

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

In the Matter of
Federal-State Joint Board on
Universal Service
Changes to the Board of Directors of the
National Exchange Carrier Association, Inc.
Universal Service Contribution Methodology
XO Communications Services, Inc.
Application for Review of Decision of the
Wireline Bureau Order
TDS Metrocom, LLC Application for Review or
Clarification or in the Alternative, Request for
Waiver of Decision of the Wireline Bureau Order
Request for Review by XO Communications
Services, LLC of Decision of the Universal Service
Administrator

CC Docket No. 96-45

CC Docket No. 97-21

WC Docket No. 06-122

ORDER ON REVIEW

Adopted: October 7, 2020

Released: October 9, 2020

By the Commission:

I. INTRODUCTION

1. Commission rules require all providers of interstate telecommunications services to contribute a portion of their interstate and international revenues to the Universal Service Fund. One such service involves the provision of mixed-use special access lines (sometimes called private lines) that carry both intrastate traffic and interstate traffic. Although intrastate services are not generally subject to assessment, Commission rules treat these mixed-use private lines as interstate for purposes of universal service contributions if more than 10% of the traffic carried on private lines is interstate traffic. In the Private Line Order, the Wireline Competition Bureau clarified the operation of the so-called "10% rule" for assessing contributions to the Fund.1 The Order also remanded to the Universal Service

1 Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Universal Service Contribution Methodology, Request for Review by McLeodUSA Telecommunications Services, Inc., et al., of Universal Service Administrator Decision, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122, Order, 32 FCC Rcd 2140 (2017) (Private Line Order or Order). The Order used 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 "10% 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

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Administrative Company (USAC) several requests for review of USAC audit findings for further consideration in accordance with the clarifications and guidance set forth in the *Order*.

2. XO Communications Services, Inc. (XO) and TDS Metrocom, LLC (TDS) seek review of the *Private Line Order*.² In addition, XO seeks *de novo* review of a *Final Determination Letter* issued by USAC, after consideration of XO's original request for review and evidence submitted on remand pursuant to the *Private Line Order*.³ USAC determined that on remand XO had not provided sufficient documentation to support the claim that the private lines at issue were intrastate. USAC therefore determined that it had appropriately reclassified the revenues from those lines as interstate during the audit.⁴ XO and TDS seek prospective application, or in the alternative, waiver of the *Private Line Order*.

3. For the reasons stated below, we affirm the *Private Line Order*. In so doing, we affirm the Commission's long-standing contribution reporting requirements that direct all contributors to obtain and provide to USAC or the Commission upon request documentation that supports the jurisdictional allocation of their revenues. We find that our decision ensuring that our filing requirements are adhered to by all contributors helps to safeguard the integrity of the Fund, resulting in a more stable funding base for the preservation and advancement of universal service.

4. However, based on the unique circumstances presented here, we find that TDS has shown good cause to grant a waiver of our rules and we direct USAC to reverse its decision in TDS's *Final Determination Letter*. We also conclude that USAC did not give sufficient weight to the additional evidence XO submitted to demonstrate it had allocated its private line revenue to the proper jurisdiction. We therefore remand USAC's *Final Determination Letter* of XO's private line revenues for further review.

II. BACKGROUND

5. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.⁵ To this end, the Commission has determined that any entity that provides interstate telecommunications services to the public for a fee must contribute to the Fund.⁶ The Commission has also directed that contributions be made "on the basis

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and 80-286, Decision and Order, 4 FCC Rcd 5660, 5660-61 (1989) (*10% Rule Order*) (referring to subject of proceeding as "special access lines," but adopting rule that refers to "private lines" and "WATS" lines"). Mixed-use lines are special access lines carrying both intrastate and interstate traffic.

² XO Communications Services, Inc., Application for Review of Decision of the Wireline Competition Bureau, WC Docket No. 06-122 (filed May 1, 2017) (XO Application); Application for Review or Clarification, or in the Alternative, Request for Waiver by US Link, Inc., WC Docket No. 06-122 (filed May 1, 2017) (TDS Application). According to the TDS Application, US Link Inc. was merged into TDS Metrocom, LLC, effective Sept. 1, 2014. Although US Link was the corporate entity at the time USAC issued its audit decision and US Link appealed that audit decision to the Commission, the Request for Review uses the company's current corporate name, TDS Metrocom, throughout, including references to the time period that US Link was a separate corporate entity. (TDS Request for Review at 1, n.1). Accordingly, references to US Link refer to Applicant TDS Metrocom, LLC.

³ XO Communications Services, LLC, Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Oct. 15, 2019) (XO 2019 Request for Review); USAC, *XO Communications Services, Inc.*, Final Determination (Aug. 15, 2019) (Confidential).

⁴ *Id.*

⁵ 47 U.S.C. § 254(d).

⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179, para. 787 (1997) (*Universal Service First Report and Order*) (subsequent history omitted). The Commission also requires certain other providers of interstate telecommunications to contribute to the universal service fund.

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of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.”⁷

6. The Commission has designated USAC as the entity responsible for administering the universal service support mechanisms.⁸ Pursuant to the Commission’s rules, USF contributors report their annual historical revenues for the prior calendar year by filing the annual Telecommunications Reporting Worksheet (FCC Form 499-A) with USAC, which is generally due on April 1 of each year.⁹ The contribution reporting requirements direct filers to apportion their revenues among the interstate and international reporting categories using information from their books of account and other internal data reporting systems.¹⁰ For private lines, if more than 10% of the traffic carried over a private or Wide Area Telephone Service (WATS) line is interstate, the revenues and costs generated by the entire line are classified as interstate.¹¹ In general, contributors are required to report actual revenues from their books of account. If the revenue category breakout cannot be determined directly from corporate books of account or subsidiary records, filers may provide good-faith estimates of those amounts and must retain and provide information supporting good-faith estimates to the Commission or USAC upon request.¹²

A. The 10% Rule

7. The Commission adopted the “10% rule” in 1989 following a recommendation by the Federal-State Joint Board on Jurisdictional Separations (Separations Joint Board) to assign mixed-use private or WATS line costs for purposes of jurisdictional separations.¹³ The 10% rule, which is codified

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See, e.g., Universal Service Contribution Methodology et al., WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (*2006 Universal Service Contribution Methodology Order*) (requiring interconnected voice over Internet protocol providers to contribute to the universal service fund because they are providers of interstate telecommunications). The Act and the Commission’s rules do, however, exempt certain carriers from the contribution requirement. For example, carriers are not required to contribute directly to the universal service fund in a given year if their contribution for that year would be less than \$10,000. 47 CFR § 54.708. Likewise, carriers with purely intrastate or international revenues are not required to contribute. *Universal Service First Report and Order*, 12 FCC Rcd at 9174, para. 779; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixteenth Order on Reconsideration, 15 FCC Rcd. 1679, 1685, para. 15 (1999). Certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers are also exempt from the contribution requirement. 47 CFR § 54.706(d). Unless a carrier meets one of the exemptions, however, it must contribute to the universal service fund.

