the revenues because the ten percent rule creates a presumption that private line revenues are intrastate in the absence of a certification that they are interstate.

II. DISCUSSION

A. USAC Appropriately Relied on the Ten Percent Rule to Determine the Jurisdictional Nature of Revenues for Contributions Purposes

8. At the outset, we confirm that USAC appropriately relied on the ten percent rule to determine whether private line revenues should be assigned to the interstate jurisdiction. The petitioners variously allege that the ten percent rule does not apply to revenues; that the ten percent rule only applies to carriers subject to jurisdictional separations cost allocation rules; that the Commission never sought

[17] XOCS Request for Review.

[18] XOCS Appeal at 7.

[19] *Id.* at 10.

[20] PaeTec Request for Review.

[21] *Id.* at 3-6.

[22] PRTC Request for Review.

[23] *Id*. at 13.

[24] US Link Request for Review.

[25] *Id.* at 4-9.

[26] Deltacom Request for Review. Deltacom also requested Commission action regarding the treatment of Virtual Private Network revenue for contributions purposes. *Id.* We decline to address that issue here.

comment on the application of the ten percent rule to universal service contributions; that USAC's application of the ten percent rule was a novel application in excess of its authority; or that USAC's application of the ten percent rule constituted a change in the Commission's rules without notice-and-comment, in violation of the Administrative Procedures Act.[27] We reject each of these arguments.

9. Prior decisions have clearly incorporated the ten percent rule into the Commission's framework for identifying interstate telecommunications for USF contributions purposes. In the *1996 Universal Service Recommended Decision*, the Federal-State Joint Board on Universal Service (USF Joint Board) recommended that the Commission adopt a definition of "interstate telecommunications" for the purpose of identifying universal service contributors, and specifically referenced the ten percent rule.[28] After seeking comment on the USF Joint Board recommendation, the Commission included a similar statement in its *First Universal Service Order* and thereby incorporated the ten percent rule into its definition of interstate telecommunications: "[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."[29] In 1997, the Commission released a draft "Universal Service Worksheet" that included the instruction that "[u]nder the Commission's rules, if 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."[30] The instructions have remained substantially the same with respect to interstate private lines since that time, even as the form has changed in other respects.[31]

10. Given this history, we find that there was sufficient notice for all carriers that the ten percent rule would provide the basis for determining whether a mixed use special access line would be considered interstate or intrastate in nature for contributions purposes. If a carrier did not believe that the matter had been properly considered by the Commission, it should have timely filed for reconsideration; at this juncture, the time for objecting or petitioning for reconsideration has long since passed.[32] Furthermore, given that the Commission incorporated the ten percent rule into its contributions requirements in the *Universal Service First Report and Order*, we conclude that the Commission intended to extend the ten percent rule to contributions without modification.

B. The Ten Percent Rule Did Not Create a Presumption That Special Access Lines Are Intrastate In Nature

11. We next affirm that the nature of the traffic carried over the private lines is the primary determinant of jurisdictional assignment, not whether a customer has provided a certification. The petitioners have conflated the primary rule–-that a mixed-use private line is assigned to the interstate jurisdiction if more than ten percent of the traffic is interstate–-with the documentation requirements

[27] McLeodUSA Request for Review (questioning applicability of ten percent rule to contributions without further notice-and-comment); PRTC Request for Review at 17-20 (arguing that USAC's interpretation of the ten percent rule was novel and could only be implemented through notice-and-comment rulemaking) US Link Request for Review at 10 (arguing that ten percent rule does not apply to non-incumbent local exchange carriers); Deltacom Request for Review at 9-10 (arguing that the ten percent rule does not apply to non-incumbent local exchange carriers).

[28] *1996 Universal Service Recommended Decision*, 12 FCC Rcd at 481.

[29] *First Universal Service Order*, 12 FCC Rcd at 9173, para. 778.

