



VIA ELECTRONIC FILING

August 8, 2019

Records Center
Washington Utilities & Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

RE: *Mitel Cloud Services, Inc. – Supplemental Clarification in Support of Mitel Cloud Services, Inc. Petition to Cancel Certificates of Public Convenience and Necessity and Withdraw Tariffs within the State of Washington (Docket No. UT-190647)*

Dear Sir or Madam,

At the request of staff, Mitel Cloud Services, Inc. (f/k/a Mitel NetSolutions, Inc., "Mitel" or "the Company"), through undersigned counsel, hereby submits this supplemental filing in support of the Company's Petition to Cancel its Certificates of Public Convenience and Necessity ("CPCNs") and Withdraw its Tariffs in the State of Washington (Docket No. UT-190647).

Mitel currently sells only the following services in the state, exclusively to sophisticated business customers: "over the top" nomadic Interconnected VoIP ("I-VoIP") services, private business communications sold on a private carriage basis, and a variety of software-based online collaboration services.

Mitel does not provide fixed I-VoIP services in Washington. Mitel only offers nomadic I-VoIP, as its services are capable of being used from any location where the user has a broadband connection. Mitel's "over the top" services, including nomadic I-VoIP, are provided over a third-party Internet Service Provider's facilities, and not over any facilities owned or controlled by Mitel. Calls originate via a broadband Internet connection over facilities owned by third parties and are terminated to the public switched telephone network ("PSTN") through terminating carriers, all of whom are engaged by private/individual contract. Mitel does not have any interconnection agreements with any incumbent local exchange carriers.

Mitel offers some forms of "telecommunications" in the State, including PRIs, Integrated Access channels, T1s, and Business Phone Line service, solely on a private carriage basis. Specifically, Mitel's telecommunications capacity is only sold to sophisticated business customers, and only pursuant to individually negotiated commercial agreements. None of these services is sold pursuant to state-approved rates, terms and conditions through a tariff on file with the Commission. Moreover, Mitel does not serve any residential or mass market consumers. Rather, Mitel's telecommunications offerings are offered on a private carriage basis, and are not "regulated telecommunications services" of the sort over which the Washington Utilities & Transportation Commission ("Commission") retains jurisdiction via statute.

Under federal law, to qualify as a common carriage "telecommunications service," a service must be offered "directly to the public."¹ In contrast, a private carriage "telecommunications" offering is offered to select customers.² The analytical framework for distinguishing between common and private, non-

¹ 47 U.S.C. § 153(53).

² 47 U.S.C. § 153(50).

common carrier services is referred to as the "NARUC" analysis, based on the court case in which this test was articulated.³ Under the NARUC test, in order to be classified and regulated as a common carrier, the carrier must hold out service to all potential users, *and* the service must allow customers to transmit intelligence of their own choosing.⁴ Common carriers "serve all potential customers indifferently," whereas private carriers "make individualized decisions ...whether and on what terms to deal."⁵ The FCC has held that where providers made "highly individualized decisions" regarding any rates and terms they offer, in order to meet the needs of a particular customer, they offered business data services on a private carriage basis.⁶

Common carriage offerings are more heavily regulated both by the FCC and by state Public Utility Commissions ("PUCs"), whereas private carriage offerings are subject to a lighter regulatory touch. Under the laws of the state of Washington, regulated "telecommunications companies" are defined as those providing service "for hire, sale, or resale to the *general public*."⁷ In other words, Washington defines regulated "telecommunications companies" as those offering services on a common carriage basis (to the general public). Companies, like Mitel, offering services on a private carriage basis (through individually negotiated agreements to select customers, rather than the general public at large) are not regulated telecommunications companies in Washington.

Any questions you may have regarding this filing should be directed to my attention at (703) 714-1313 or by email to jsm@commlawgroup.com. Thank you for your assistance in this matter.

Respectfully submitted,



Jonathan S. Marashlian

³ *Nat'l Assoc. of Regulatory Util. Comm'rs v. Fed. Commc'ns Com.*, 525 F.2d 630, 641 (1976) ("NARUC I"). The FCC recently reiterated its "longstanding reliance on the NARUC analysis" in evaluating private carriage classification in its Broadband Data Services ("BDS") Order. *See In the Matter of Business Data Services in an Internet Protocol et. al.*, Report and Order, FCC 17-43 at 284, 32 FCC Rcd 3459 (Apr. 28, 2017) ("BDS Order").

⁴ *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (quoting *National Association of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II") and citing *NARUC I*; see also, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) ("A common-carrier service in the communications context is one that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing A common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal.") (footnote and citations omitted).

⁵ *NARUC I*, 525 F.2d at 644, n.76.

⁶ See BDS Order, FCC 17-43 at ¶ 271.

⁷ Wash. Rev. Code § 80.04.010(28).