⁷ 47 CFR § 54.706(b); *see Universal Service First Report and Order*, 12 FCC Rcd at 9202, para. 836.

⁸ 47 CFR § 54.701; *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18423-24, para. 41 (1997) (*Universal Service Order Second Order on Reconsideration*).

⁹ *See* Universal Service Administrative Company, Schedule of Filings, <https://www.usac.org/service-providers/contributing-to-the-usf/when-to-file/> (last visited Feb. 4, 2020). Contributors project future quarters’ revenue on the quarterly Telecommunications Reporting Worksheet (FCC Form 499-Q), which is due on February 1, May 1, August 1, and November 1. *Id.* Contributors may revise quarterly filings within 45 days of the due date. *Id.*

¹⁰ 2019 Form 499-A Instructions at 22, 38.

¹¹ *See Universal Service First Report and Order*, 12 FCC Rcd 8776, 9173 at para. 778; 2019 FCC Form 499-A Instructions at 27, 39.

¹² *Id.* at 14, 39.

¹³ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 4 FCC Rcd 1352, para. 2 (1989) (*10% Rule Recommended Decision*). Jurisdictional separations is the process of apportioning regulated costs between the

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in section 36.154(a) of the Commission's rules, treats as interstate all private lines and WATS lines carrying both intrastate and interstate traffic if the interstate traffic on the line involved constitutes more than 10% of the total traffic on the line.¹⁴ The Separations Joint Board also recommended that customer certifications be used to verify private line traffic, stating that the proposed treatment for mixed-use lines could best be achieved through customer certification that each special access line carried more than a *de minimis* amount of interstate traffic.¹⁵ In the *10% Rule Order*, the Commission adopted the Separations Joint Board's recommendation for the purpose of separating investment in mixed-use special access lines and acknowledged the role of certifications.¹⁶ That order modified section 36.154(a) of the Commission's rules to reflect the new approach for assigning jurisdictional separations for mixed-use private lines and WATS lines.¹⁷

8. In the 1997 *First Universal Service Report and Order*, the Commission incorporated the 10% rule for universal service contributions to determine how to assign revenue from mixed-use private lines.¹⁸ The first Universal Service Worksheet that was attached to that order and all subsequent Form 499-A Instructions specified that “[u]nder the Commission's rules, if over 10% 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.”¹⁹

B. The Bureau's 2017 Private Line Order

9. Pursuant to the Commission's rules, USAC may conduct audits of providers' Forms 499 to determine the accuracy of the information reported on the Forms,²⁰ and any aggrieved party may seek review of an adverse USAC decision.²¹ Prior to 2017, the Bureau had pending before it a number of requests for review of USAC audit decisions, including those filed by XO and TDS.²² At issue were

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interstate and intrastate jurisdictions, primarily for the purpose of determining whether a local exchange carrier's regulated costs are to be recovered through its rates for interstate services or through its rates for intrastate services. The 10% rule was adopted to address the states' concern that costs related to special access lines carrying both intrastate and interstate traffic were generally assigned to the interstate jurisdiction, an approach that the Separations Joint Board said tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic. *Id.* at para. 1.

¹⁴ 47 CFR § 36.154(a) (Subcategory 1.2).

¹⁵ *10% Rule Recommended Decision*, 4 FCC Rcd at 1360, para. 32.

¹⁶ *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 para. 3, 6-9 & Appendix (1989) (*10% Rule Order*).

¹⁷ *See 10% Rule Order*, 4 FCC Rcd at 5661, App.; 47 CFR § 36.154(a) (Subcategory 1.1; Subcategory 1.2).

¹⁸ *See Universal Service First Report and Order*, 12 FCC Rcd 8776, 9173 at para. 778 (stating that “under the Commission's rules, if over 10% 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”) (citing 47 CFR § 36.154(a)). *See also Universal Service Second Order on Reconsideration*, 12 FCC Rcd 18400, 18512, App. A.

¹⁹ *Id.* The relevant language in the instructions has not changed since 1997. *See, e.g., 2008 FCC Form 499-A Instructions* at 21; *2019 FCC Form 499-A Instructions* at 27, 39.

²⁰ *See 47 CFR § 54.706(e); 47 CFR § 54.707.*

²¹ 47 CFR § 54.719.

²² 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); XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 29, 2010); Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed April 3, 2012); 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);

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USAC audit findings in which USAC had reclassified as interstate certain private line revenues the petitioners had reported as intrastate on their Form 499-A filings.²³ Specifically at issue were revenues associated with private line circuits that have physical end points located in the same state (notably, the end point for one such circuit may be an aggregation point for circuits that cross state lines or an interconnection point with other private line circuits that may or may not cross state lines).²⁴ The petitioners claimed that the circuits were jurisdictionally intrastate but USAC determined that, for certain private lines, the petitioners had not provided sufficient supporting documentation to demonstrate the circuits were in fact intrastate for contributions purposes.²⁵ The petitioners argued that USAC had incorrectly presumed that in the absence of a customer certification to the contrary, private line traffic is jurisdictionally interstate pursuant to the 10% rule.²⁶ The petitioners further claimed that the 10% rule in fact created a presumption that revenues from geographically intrastate private line circuits are presumed to be intrastate unless the customer certifies that more than 10% of the traffic on the private line is interstate.²⁷