[30] *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18512 & n. 5 (1997) (Appendix C – Universal Service Worksheet).

[31] *See, e.g., Universal Service Second Order on Reconsideration,* 12 FCC Rcd at 18512, App. A; 2015 Form 499-A at 38-39.

[32] *See* McLeodUSA Request for Review, at 12 (arguing that there was no notice and comment regarding use of ten percent rule for separations); USLink Request for Review, at 10 (arguing that the ten percent rule is not applicable to non-incumbent local exchange carriers).

associated with the rule. Mixed-use special access lines are assignable to the interstate jurisdiction if the interstate traffic constitutes more than ten percent of the total traffic and to the intrastate jurisdiction if it constitutes ten percent or less.[33] We find no basis for allowing carriers to simply presume, without any evidence or good-faith inquiry, that ten percent or less of the traffic on a mixed-use line is interstate.[34] Stated differently, carriers and their customers must make a good faith effort to assign a mixed-use private line to the appropriate jurisdiction because no default presumption of interstate or intrastate jurisdiction exists.

12. The Commission adopted the ten percent rule in 1989 based on a Recommended Decision by the Separations Joint Board, and specifically stated that it was adopting the reasoning underlying that recommendation as well.[35] While the Separations Joint Board ultimately recommended directly assigning the cost of mixed use special access lines to the intrastate jurisdiction when such lines carried *de minimis* amounts of interstate traffic,[36] it explicitly rejected a proposal to directly assign mixed-use special access lines solely to the intrastate jurisdiction because "it fail[ed] to recognize legitimate federal regulatory interests in this area."[37] Further, in making its recommendation, the Separations Joint Board emphasized the importance of tariffing and regulatory authority in its decision: "We cannot recommend continuing a system in which all facilities carrying interstate traffic, no matter how little the amount, are obtained from the interstate tariff . . . . This allows customers to evade state tariff regulation merely by adding *de minimis* amounts of interstate traffic to private lines carrying intrastate communications. Such actions significantly undermine state regulatory authority."[38] Contrary to arguments made by requestors, the ten percent rule was not intended to create any blanket presumptions applicable to all mixed-use circuits in favor of either the intrastate or interstate jurisdictions.[39]

13. Furthermore, it is apparent from the Commission's subsequent *Ten Percent Order* that it intended to address the extent to which states maintain regulatory authority, not merely to allocate costs. The Commission adopted the Joint Board's reasoning and stated, "[w]e also believe that the tariffing implications of the new separations rules . . . is in these circumstances consistent with the system of federal and state regulation established in the Communications Act, which provides a central role for the separations process in determining the scope of state and federal ratemaking authority."[40]

14. We find no indication that the Separations Joint Board or the Commission intended to relieve carriers or their customers from the obligation to determine the correct jurisdictional assignment for private lines or to create a presumption that private lines are interstate or intrastate in the absence of such an effort. The rule recommended by the Separations Joint Board and adopted by the Commission does not refer to any presumption, even though it would have been quite logical to construct a rule that did, had they intended to do so. Neither the Separations Joint Board nor the Commission ever used the term "presumption" or "safe harbor" or any other language explicitly drawing an inference from the lack of certification, even though, again, it would have been obvious to do so if that had been its intent.

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[33] 47 CFR § 36.154(a); *Ten Percent Rule Order*, 4 FCC Rcd at 5660, para. 2.

[34] McLeodUSA Request for Review at 10-11; XOCS Request for Review at 14-23; PaeTec Request for Review at 3-7; PRTC Request for Review at 13-17; US Link Request for Review at 4-9; Deltacom Request for Review at 4-8.

[35] *Ten Percent Rule Order*, 4 FCC Rcd at 5660-61, para. 6; *Ten Percent Rule Recommended Decision*, 4 FCC Rcd at 1355-58, paras. 22-34.

[36] *Id.* at 1356, para. 25.

[37] *Id.*, at 1361 n.140.