10. On March 30, 2017, the Bureau released the *Private Line Order* to address the issue of how revenues associated with private line circuits that have physical end points located in the same state should be treated for purposes of assessing contributions to the Fund.²⁸ The Bureau found that the 10% rule does not create a blanket presumption applicable to mixed-use circuits in favor of either the intrastate or interstate jurisdictions and affirmed that the primary determinant of the proper jurisdictional assignment of private lines is the nature of the traffic carried over those lines and not the existence or lack of customer certifications.²⁹ The Bureau also found that USAC applied its reasonable judgment as auditor to draw adverse inferences in instances where the carrier lacked documentation to support its jurisdictional allocation of revenues from the lines in question.³⁰

11. The Bureau determined, however, that USAC's auditors, at least in some cases, had failed to give sufficient weight to evidence provided by the petitioners, and remanded the underlying requests for review to USAC for further consideration consistent with the finding that contributors are permitted to provide a broader range of evidence of revenue allocation on a circuit.³¹ Moreover, the Bureau provided guidance on the type of evidence USAC may consider when determining whether filers have met their burden of proof in demonstrating that a private line is properly assigned to the intrastate or interstate jurisdiction.³² The Bureau provided examples of the type of documentation a provider could use to demonstrate the appropriate jurisdictional assignment of revenues such as certifications that the traffic

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Request for Review by US Link, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed Sept. 30, 2013); Request for Review by Deltacom, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed Sept. 30, 2013).

²³ *Private Line Order*, 32 FCC Rcd at 2142, para. 5.

²⁴ *Id.*

²⁵ *Private Line Order*, 32 FCC Rcd at 2148.

²⁶ *Private Line Order*, 32 FCC Rcd at 2142-43.

²⁷ *Private Line Order*, 32 FCC Rcd at 2142, para. 6.

²⁸ *Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Universal Service Contribution Methodology*, Order, 32 FCC Rcd 2140 (2017) (*Private Line Order*)

²⁹ *Private Line Order*, 32 FCC Rcd at 2144-48, paras. 11-22.

³⁰ *Id.* at 2148, para. 22.

³¹ *Id.* at para. 23.

³² *Id.* at 2148-40, paras. 24-30.

is more than 10% or that 10% or less of the traffic is interstate, contractual terms, and evidence that the private lines are not linked by the customer to other network facilities that, in combination, would cause interstate traffic to be carried on the lines at issue.³³

C. Applications for Review

12. On May 1, 2017, XO and TDS filed the instant Applications for Review of the *Private Line Order*, in which they argue that the Bureau's interpretation of the 10% rule is inconsistent with prior Commission precedent.³⁴ XO and TDS also claim that the *Private Line Order* imposed new evidentiary standards and a new burden of proof, without providing the opportunity for notice and comment required by the Administrative Procedure Act.³⁵ XO and TDS reiterate their claim that customer certifications are only needed if more than 10% of traffic on the line is interstate, and argue that requiring other forms of evidence to support the jurisdictional assignment of private lines creates new evidentiary burdens.³⁶ XO also claims that the Bureau added a new obligation when it recommended that carriers take steps to ensure that when their customers certify the jurisdictional nature of a circuit, or purchase service from a tariff, the customers understand that it is the nature of the traffic carried over the private line that determines its jurisdictional assignment, not merely the physical endpoints of the circuit.³⁷ XO and TDS further argue that given the new evidentiary requirements and the amount of time that has passed, we should apply the *Private Line Order* prospectively only.³⁸ TDS argues that, in the alternative, there is good cause to grant a waiver of the rule.³⁹

D. XO's Request for Review of USAC's *Final Determination Letter*

13. Pursuant to the *Private Line Order*'s remand of XO's request for review, USAC sent a letter to XO requesting that the company submit any documentation it believed demonstrated the nature of the traffic carried over the private lines at issue.⁴⁰ XO responded to this request on January 18, 2018 and March 12, 2018, providing supplemental information to USAC; after consideration of all of the information submitted by XO during the audit and on remand, USAC determined, however, that the information was insufficient to support XO's allocation of the private lines at issue as intrastate and therefore concluded that there was no change to XO's contribution obligations as previously calculated during the audit.⁴¹

14. XO seeks *de novo* review of the *Final Determination Letter*. XO argues that "[t]o the extent that USAC relied upon the *Private Line Order* to reach its conclusions, USAC's decision is flawed

³³ *Private Line Order*, 32 FC Rcd at 2148-50, paras 22-30.

³⁴ See, e.g., TDS Application at 7, XO Application at 11 (both citing *National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4153 (1995) (*National Association for Information Services*); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Order, 16 FCC Rcd 11167 (2001) (*MTS and WATS Market Structure Order*); *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (*GTE Telephone*)).

³⁵ TDS Application at 8, 10-11; XO Application at 13-17.

³⁶ TDS Application at 8, 10-11; XO Application at 13-17.

³⁷ XO Application at 14-15.

³⁸ TDS Application at 11; XO Application at 13-17.

³⁹ TDS Application at 12.

⁴⁰ XO 2019 Request for Review at Exh. 1, Letter from USAC to Ms. Robert Mutzenback, Vice President, Taxes, XO Communications Services, Inc. at 3-4 (dated Aug. 15, 2019) (*USAC Final Determination Letter*) (Confidential).

⁴¹ *Id.* at 7.

for the same reason that the *Private Line Order* is flawed.”⁴² XO further asserts that “to the extent the *Final Determination Letter* properly tracks the 10% Rule, the Commission should waive application of the rule in this instance” because of “widespread confusion” in the industry regarding private lines prior to the *Private Line Order*.⁴³

III. DISCUSSION

15. The Commission’s contribution methodology requires filers to apportion their revenues among the interstate and international reporting categories.⁴⁴ It is well established that for private lines, if more than 10% of the traffic carried over the line is interstate, the revenues and costs generated by the entire line are classified as interstate.⁴⁵ In the *Private Line Order*, the Bureau upheld the Commission’s long-standing contribution reporting requirements by finding that providers of private lines, like all other providers, are required to conduct a level of due diligence to ensure that they accurately allocate their intrastate and interstate revenues to the proper jurisdiction and to be able to justify those allocations in an audit by providing upon request supporting documentation. To this end, the *Private Line Order* provided guidance to contributors and USAC on the types of evidence that can be considered for meeting this obligation.

16. At the outset, we affirm the Bureau’s conclusions that it is the nature of the traffic carried over circuits that determines the jurisdictional assignment of private lines, not merely the physical endpoints of the facility over which service is delivered. We also affirm that there is no presumption in favor of assigning lines to either the interstate or intrastate jurisdictions for contributions purposes.⁴⁶ Similarly, there is no basis for concluding that the lack of a customer certification creates a presumption about the jurisdictional nature of a circuit for contributions purposes.

17. For the reasons discussed in the *Private Line Order*, we agree with the Bureau that there is no indication that the Separations Joint Board or the Commission intended to relieve carriers or their customers of 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.⁴⁷ In addition, it is clear that under the Commission’s long-standing contribution reporting requirements, carriers have the obligation to provide, upon request, supporting documentation to justify the revenues they report on the Forms 499-A. We also agree with the Bureau that USAC, in its role as auditor, may draw an adverse inference about a carrier’s jurisdictional assignment of revenues from the failure to provide sufficient supporting evidence requested by USAC.⁴⁸ Accordingly, we deny XO and TDS’s request to reverse the *Private Line Order*.

A. The Lack of a Customer Certification Does Not Determine the Jurisdictional Assignment of Private Lines for Contributions Purposes

18. We find that XO and TDS’s position that revenues from a private line with endpoints in the same state should be deemed interstate for contributions purposes *only if* the customer has certified that more than 10% of the traffic on that line is interstate is untenable in light of the Commission’s long-standing contribution reporting requirements that clearly require contributors to conduct a level of due

⁴² XO 2019 Request for Review at 5-6.

⁴³ *Id.* at 5-7.

⁴⁴ 2019 Form 499-A Instructions at 22, 38.

⁴⁵ See *Universal Service First Report and Order*, 12 FCC Rcd 8776, 9173 at para. 778; 2019 FCC Form 499-A Instructions at 27, 39.

⁴⁶ *Private Line Order*, 32 FCC Rcd at 2144-48, paras. 11-21.

⁴⁷ *Id.* at 2145 at para. 14.

⁴⁸ *Private Line Order*, 32 FCC Rcd at 2148, para. 22.

diligence to ensure that they accurately allocate their intrastate and interstate revenues to the proper jurisdiction and be able to justify those allocations in an audit.⁴⁹ Since 1997, the Commission has directed filers that cannot determine their intrastate, interstate, and international revenues from their corporate books of account to provide good-faith estimates of their revenues on their Forms 499, to document how they calculate their estimates, and to make the information available to the Commission or USAC upon request.⁵⁰ In addition, section 54.711 of the Commission's rules permits the Commission or USAC to "verify any information contained in the [Forms 499]."⁵¹

19. Section 54.711 also requires contributors to maintain, for three years, records and documentation "to justify information reported in the [Form 499-A]" and to provide "such records and documentation" to the Commission or USAC upon request.⁵² Moreover, in 2007, the Commission amended section 54.706 of the rules to require contributors to retain for at least five years, "all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules."⁵³ In light of these long-standing contribution requirements, we find no merit in XO and TDS's position that it need not provide a certification or other supporting evidence upon USAC's request for circuits it claims are intrastate.

20. We also find unpersuasive XO and TDS's contention that the *lack* of a customer certification is sufficient to justify the allocation of the circuits in question to the intrastate jurisdiction. We agree with the Bureau that had the Commission wanted to create a presumption from the lack of customer certifications, it would have done so.⁵⁴ Moreover, allowing such a presumption for private lines would allow carriers to completely bypass these reporting requirements and would lead to the absurd result that "no evidence" is "sufficient evidence" to support a jurisdictional assignment of these lines.

21. XO and TDS claim that the Bureau's interpretation of the 10% rule is inconsistent with language in prior Commission decisions, arguing that prior Commission statements in orders discussing the 10% rule requires them to produce certifications supporting their jurisdictional assignment only when

⁴⁹ See TDS Application at 7; XO Application at 6-12.

⁵⁰ See, e.g., *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45 12 Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12444 at 12445, 12453 paras. 3, 21 (CCB 1997) ("[W]e instruct entities that currently are unable, without substantial difficulty to distinguish their intrastate, interstate, or international revenues or are unable to provide specific, line-by-line revenue totals for certain categories of revenues, to provide good faith estimates of such revenues in the Universal Service Worksheet[.] . . . Contributors may derive their estimates using a method that they, in good faith, believe will yield a reasonably accurate result. Contributors must document how they calculated their estimates and make such information available to the Commission or Administrator upon request."); *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, FCC 99-175, 14 FCC Rcd 16602 at Appendix D (Telecom Reporting Worksheet) (1999); 2000 FCC Form 499-A Instructions at 19. See also, e.g., 2006 FCC Form 499-A Instructions at 20-21; 2011 FCC Form 499-A Instructions at 22-23; 2019 FCC Form 499-A Instructions at 29 (all stating, "Information supporting good-faith estimates must be made available to either the FCC and [USAC] upon request").

⁵¹ 47 CFR § 54.711.

⁵² *Id.*

⁵³ 47 CFR § 54.706(e) ("Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules"); *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, Report and Order, 22 FCC Rcd 16372, 16386–87, para. 27 (2007) (*USF Comprehensive Review Order*).

⁵⁴ *Private Line Order*, 32 FCC Rcd 2 at 2145, para. 14.

they claim the circuits are interstate.⁵⁵ However, two of the orders cited mention the certificates in general statements summarizing the rule in context of the separations cost allocation process, and the third case merely acknowledges in a footnote that a company, whose service was determined to be interstate, agreed to ask its customers of that service to certify that 10% or more of their traffic was interstate.⁵⁶ Based on the statements in these orders, XO and TDS believe they are under no obligation to produce any documentation to support that claim in response to requests by USAC or the Commission. We disagree. Nothing in the three orders cited by XO and TDS allows a contributor to avoid justifying a jurisdictional claim in response to a request from the Commission or USAC. Moreover, none of the orders cited address the role of customer certifications in contributor audits or support the position that the absence of a customer certification is sufficient to demonstrate that a carrier has allocated revenues derived from its private lines to the appropriate jurisdiction for USF contributions purposes.⁵⁷

22. When the Commission adopted the 10% rule in 1997 for contributions purposes, it made no mention of the need for customer certificates, and the long-standing contributions reporting requirements have always directed contributors to obtain and provide upon request documentation showing how they calculated their interstate revenues.⁵⁸ As the Bureau explained in the *Private Line Order*, the Commission codified the 10% rule without requiring customer certifications,⁵⁹ and when the Commission repurposed the 10% rule to provide a clear allocation for mixed-use lines under the new contributions framework in the *Universal Service First Report and Order*, it did so without reference to customer certifications.⁶⁰ The Form 499 instructions implementing that order stated that “[u]nder the

⁵⁵ See, e.g., TDS Application at 7, XO Application at 11.