[38] *Ten Percent Rule Recommended Decision*, 4 FCC Rcd at 1357, para. 30.

[39] *Id.* at 1358, para. 34.

[40] *Ten Percent Rule Order*, 4 FCC Rcd at 5660-61, paras. 6-7.

15. As evidence of the Separations Joint Board's intent to create a presumption in favor of intrastate allocation, some carriers apparently rely on the Board's suggestion that "the benefits of this method can best be achieved through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic."[41] In the view of these carriers, the absence of such a certification allows them to presume that a line is intrastate. We note that these certifications are secondary to the ten percent rule: they were not mentioned by the Separations Joint Board in its summary of the Recommended Decision and are not reflected in the codified rule. To make these certifications determinative of jurisdictional status would significantly modify the codified rule without any explicit indication by the Separations Joint Board that it intended to do so. Moreover, the carriers' interpretation of the rule assumes no good faith requirement. It would permit carriers and customers to elect state jurisdiction even in instances where they know (or remain willfully ignorant) that more than ten percent of the traffic is interstate, simply by failing to request or complete a certification. This would conflict with the Commission's statement in adopting the Separations Joint Board's recommendation that "[it] expect[ed] customers to act in good faith when certifying the nature of their traffic based on existing information…."[42]

16. We are not persuaded by arguments that the Separations Joint Board intended that mixed-use private lines should be presumed intrastate in the absent of a customer certification because it considered the pre-existing "contamination rule" to deprive the states of regulatory authority. The Separations Joint Board in fact articulated a very narrow concern regarding the contamination rule: that carriers and users could "evade state tariff regulation merely by adding *de minimis* amounts of interstate traffic to private lines carrying intrastate communications."[43] The Separations Joint Board described its recommendation as making "modest" changes, not a significant revision to jurisdictional authority.[44] We do not think it is likely that the Separations Joint Board, in its narrow effort to prevent evasion of state authority by means of adding a small amount of interstate traffic, intended to permit a similar evasion of federal authority.

17. We are similarly unpersuaded by arguments that read intent into the Separations Joint Board's statement that it did not expect close cases requiring verification to arise frequently because "the typical situation involves physically intrastate systems carrying small amounts of interstate traffic."[45] As the Separations Joint Board later made clear in its Recommended Decision, it was referring to situations in which there are "conflicts about state versus federal tariffing of special access service," not to physically intrastate systems generally.[46]

18. We now turn to the appropriate role of customer certifications within this framework. Concerned with the administrative practicality of the ten percent rule, the Separations Joint Board held that "the benefits of [the rule] can best be achieved through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic."[47] To avoid overly burdensome processes, the Separations Joint Board further recommended that "verification of customer representations concerning relative state and interstate traffic levels be carefully circumscribed. In determining the jurisdiction to which mixed use special access lines are to be assigned, the [Local

[41] *Ten Percent Rule Recommended Decision,* 4 FCC Rcd at 1357, para. 32. *See, e.g.,* McLeodUSA Request for Review at 10-11.

[42] *Ten Percent Rule Order*, 4 FCC Rcd at 5661, n.7.

[43] *Ten Percent Rule Recommended Decision*, 4 FCC Rcd at 1357, para. 30.

[44] *Id.* at 1358, para. 34.

[45] *See* US Link Request for Review at 5.

[46] *Ten Percent Rule Recommended Decision*, 4 FCC Rcd at 1357, paras. 31-32.

[47] *Id.* at 1357, para. 32.