⁵⁶ See *National Association for Information Services*, 10 FCC Rcd at 4161 para. 17 (1995) (stating that “a subscriber line is deemed to be interstate in nature for cost allocation purposes if the customer certifies that ten percent or more of the calling on that line is interstate.” (emphasis added)); *MTS and WATS Market Structure Order*, 16 FCC Rcd 11167 at para. 2 (2001) (stating that under the Part 36 rules, “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”; *GTE Telephone*, 13 FCC Rcd 22466 (1998)) (*GTE Telephone*) (finding that GTE’s ADSL service was an interstate service properly tariffed at the federal level and noting in a footnote that GTE would ask every ADSL customer to certify that ten percent or more of its traffic was interstate).

⁵⁷ *Private Line Order*, 32 FCC Rcd at 2144-48, 11-21. The Bureau noted that the Commission has repeatedly described the 10% rule based on the nature of the traffic, in most cases without any reference to a customer certification. See *Private Line Order*, 32 FCC Rcd at 2147-48 and n.52.

⁵⁸ See, e.g., *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45 12 Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12444 at 12445, 12453 paras. 3, 21 (CCB 1997) (“[W]e instruct entities that currently are unable, without substantial difficulty to distinguish their intrastate, interstate, or international revenues or are unable to provide specific, line-by-line revenue totals for certain categories of revenues, to provide good faith estimates of such revenues in the Universal Service Worksheet[.] . . . Contributors may derive their estimates using a method that they, in good faith, believe will yield a reasonably accurate result. Contributors must document how they calculated their estimates and make such information available to the Commission or Administrator upon request.”); *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, FCC 99-175, 14 FCC Rcd 16602 at Appendix D (Telecom Reporting Worksheet) (1999); 2000 FCC Form 499-A Instructions at 19. See also, e.g., 2006 FCC Form 499-A Instructions at 20-21; 2011 FCC Form 499-A Instructions at 22-23; 2019 FCC Form 499-A Instructions at 29 (all stating, “Information supporting good-faith estimates must be made available to either the FCC and [USAC] upon request”).

⁵⁹ *Id.* at 2146, para. 15.

⁶⁰ See *Universal Service First Report and Order*, 12 FCC Rcd at 9173, para. 778 (stating that “[u]nder the Commission’s rules, if over 10% 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”).

Commission's rules, if over 10% 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," and all subsequent Forms 499-A instructions have included the same language, with no reference to customer certifications.⁶¹

23. XO and TDS have not provided, and we have not found, any Commission precedent supporting their position that customer certifications used by incumbent local exchange carriers for cost separations were incorporated into the contributions methodology as an evidentiary standard or that there is a presumption that a private line with endpoints in the same state is assignable to the intrastate jurisdiction in the *absence* of a certification that more than 10% of the traffic carried over the line is interstate. Indeed, as the Bureau stated in the *Private Line Order*, the Separations Joint Board specifically stated that "[it] expect[ed] customers to act in good faith when certifying the nature of their traffic based on existing information"⁶² We agree with the Bureau that permitting contributors to presume that a physically intrastate private line is properly assignable to the intrastate jurisdiction based solely on the lack of a customer certification would allow a carrier to avoid any kind of good faith query into the jurisdictional nature of the traffic carried on the line.⁶³

B. The Bureau Did Not Incorrectly Presume that All Geographically Intrastate Private Lines Are Mixed Use Lines that May Connect to the Internet

24. We next reject TDS's claims that the Bureau erred by presuming that all geographically intrastate private lines are "mixed use," connect to the Internet, and therefore constitute interstate circuits for contributions purposes.⁶⁴ TDS misreads this aspect of the *Private Line Order*. The Bureau did not conclude that all physically intrastate lines are connected to the Internet; indeed the Bureau recognized that in some cases geographically intrastate lines may be technically unsuitable for carrying interstate traffic and provided guidance on how a carrier can demonstrate the unsuitability of a private line for interstate use to justify a claim that the circuit's revenues were intrastate for contributions purposes.⁶⁵ The Bureau concluded, however, that "a reasonable auditor could find that a 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."⁶⁶

25. In addition, the Bureau stated that any conclusion that a private line that ultimately connects to the Internet carries more than a *de minimis* amount of interstate traffic would be reached only after examining any relevant evidence presented by the carrier, and we note that XO and TDS had the opportunity to rebut USAC's finding with additional evidence of traffic but failed to do so.⁶⁷ Given the nature of modern IP networks, absent any evidence to the contrary, it is not unreasonable for USAC to take the position that a private line may connect to the Internet and carry more than a *de minimis* amount of interstate traffic.⁶⁸ We conclude that depending on the facts presented, USAC can apply its reasonable

⁶¹ *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18512 & n.5 (1997) (Appendix C – Universal Service Worksheet); *see also, e.g.*, 2019 FCC Form 499-A at 27, 39.

⁶² *Private Line Order*, 32 FCC Rcd at 2146, para. 15 (citing the *10% Rule Order*, 4 FCC Rcd at 5661, n.7).

⁶³ *See Private Line Order*, 32 FCC Rcd at 2146, 2148, paras. 15, 21.

⁶⁴ TDS Application at 2.

⁶⁵ *Private Line Order*, 32 FCC Rcd at 2148, paras. 22, 27.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See, e.g., GTE Telephone*, 13 FCC Rcd at 22476, para. 19 (stating that in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state); *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) (stating that "[t]he dividing line between the regulatory jurisdictions of the FCC and states depends on the 'nature of the communications which pass through the facilities [and not on] the physical location of the lines'").

judgment as auditor to draw adverse inferences that a line is either interstate or intrastate in instances where the carrier is unable to provide *any* documentation demonstrating the jurisdictional nature of the traffic.⁶⁹ To do otherwise would create an incentive not to maintain supporting documentation and circumvent the obligation to contribute on the revenues derived from this type of circuit.

C. The *Private Line Order* Is Internally Consistent

26. TDS argues that the *Private Line Order* should be reversed because it is internally inconsistent. Specifically, TDS points to language that the “Commission intended to extend the 10% rule to contributions without modification.”⁷⁰ TDS asserts that the 10% rule, which was adopted as part of the Part 36 formal separations process, does not apply to non-incumbent local exchange carriers and did not include a burden of proof and production.⁷¹ According to TDS, extending the 10% rule to apply a new burden of proof to non-incumbent local exchange carriers and other carriers modifies that rule, making the *Private Line Order* internally inconsistent.⁷²

27. We find no merit in TDS’s argument. The 10% rule as set forth in subcategories 1.1 and 1.2 of section 36.154 of our rules functions as a definitional provision that applies to carriers that are subject to the formal cost separations process.⁷³ The Commission repurposed the 10% rule for contributions to provide a bright-line metric identifying traffic on mixed-use private lines, using the same delineations contained in that rule. When the Commission repurposed the 10% rule for contributions, it gave no indication that it would apply that rule only to certain carriers. Indeed, the Form 499-A Instructions adopted in 1997 include no qualifiers suggesting that the Commission intended to limit the rule as it was limited under Part 36. All providers of interstate telecommunications are subject to the contribution requirements unless they qualify for one of the exemptions specified by the Commission. As such, TDS is required to allocate its traffic among the intrastate, interstate, and international jurisdictions and be able to provide evidence to support the allocations.

D. The *Private Line Order* Did Not Create a New Burden of Proof

28. TDS next incorrectly asserts that the *Private Line Order* applied a new burden of proof (preponderance of the evidence) that does not apply to the evaluation of evidence supporting the allocation of private lines to the interstate and intrastate jurisdictions.⁷⁴ Absent statutory requirements to

⁶⁹ *Id.* at 2148, para. 22.

⁷⁰ TDS Application at 8.

⁷¹ *Id.* at 8-10.

⁷² *Id.* at 8-10, 12.

⁷³ Prior to adoption of the 10% rule, addition of even a *de minimis* amount of interstate traffic on a private line could result in the classification of a line as interstate. The Separations Joint Board found that state interests could be better served by permitting states to regulate charges for intrastate private line systems carrying small amounts of interstate traffic than by the then-current approach which allowed carriers to assign a mixed-use line to the interstate jurisdiction with the addition of even a *de minimis* amount of interstate traffic to the line. 4 FCC Rcd at 1352, para. 1; 10% Rule Order, 4 FCC Rcd at 5660, para. 1.

⁷⁴ See TDS Application at 9-10 (arguing that the reasonable expectation standard was adopted for the first time in the *Wholesaler-Reseller Clarification Order* for the limited use of determining whether wholesale providers have demonstrated that they have a “reasonable expectation” that their customers are contributing on the revenues associated with the services at issue). That order, however, was a clarification on reconsideration, that the “preponderance of the evidence” standard, rather than the higher “clear and convincing” standard, is the appropriate standard generally for evaluating evidence in adjudicatory matters, including contributor audits. See *Wholesaler-Reseller Clarification Order*, WC Docket No. 06-122, CC Docket No. 96-45, Order, 27 FCC Rcd 13780 (2012); *Universal Service Contribution Methodology, Petition for Clarification and Partial Reconsideration by XO Communications Services, LLC*, WC Docket No. 06-122, Order on Reconsideration, 29 FCC Rcd 9715 (2014) (*Wholesaler-Reseller Clarification Order*).

the contrary or factors warranting a heightened standard, the Commission generally applies the preponderance of the evidence standard in informal agency adjudications, including in universal service matters.⁷⁵ Under Commission precedent, the preponderance of the evidence standard requires that the proponent demonstrate that it is more likely than not that its position is correct.⁷⁶

29. We find no basis for TDS's argument that the preponderance of the evidence standard conflicts with the Form 499-A's good-faith requirement.⁷⁷ The good-faith requirement applies to filers who cannot determine their interstate and international revenues from their books of account.⁷⁸ The requirement to report revenues in good faith is separate and distinct from an evidentiary standard that applies to the quantity and quality of the evidence contributors must produce to demonstrate that they reported their revenues in accordance with the Commission's rules.

30. In the *Private Line Order*, the Bureau concluded that USAC, at least in some cases, had failed to give sufficient weight to evidence provided by the petitioners in support of their Form 499-A revenue filings.⁷⁹ Accordingly, the Bureau directed USAC to "carefully consider all documentation tending to demonstrate the appropriate jurisdictional assignment of the revenues," and provided guidance on the type of evidence petitioners could submit to justify the jurisdictional allocation of their revenue.⁸⁰ XO and TDS argue, however, that the Bureau's instructions "go beyond ordinary clarifications, and instead appear to require new actions and new evidence that would be impractical to expect to be available retroactively."⁸¹ XO and TDS assert that these new requirements should apply to future submissions only because XO and TDS are unable to obtain "new evidence" relating to service provided a number of years ago.⁸²

31. We find no merit in this argument. On the contrary, the *Private Line Order* did not create any new evidentiary requirements, but merely provided guidance as to the type of evidence that USAC can use when reviewing the jurisdictional assignment of the circuits under consideration and how both carriers and customers can ensure that the circuits in question are properly assigned to the interstate and intrastate jurisdictions.⁸³ The measures set forth in the *Order* are not mandatory requirements, but are guidance or examples of how filers may meet their burden of proof, without limitation on the types of evidence that filers may offer. A customer certification is one such form of supporting documentation that a filer may submit to USAC; other forms of evidence and/or good-faith showings are acceptable to

⁷⁵ See, e.g., *American Communications Services, Inc.; MCI Telecommunications Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulator Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, CC Docket No. 97-199, Memorandum and Order, 14 FCC Rcd 21579, 21614, para. 76 (1999) (*American Services et al.*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20568-69, paras. 45-46 (1997) (*Ameritech Michigan*).