Exchange Carriers (LECs)] should only require verification when the customer representations involved appear questionable."[48]

19. While this language reflects the Separations Joint Board's primary concern of the day – the evasion of state regulatory authority by adding a *de minimis* amount of interstate traffic to private lines that otherwise carried only intrastate traffic – it does not imply that the completion of (or lack of) certifications, as opposed to the jurisdictional nature of the traffic itself (*i.e.,* whether more than ten percent of the traffic on a line is interstate), is the primary determinant of jurisdictional authority. The Joint Board did not explicitly contemplate that a carrier would decline to seek a certification or that a customer would decline to complete a certification where possible. Moreover, although the Joint Board said verification of the certifications should be "carefully circumscribed," it indicated that verification should be used to determine the correct jurisdictional assignment any time customer representations "concerning relative state and interstate traffic levels" appeared questionable, thus not limiting verification to cases where the carrier questioned the *interstate* jurisdictional assignment.[49]

20. Subsequent discussion of the ten percent rule by the Commission also emphasized accurately determining the nature of the traffic, without any reference to a presumption based on certification and, in most cases, without discussion of the certification process at all. For example, when rejecting a motion to delay implementation of the ten percent rule, the Commission discussed the burdens associated with the rule without any mention of a presumption that physically intrastate lines were intrastate in the absence of a certification.[50] Similarly, when approving tariffs implementing the ten percent rule, the Commission discussed the LECs' verification and certification procedures without any reference to a presumption and noted that the tariffs required existing customers to certify the jurisdiction of their special access lines.[51] The Commission has repeatedly described the ten percent rule based on the nature of the traffic, in most cases without any reference to a certification.[52] In the few instances the Commission did refer to the certifications, it was in a manner entirely consistent with the *Ten Percent Rule Recommended Decision*.[53] The Commission never referred to a presumption or otherwise suggests

[48] *Id.*

[49] *Id.*

[50] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Order, 5 FCC Rcd 6605 (1990).

[51] *Local Exchange Carriers' Revisions to Tariffs to Implement Section 36.154(a) of the Commission's Rules*, Order, 5 FCC Rcd 3248 (1990) (*1990 Tariff Implementation Order*).

[52] *See Local Exchange Carriers Rates, Terms, and Conditions for Expanded Interconnection for Special Access*, CC Docket No. 93-162, Order Designating Issues for Investigation, 8 FCC Rcd 6909, 6925 n. 196 (1993); *First Universal Service Order*, 12 FCC Rcd at 9173, para. 778; *Federal-State Joint Board*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11830, 11555, para. 112 (1998); *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45 et al., Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3781 n. 175 (2002); *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-26, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16327, para. 19 (2012). We also note that both the Federal-State Joint Board on Universal Service and, more recently, the state members of the Federal-State Joint Board on Separations have demonstrated a similar understanding of the rule. *1996 Universal Service Recommended Decision*, 12 FCC Rcd at 481; *Federal-State Joint Board on Separations Seeks Comment on Proposal for Interim Adjustments to Jurisdictional Separations Allocation Factors and Category Relationships Pending Comprehensive Reform and Seeks Comment on Comprehensive Reform*, CC Docket No. 80-256, Public Notice, 25 FCC Rcd 3336, 3344-45 (2010) (Appendix attaching letter from state members of the Federal-State Joint Board on Separations to Commissioner Clyburn).

[53] *See 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, 4161, para. 17 (1995); *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148,* CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 2246, 22481, para. 27 & n.95 (1998); *MTS WAT*

(continued….)

that a carrier or customer may elect intrastate jurisdiction, even though the private line in question carries more than a *de minimis* amount of traffic, by simply declining to request or complete a certification.

21. In summary, we find no basis in our rules to conclude that a carrier may simply presume that a mixed-use private line is properly assignable to the intrastate jurisdiction. The carrier must engage in some kind of good faith query into the jurisdictional nature of the traffic carried on the line. Allowing such a presumption would permit carriers to regularly assign to the state jurisdiction authority, costs and revenues associated with private lines carrying more than ten percent interstate traffic, in violation of the plain language of section 36.154 of the Commission's rules and the Commission's longstanding USF rules and policies.