⁷⁶ *American Communications Services et al.*, 14 FCC Rcd at 21614, para. 76; *Ameritech Michigan*, 12 FCC Rcd at 20568-69, paras. 45-46.

⁷⁷ TDS Application for Review at 9-10.

⁷⁸ See, e.g. 2008 FCC Form 499-A Instructions at 20; 2011 FCC Form 499-A Instructions at 14; 2019 FCC Form 499-A Instructions at 22 ("If revenue category breakout cannot be determined directly from corporate books of account or subsidiary records, filers may provide on the Worksheet a good-faith estimate of the breakout . . . Filers should maintain documentation for good-faith estimates.").

⁷⁹ *Private Line Order*, 32 FCC Rcd at 2148, para. 23.

⁸⁰ *Id.*

⁸¹ XO Application at 13; see also TDS Application for Review at 11.

⁸² XO Application at 3, 13-18; see also TDS Application at 11 (arguing that it "would be manifestly unjust" to apply the *Private Line Order* retroactively).

⁸³ *Private Line Order*, 32 FCC Rcd at 2148-49, paras. 24-28.

demonstrate either the nature of the traffic over the private line or the unsuitability of the private line circuit for interstate use. Indeed, USAC has accepted anecdotal evidence where the carrier provided information about the customer that made an intrastate jurisdiction designation reasonable.⁸⁴ Contributors have always been obligated to justify the claims made on the Form 499 when reporting revenues; the *Private Line Order* simply made available other types of documentary evidence contributors could use to satisfy this requirement.

E. Request for Prospective Application or Waiver of the *Private Line Order*

32. XO and TDS seek prospective application or waiver of the *Private Line Order*.⁸⁵ XO again relies upon the aforementioned Commission statements pertaining to certifications outside of the contributions context,⁸⁶ claiming that prior to the *Private Line Order*, these statements contributed to industry confusion creating a widespread understanding regarding the operation of the 10% rule and the use of customer certifications.⁸⁷ XO argues that we should therefore apply the *Private Line Order* prospectively.⁸⁸ XO and TDS also argue that it would be manifestly unjust to apply the “new” evidentiary requirements set forth in the *Private Line Order* retroactively because it is not feasible, given the passage of time since the audits were conducted, to obtain customer certificates or to develop other information about the nature of the traffic on the circuits in question that would be consistent with the *Private Line Order*.⁸⁹

33. We reject the argument that previous Commission statements discussing the 10% rule in general terms created a “widespread and reasonable understanding” within the industry that private lines with endpoints in the same state are presumptively intrastate for contributions purposes unless contributors obtained customer certifications that more than 10% of traffic on the private line is interstate.⁹⁰ XO has failed to provide support for this claim other than its own conclusory assertions, and reliance on the three Commission statements is misplaced because none of them discusses the rule in the

⁸⁴ See, e.g., XO Request for Review at 12 (stating that USAC found that an affidavit was sufficient to treat as intrastate revenues from a private line provided to the Memphis Public School System).

⁸⁵ TDS Application for Review 11-12; XO Application for Review at 17; XO 2019 Request for Review at 5-7; Letter from Steven A. Augustino, Counsel to XO Communications Services, LLC, to Marlene H. Dortch, Secretary FCC, WC Docket No. 06-122 (filed June 4, 2019) (XO June 4, 2019 *Ex Parte* Letter); Letter from Steven A. Augustino, Counsel to XO Communications Services, LLC, to Marlene H. Dortch, Secretary FCC, WC Docket No. 06-122 (filed June 26, 2019) (XO June 26, 2019 *Ex Parte* Letter).

⁸⁶ XO and TDS suggest that prior Commission statements in orders discussing the 10% rule requires them to produce certifications supporting their jurisdictional assignment only when they claim the circuits are interstate. Two of the orders cited mention the certificates in general statements summarizing the rule in context of the separations cost allocation process. See *National Association for Information Services*, 10 FCC Rcd at 4161 para. 17 (1995) (stating that “a subscriber line is deemed to be interstate in nature for cost allocation purposes if the customer certifies that ten percent or more of the calling on that line is interstate.” (emphasis added)); *MTS and WATS Market Structure Order*, 16 FCC Rcd 11167 at para. 2 (2001) (stating that under the Part 36 rules, “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.” The third case merely acknowledges in a footnote that a company, whose service was determined to be interstate, agreed to ask its customers of that service to certify that 10% or more of their traffic was interstate. See *GTE Telephone*, 13 FCC Rcd 22466 (1998) (*GTE Telephone*) (finding that GTE’s ADSL service was an interstate service properly tariffed at the federal level and noting in a footnote that GTE would ask every ADSL customer to certify that ten percent or more of its traffic was interstate).

⁸⁷ XO 2019 Request for Review at 6; XO June 4, 2019 *Ex Parte* Letter at 5-7; XO June 26, 2019 *Ex Parte* Letter at 2.

⁸⁸ XO June 4, 2019 *Ex Parte* Letter.

⁸⁹ XO 2019 Request for Review at 7; XO June 4, 2019 *Ex Parte* Letter at 8; TDS Request for Review at 11.

⁹⁰ See, e.g., XO 2019 Request for Review at 4-6.

context of contributions: in two of the three decisions, the Commission referenced the role of customer certifications in the separations cost allocation process,⁹¹ and the third decision merely notes a customer's willingness to use customer certifications to demonstrate interstate usage for the purpose of subjecting DSL lines to federal jurisdiction and tariffs.⁹² What is more, we have before us only three petitions that challenge USAC's findings with respect to the evidentiary requirements for intrastate private lines.⁹³ Indeed, in our experience and judgment, XO's interpretation is the outlier—not the norm. None of the top ten contributors to the Fund, whose local private line revenues comprise over 80% of all local private line revenue in the industry, has filed a petition challenging the *Private Line Order*.⁹⁴ Additionally, of the six providers whose audit determinations were remanded back to USAC in the *Private Line Order*, four—including petitioner TDS—were able to provide supporting documentation that the traffic on at least some of the lines at issue was intrastate.⁹⁵ We therefore see no evidence of widespread confusion on which we could base a prospective only determination. And instead we find that the use of the 10% rule for contributions purposes has been widely understood in light of the Commission's long-standing reporting requirements, including the requirement to provide to the Commission or USAC upon request information to support the jurisdictional allocation of their private line revenue.