C. USAC Audits Involving Ten Percent Rule

22. In the instances before us, USAC's auditors recategorized as interstate private line revenues initially reported as intrastate. USAC recategorized these revenues not because the ten percent rule required such a presumption, but because USAC applied its reasonable judgment as auditor to draw adverse inferences in instances where the carrier lacked documentation. On its face, we find such judgment reasonable. Given the nature of modern IP networks, public and private, an auditor could reasonably conclude that a private line that ultimately connects to the Internet carries more than a *de minimis* amount of interstate traffic, absent documentation to the contrary. Any such conclusion, of course, would need to be reached only after examining any relevant evidence presented by the carrier. A reasonable auditor could find that a given customer would only take an intrastate private line if it has special circumstances that warrant very specific provisioning, which the carrier should be able to document.

23. On review of the cases at hand, however, we conclude that USAC's auditors, at least in some cases, failed to give sufficient weight to evidence provided by the petitioners. For that reason, we remand these requests for review to USAC for further consideration, with the following guidance.

24. First, the revenues associated with services purchased pursuant to a tariff are properly assigned to the jurisdiction in which the tariff was published. We recognize that there may be instances in which a customer purchases from a tariff for which it is not eligible and the carrier has inadequate safeguards in place to prevent such a purchase. If USAC believes that a carrier is violating Commission rules by providing tariffed services to customers that are not eligible for the tariff, it may refer such cases to the Commission for further investigation.

25. Second, the auditor should carefully consider all documentation tending to demonstrate the appropriate jurisdictional assignment of the revenues. This documentation may take various formats. For example, the carrier may rely on customer certifications or equivalent acknowledgments (such as terms in contracts) regarding the jurisdictional nature of its traffic. These statements need only indicate whether, to the customer's understanding, more than ten percent of the traffic on its private line is interstate or, alternatively, ten percent or less of the traffic is interstate. To ensure that customers make informed certifications, carriers should provide basic guidance to their customers regarding what constitutes intrastate or interstate traffic. Carriers should specifically make customers aware that it is the nature of the traffic over the private line that determines its jurisdictional assignment, not merely the physical endpoints of the facility over which service is delivered.[54]

(Continued from previous page)
Market Structure; Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 78-72 and 80-286, Order, 16 FCC Rcd 11167, para. 2 (2001).

[54] *See, e.g.*, *Vonage Holdings Corp.*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22413, paras. 24-25 n.89 (2004).

26. Consistent with the *Ten Percent Order* and the *Ten Percent Recommended Decision*, customers need not perform detailed traffic studies to support the certifications.[55] Similarly, as recommended by the Joint Board, "verification of customer representations concerning relative state and interstate traffic levels [should] be carefully circumscribed" and "only require[d] when customer representations involved appear questionable."[56] Further, "[s]uch verification should be limited to general information concerning system design and functions whenever possible."[57] USAC may consider other documentation or evidence of the jurisdictional nature of the private lines, as it finds reasonable in its judgment as an auditor.

27. In instances where a private line is technically unsuitable for any interstate use, the carrier may document the jurisdictional nature of the line through a sworn declaration from a corporate officer. The declaration should be based on the carrier's precise knowledge of the network design and the customer's stated or planned usage of the network. Ideally, this declaration would be supported with engineering reports or other documents regarding the technical specifications for the service, but USAC's auditors should use their reasonable judgment regarding whether a carrier's documentation in support of the declaration is sufficient to demonstrate the unsuitability of a private line for interstate use. Given the complex nature of modern networks and services, however, this may be a high standard that is difficult for a carrier to meet in many instances. For example, the carrier may be unable to demonstrate that its private lines are not linked by the customer to other network facilities that, in combination, would cause interstate traffic to be carried on the private lines at issue. Thus, it may be easier for the carrier to collect a certification or equivalent statement from the customer regarding the nature of the traffic.

28. For example, XOCS argues that the revenues at issue were provided over dedicated circuits that were wholly intrastate in nature, and therefore the ten-percent rule should not have applied at all.[58] XOCS further contends that it provided documentary support, in the form of an affidavit, that the services provided were intrastate, closed networks that would be inappropriate for interstate uses.[59] Though we agree that a circuit used solely for intrastate *traffic* is not subject to the ten percent rule, we find it reasonable for auditors to seek evidence that the revenue associated with that circuit has been properly assigned. In this instance, USAC accepted XOCS's affidavit to demonstrate the intrastate nature of the traffic in one case, but did not accept that case as illustrative and determinative with regard to every other case. We find that USAC's auditors properly exercised their reasonable discretion to reject XOCS's illustrative case as broadly demonstrating the jurisdictional assignment of every other instance in dispute. Consistent with the clarifications in this order, however, we remand XOCS's request for review to USAC with leave for XOCS to provide evidence supporting each individual assignment of revenue to the intrastate jurisdiction.

29. In performing contributor audits, USAC's auditors should use their reasonable judgment regarding the appropriate treatment in those cases where a carrier providing mixed-use special access lines does not produce a customer certification supporting its jurisdictional assignment. In cases where documentation submitted is inadequate, however, USAC may draw an adverse inference from the lack of documentation. We further note that in the USF contributions context, all contributors are required to retain, for at least five years from the date of a contribution, "all records that may be required to demonstrate to auditors that the contributions made were in compliance with" the Commission's rules,

[55] *Ten Percent Rule Order*, 4 FCC Rcd at 5661, n.7; *Ten Percent Rule Recommended Decision,* 4 FCC Rcd at 1375, para. 32.

[56] *Ten Percent Rule Recommended Decision,* 4 FCC Rcd at 1357, para. 32.

[57] *Id.*

[58] XOCS Request for Review, at 24-26.

[59] *Id.*

including "historical customer records" and "any other relevant documentation."[60] This requirement applies to the reporting of revenues as interstate or intrastate, except in cases where the Commission has explicitly directed contributors to assign certain revenues to the intrastate or interstate jurisdictions without further inquiry, or provided a reporting safe harbor. Thus, requiring carriers to maintain documentation (such as certifications) to support their assignment of mixed-use private line revenue is consistent not only with the ten percent rule, but with longstanding USF contributions rules designed to prevent waste, fraud, and abuse.[61]

30. We remind contributors that in USAC contributor audits they have the burden of production and the burden of proof (by a preponderance of the evidence).[62] In multiple instances, petitioners have failed to provide documentation to USAC auditors on a timely basis to support their assertions.[63] If contributors choose to withhold or otherwise fail to produce relevant evidence to USAC on a timely basis during the audit, they are not entitled to claim after the fact that USAC failed to properly consider the evidence or failed to request additional information based on the untimely evidence. However, given the clarifications we provide in this order, we instruct USAC to permit petitioners to provide additional documentation or other evidence that would tend to support their claims.

III. ORDERING CLAUSES

31. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the above-captioned Requests for Review ARE DENIED in relevant part consistent with this Order and ARE REMANDED to USAC for further consideration in accordance with the terms of this Order.

32. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 CFR § 1.103(a), that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Wireline Competition Bureau

[60] 47 CFR § 54.706(e).

[61] Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight *et al.*, Report and Order, WC Docket Nos. 05-195 *et al.,* 22 FCC Rcd 16372, 16383, para. 23 (2007).

[62] *Wholesaler-Reseller Clarification Order,* 27 FCC Rcd at 13802, para. 52; *Universal Service Contribution Methodology, Petition for Clarification and Partial Reconsideration by XO Communications Services, LLC,* Order on Reconsideration, WC Docket No. 06-122, 29 FCC Rcd 9715, 9719-9720 (2014).

[63] *See, e.g.,* McLeodUSA Request for Review at Exh. A (sworn declaration regarding technical configuration of private line circuits apparently provided for the first time with Request for Review).