34. Nor are we persuaded that the *Private Line Order* instituted new requirements that were impossible for XO and TDS to meet. The requirements to maintain and provide upon request information justifying jurisdictional allocations of private lines reported on Form 499 is not a new requirement. In addition, USAC auditors conducted the audits in a timely manner, and during that review, requested documentation supporting XO and TDS's representation of the jurisdictional nature of the traffic.⁹⁶ Filers have the obligation to have the appropriate documentation to support their jurisdictional allocations at the time they file their Forms 499-A, and any Bureau delay in addressing the pending petitions following the audits does not excuse XO and TDS from their obligation to obtain and retain supporting documentation to demonstrate that they assigned their lines to the correct jurisdiction.

35. Nonetheless, based on the record, we grant TDS's request for waiver. The Commission may waive any provision of its rules for good cause shown, where the particular facts make strict compliance inconsistent with the public interest. Waiver is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. We find that both during the audit and on remand, TDS was diligent in contacting its customers to verify the jurisdiction of its private lines. As a result of its outreach efforts on remand, TDS submitted additional customer certifications as well as private line product descriptions

⁹¹ See *National Association for Information Services*, 10 FCC Rcd 4153; *MTS and WATS Market Structure Order*, 16 FCC Rcd 11167 (2001).

⁹² See *GTE Telephone*, 13 FCC Rcd 22466. The Commission found that GTE's ADSL service carried more than a *de minimis* amount of interstate traffic and was therefore subject to federal jurisdiction under the 10% rule. Accordingly, the company agreed to ask its ADSL customers to certify that 10% or more of its traffic was interstate. *Id.* at 22481, para. 27, n.95.

⁹³ In addition to the two petitions addressed in this order, subsequently a third petition was filed by Altice USA, Inc.

⁹⁴ See *Universal Service Monitoring Report*, Table 1.3 (2019). These companies are (in alphabetical order): América Móvil, AT&T Inc., CenturyLink, Charter Communications, Comcast Corporation, Deutsche Telekom AG, Frontier Communications Corporation, SoftBank Corporation, Verizon Communications, and Windstream Holdings, Inc.

⁹⁵ USAC Final Determination Letter, *PaeTec* (dated Jan. 24, 2019) (Confidential); USAC Final Determination Letter, *US Link, Inc.* (currently d/b/a TDS Metrocom, LLC) (dated June 4, 2019) (Confidential); USAC Final Determination Letter, *Deltacom, Inc.* (dated July 24, 2020) (Confidential); USAC Final Determination Letter, *Puerto Rico Telephone Company, Inc.* (dated Aug. 26, 2020) (Confidential).

⁹⁶ See TDS Application at 2 (USAC commenced an audit of TDS's 2011 FCC Form 499-A in April 2012); XO Application at 3 (USAC commenced an audit of XO's 2007 calendar year revenues in July 2008).

and a circuit listing for USAC's consideration. Indeed, on remand, USAC found that the additional evidence was sufficient to demonstrate that some of the circuits at issue were intrastate, consistent with TDS's original reporting.⁹⁷ Further, TDS demonstrated diligence in responding to USAC's information requests both during the audit and on remand. Therefore, based on the specific facts and circumstances of this case, we find that relief is warranted. We grant TDS's request for waiver as applied to USAC's audit of TDS's 2010 private line revenue, and thus we reverse USAC's determination to the extent that it reclassified the remaining lines at issue as interstate.

36. Separately, we remand USAC's *Final Determination Letter* to USAC for further review. At the time of the audit, USAC requested that XO provide information to demonstrate that less than ten percent of the traffic on the circuits at issue was intrastate in nature. USAC did not limit the type of evidence XO could provide and XO provided an affidavit from a company employee.⁹⁸ That affidavit included descriptions and technical aspects of XO's various private line circuit offerings as well as an explanation of how the purchasers of the services used the circuits to meet the needs of their businesses. According to the affidavit, the purchasers of XO's private line services needed dedicated network to provide secure, rapid transmission of information among their business locations (all of which were within the same state for each such customer). XO states that it does not configure its private line service for the purpose of connecting its customers with an interexchange carrier or Internet service gateway and that to the best of its knowledge, virtually all traffic over these circuits originates and terminates within the customer's own network and the end points of the facilities provisioned by XO "define the limits of where traffic over the facilities is transmitted."⁹⁹ XO explains, in other words, that these specific customers at issue did not have access to the public Internet or other networks as a result of XO's configuration of the customer's Dedicated Transport Service.¹⁰⁰ Because we conclude USAC did not give sufficient weight to this affidavit, we direct USAC to give the affidavit additional consideration to determine whether the information provided was probative with regard to XO's allocation of its private line revenues for the customers at issue.¹⁰¹

IV. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's Rules, that the Applications for Review filed by XO Communications Services, Inc. and TDS Metrocom, LLC are DENIED and the *Private Line Order* is AFFIRMED.

38. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i) and 254(d) of the Communications Act, 47 U.S.C. §§ 154(i), 254(d) and section 1.3 of the Commission's rules, 47 CFR § 1.3, TDS Metrocom, LLC's Request for Waiver is GRANTED.

⁹⁷ USAC Final Determination Letter, US Link, Inc. (currently d/b/a TDS Metrocom, LLC) (dated June 4, 2019) (Confidential).

⁹⁸ See Declaration of Matthew Alexander, (dated March 1, 2010).

⁹⁹ *Id.* at paras. 12-15.

¹⁰⁰ *Id.* at 12.

¹⁰¹ Final Determination Letter, *XO Communications* (dated August 15, 2019). Because we remand the issue to USAC for further consideration, we find that XO's request for waiver is premature and we accordingly dismiss it.

39. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i) and 254(d) of the Communications Act, 47 U.S.C. §§ 154(i), 254(d) and section 1.3 of the Commission's rules, 47 CFR § 1.3, XO Communications Services, LLC's Request for Waiver is DISMISSED.

40. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i) and 254(d) of the Communications Act, 47 U.S.C. §§ 154(i), 254(d), and the authority delegated by sections 0.91, 0.291, and 1.3 of the Commission's rules, 1.3, XO Communications Services, LLC's Request for Review is REMANDED to USAC for further review.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary