

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
Jurisdictional Separations and Referral to the ) CC Docket No. 80-286  
Federal-State Joint Board )  
 )

**COMMENTS  
of the  
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. (NECA),  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION (NTCA),  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL  
TELECOMMUNICATIONS COMPANIES (OPASTCO),  
EASTERN RURAL TELECOM ASSOCIATION (ERTA),  
WESTERN TELECOMMUNICATIONS ALLIANCE (WTA)**

The Commission has requested comment on a proposal to extend, until June 30, 2010, the current freeze of Part 36 category relationships and jurisdictional cost allocation factors.<sup>1</sup>

The above-named Associations, representing rural incumbent local exchange carriers (ILECs) throughout the United States (collectively, the Associations)<sup>2</sup> support extension of the freeze, but respectfully suggest the Commission specify the freeze extension will extend for a period not to exceed one year following issuance of Commission orders reforming existing intercarrier compensation (ICC) and high-cost universal service fund (USF) support rules. As

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<sup>1</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 74 Fed Reg. 15236 (2009) (*NPRM*).

<sup>2</sup> NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission's Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 incumbent local exchange carriers ("ILECs") that choose to participate in these arrangements. NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. OPASTCO is a national trade association representing over 520 small ILECs serving rural areas of the United States. ERTA is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River. WTA is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. Most members serve fewer than 3000 access lines overall and fewer than 500 access lines per exchange.

discussed below, this approach will help avoid the need for an additional extension proceeding in 2010 and will assure the Commission and the industry have adequate time to analyze needed changes to existing separations rules in light of revised ICC and USF rules. Yet, consistent with the Commission and Joint Board's intent, a one-year deadline for expiration of the freeze following ICC and USF reform will maintain a finite goal for accomplishing needed separations reform.

Although the Associations support extension of the existing freeze, the Commission should seek to accommodate specific adjustments to separations where needed. Specifically, in its order extending the freeze the Commission should permit Rate of Return (RoR) carriers an opportunity to readjust their category relationships for the remainder of the freeze. With the freeze now proposed to remain in place to 2010 or potentially beyond, carriers who made their original election in 2001 should be permitted the option to apply updated category factors effective with calendar year 2009 cost studies. In addition, a decision extending the freeze should not prejudice other needed adjustments to Part 36 and related Part 54 rules, including correction of the "one way ratchet" rule for local switching support (LSS) under consideration in WCB Docket No. 05-337.

## **I. DISCUSSION**

### **A. The Freeze Should Be Extended For A Maximum Period of One Year Following Comprehensive ICC and USF Reform**

The Commission first "froze" separations factors in 2001, in response to a recommendation by the Federal-State Joint Board on Separations.<sup>3</sup> At the time, the Commission contemplated it would complete comprehensive separations reform proceedings within five years

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<sup>3</sup> See *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382 (2001) (*2001 Separations Freeze Order*).

(i.e., by 2006), but acknowledged extension of the freeze might be necessary depending on the status of reform efforts.<sup>4</sup>

While several options for separations reform were considered during the initial freeze period, no final action was taken and the Commission accordingly extended the freeze for an additional three-year period.<sup>5</sup> The Commission found allowing the freeze to expire would create undue instability in carrier cost allocations and impose substantial administrative burdens on carriers, who would be required to re-implement various traffic measurement systems that had not been updated or maintained over the prior five years.<sup>6</sup>

In the intervening three years, the Commission has made progress in addressing urgent ICC and USF reform problems.<sup>7</sup> But critical questions closely related to separations reform remain unresolved.<sup>8</sup> Clearly an extension of the freeze is necessary. As the NPRM itself points

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<sup>4</sup> *Id.* at ¶ 29.

<sup>5</sup> See *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd at 5523 (2006).

<sup>6</sup> *Id.* at ¶ 18.

<sup>7</sup> The Commission has, for example, imposed an interim freeze on USF disbursements to competitive eligible telecommunications carriers, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008); it has responded to the D.C. Circuit's writ of mandamus requesting an explanation of the legal basis for its rules governing ISP-bound traffic, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand, 73 Fed. Reg. 72732 (2008); and has proposed new USF rules governing USF support and ICC mechanisms, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 73 Fed. Reg. 66821 (2008).

<sup>8</sup> For example, in its intercarrier compensation proceeding the Commission is considering ways to resolve disparities between intrastate and interstate access rates with possible increases in subscriber line charges and/or institution of a federal restructure mechanism to recover lost

out, ILECs have not been required to utilize the programs and expertise necessary to prepare separations information since the inception of the freeze in 2001.<sup>9</sup> If current separations rules return to force, ILECs would be required to incur substantial expense to reinstitute their separations processes at a time when they likely do not have the necessary employees and systems in place to reinstitute complex separations studies. This would be a particular burden for small RoR “cost” companies, who have limited internal resources and traditionally have relied on specialized cost study consultants to perform cost study functions. Likewise, it would also be burdensome for companies that rely upon internal resources, as removal of the current freeze would necessitate specialized training and assignment of dedicated personnel to these tasks. It is highly unlikely these carriers could obtain the necessary resources to conduct required studies should the freeze be allowed to expire in June 2009.

Moreover, it would be wasteful to require these companies to devote scarce resources to comply with outdated separations procedures, especially since these procedures are likely to change substantially in the not-too-distant future as a result of separations reform. Requiring small carriers to (temporarily) reinstitute complex separations studies would also divert resources from more important efforts, such as deployment of broadband-capable network facilities in rural areas.

Although the Commission has made clear its plans to address remaining ICC, USF and separations reform problems on a timely basis, the Associations are concerned the Commission’s proposal to establish a hard date of June 30, 2010 for final expiration of the separations freeze

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revenues; development of a federal benchmark mechanism, and numerous other measures with potential impacts on separations procedures. In the universal service context, the Commission is considering various proposals for reverse auctions and new funding mechanisms for broadband deployment. Policy decisions made in these areas as well as other proceedings could have profound effects on separations policy.

<sup>9</sup> *NPRM* at ¶ 17.

may turn out to be unwise. As the Commission has previously recognized, separations reform is inextricably intertwined with both ICC and USF reform. Each area is governed by complex sets of regulations, set out in Parts 36, 51, 64 and 69 of the Commission's rules, and each must "mesh" for the process to work. For new separations rules to be in place by June 2010, the Commission would not only need to establish new rules governing ICC and USF, but also conduct necessary proceedings – including "extensive state input"<sup>10</sup> – to determine how those new ICC and USF rules might affect separations policy and promulgate specific regulations governing telephone company accounting practices.

The urgency associated with this self-imposed deadline would come at a time when the FCC is undergoing significant leadership changes, including the expected confirmation of Julius Genachowski as its new Chairman and the departure of Commissioner Adelstein, who has been nominated to lead the Rural Utilities Service (RUS). The Commission will also be under tremendous pressure this year to assist the National Telecommunications and Information Agency (NTIA) as well as RUS in the administration of various Broadband deployment grant and loan programs incorporated in the American Recovery and Reinvestment Act of 2009 (ARRA), not to mention ongoing issues associated with the DTV transition and other pressing matters. In this environment it is possible, but highly unlikely, all the necessary pieces will fall into place in time for carriers to implement new separations procedures on June 30, 2010.

On the other hand, it is not unreasonable for the Commission to establish a one-year time limit for reform of separations rules once critical components of ICC and USF reform are determined. This sort of extension would provide adequate opportunity for carriers to integrate new USF and ICC regulations with separations processes. For this reason, the Associations

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<sup>10</sup> *Id.*

respectfully urge the Commission to refrain from establishing a date certain for expiration of the current separations freeze, and instead specify the current freeze will extend for a maximum period of one year following issuance of Commission orders reforming existing ICC and high-cost USF support rules.

This approach has several advantages. First, it avoids the need to have an additional proceeding regarding further extension of the freeze in the event the Commission is unable to resolve interrelated ICC, USF and separations reform questions by June 2010. Extending the freeze for a maximum one-year period following issuance of ICC and USF reform orders will also enable the Commission and the industry to focus efforts on ways to adapt separations policies and procedures to newly-established ICC and USF reform initiatives, rather than attempt to resolve all three areas at once.<sup>11</sup> Yet, because the extended freeze will continue to have a firm one-year expiration date following ICC and USF reform, the Commission, the Joint Board and industry participants will retain a strong incentive to resolve separations reform issues in a timely manner.

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<sup>11</sup> The Commission has successfully followed similar “conformance” approaches to rulemaking in the past. For example, in the 1980s, the FCC adopted a new Uniform System of Accounts (“USOA”). *Revision of the Uniform System of Accounts and Financial Reporting Requirements for Telephone Companies (Parts 31, 33, 42 and 43 of the FCC's Rules)*, Report & Order, 60 Rad. Reg. 2d (P&F) 1111 (1986); *recon.*, 2 FCC Rcd 1086; *further recon.*, 2 FCC Rcd 6555 (1987). In reaction, the Joint Board recommended, and the FCC adopted, major revisions to the Separations rules that included USOA-conforming amendments and other revisions to the jurisdictional allocations rules (e.g., new rules for allocating Central Office Equipment investments and expenses). *Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board*, Recommended Report & Order, 2 FCC Rcd 2582; Report & Order, 2 FCC Rcd 2639 (1987); *recon.*, 3 FCC Rcd 5518 (1988); *aff'd PSC of the Dist. of Columbia v. FCC*, 906 F.2d 713 (D.C. Cir. 1989). Further conforming amendments were also made to the Part 69 Access Charge rules. *Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform It with Part 36, Jurisdictional Separations Procedures*, Report & Order, 2 FCC Rcd 6447 (1987); *recon.*, 4 FCC Rcd 4765 (1988). *See also Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Report & Order, 19 FCC Rcd 853 (2004) (conforming separations rules to USOA amendments adopted in 2001).

B. RoR Carriers Who Elected to Freeze Category Relationships in 2001 Should Be Given a One-time Opportunity to Update Those Factors.

The NPRM tentatively concludes extending the freeze on an interim basis will continue to result in reasonable cost apportionments, in conformance with the Supreme Court's *Smith v. Illinois Bell* decision.<sup>12</sup> The NPRM points out in this regard extending the freeze will cause price cap carriers to continue to use the same relationships between categories of investment and expenses within Part 32 accounts, and the same jurisdictional allocation factors, that have been in place since the inception of the current freeze.<sup>13</sup> RoR carriers will also continue to use the same frozen jurisdictional allocation factors, but category relationships will remain frozen only for those companies who originally opted to freeze these factors.<sup>14</sup>

The Associations agree extending the separations freeze for an additional interim period will maintain reasonable cost allocations, at least for most carriers. For RoR companies who opted to freeze categorization factors in 2001, however, simply extending the current freeze of categorization factors may not produce reasonable results.

At the time it imposed the original freeze, the Commission recognized a mandatory freeze of categorization factors as well as traffic factors could cause harm to small RoR companies, particularly those expecting significant changes in investment levels during the course of the freeze.<sup>15</sup> Given the option to freeze categorization factors, small RoR companies were able to weigh the benefits and potential risks associated with a freeze of categorization

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<sup>12</sup> NPRM at ¶ 18, citing *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 2001 Separations Freeze Order at ¶ 58.

factors over the expected five-year duration of the initial freeze. These companies did not, however, contemplate their five-year election might extend for an additional three years beyond 2006, much less until 2010, as the Commission now proposes.

As an illustration of the harm such unplanned extensions can cause, the Commission has before it a petition for waiver filed by Gila River Telecommunications, Inc. (GRTI), a small RoR company serving Native American tribal lands in Arizona.<sup>16</sup> Like other small companies, GRTI decided to freeze its category relationships with the expectation the Commission's 2001 separations freeze would last no longer than five years. Seeking to extend service to additional portions of its territory, GRTI eventually made substantial network investments.<sup>17</sup> With its category relationships frozen, however, GRTI has found itself unable to recover additional costs via the Commission's high-cost universal service program, and estimates it is suffering an annual loss of over \$1.2 million in high cost universal service support over a three-year period.<sup>18</sup>

Other small RoR companies have also experienced significant changes in investment and service demand since categorization factors were initially frozen. These companies are currently seeking to upgrade their networks to meet demands for advanced services, including broadband, but in some cases find themselves hindered by outdated cost categorizations. RoR companies in this situation should have the ability to calculate current interstate revenue requirements based on today's actual data, rather than allocations reflecting a network investment environment nearly ten years old.

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<sup>16</sup> See Petition of Gila River Telecommunications, Inc. Pursuant to 47 C.F.R. Sections 36.3, 36.123-126, 36.152-157, and 36.372-382 for Commission Approval to Unfreeze Part 36 Category Relationships, CC Docket No. 80-286 (Nov. 21, 2006) (*Gila River Petition*).

<sup>17</sup> *Id.* at 6-8.

<sup>18</sup> *Gila River Petition* at 12, 14, 16. See also Letter from Mitchell F. Brecher, Counsel for Gila River Telecommunications, Inc., to Marlene H. Dortch, FCC, CC Docket No. 80-286 (Apr. 16, 2009).



The Commission should resolve such problems by including a “fresh look” categorization option for RoR carriers if it extends the overall separations freeze. This would permit all RoR carriers a one-time option to freeze or unfreeze their Part 36 category relationships based on current investment and expense levels, effective with 2009 cost studies. An additional opportunity to freeze or unfreeze categorization factors would benefit all small RoR carriers, but would be especially important for companies (like GRTI) who elected to freeze categorization factors in 2001, but subsequently made significant investments in plant that, absent the freeze, would result in additional allocations of loop plant to the interstate jurisdiction.

The Associations recognize the benefits of freezing (or re-freezing) categorization factors at this point may be minimal, given the short expected duration of the extended freeze. Accordingly, if the Commission were to find an additional “fresh look” opportunity for all carriers is unwarranted, it should at a minimum permit those companies who elected to freeze their category relationships in 2001 the opportunity to “unfreeze” these relationships for the remainder of the extended freeze period.

C. A Freeze Extension Should Not Prejudice Needed Commission Action on Short-Term Separations Reform Issues

Section 36.125 of the Commission’s rules governs the allocation of Local Switching Equipment (Category 3) costs. Under this provision of the rules, small telephone companies (i.e., those with 50,000 lines or less) apportion additional local switching costs to the interstate jurisdiction using a dial equipment minute (DEM) weighting factor. The additional interstate-allocated costs are then recovered from the federal LSS mechanism pursuant to section 54.301 of the Commission’s rules.

The NPRM proposes to revise section 36.125(j) to reflect the proposed extension of the separations freeze. Revised section 36.125(j) would read as follows:

[i]f during the period from January 1, 1997, through June 30, 2010, the number of a study area's access lines increased or will increase such that, under § 36.125(f) the weighting factor would be reduced, that lower weighting factor shall be applied to the study area's 1996 unweighted interstate DEM factor to derive a new local switching support factor. The study area will restate its Category 3, Local Switching Equipment factor under § 36.125(f) and use that factor for the duration of the freeze period.

In prior comments in this proceeding, the Associations have pointed out this rule was intended to allow for changes in the DEM weight as carrier access lines changed during the freeze period.<sup>19</sup> However, while the rule requires carriers with increases in access lines that result in crossing a DEM weight threshold to change their DEM weight to reflect their increased line count, the rule apparently fails to enable carriers that have a decrease in access lines that result in crossing a DEM weight threshold to adjust their DEM weight to its proper level. In other words, a company that has fallen below a line count threshold and would otherwise qualify for a higher weighing factor is, under section 36.125(j), required to use a weighting factor applicable to larger companies.

The Commission is currently considering in a separate proceeding a petition filed by the Coalition for Equity in Switching Support intended to address problems caused by this "one way ratchet" rule.<sup>20</sup> The Associations agree this rule needs to be changed, and accordingly plan to file comments supporting immediate positive action on the Coalition's petition in the context of WCB Docket No. 05-337.

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<sup>19</sup> *E.g.*, Letter from Stuart Polikoff, OPATSCO, *et al.*, to Marlene H. Dortch, FCC, CC Docket Nos. 80-286, 96-45 (Feb. 5, 2009), at 2; Letter from Joseph A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 80-286 (Dec. 12, 2006); Reply Comments of the Associations, CC Docket No. 80-286 (Nov. 20, 2006), at 7-8; Comments of the Associations, CC Docket No. 80-286 (Aug. 22, 2006), at 10-11; Letter from Joseph A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 80-286 (Mar. 22, 2006), at 2.

<sup>20</sup> Coalition for Equity in Switching Support, Petition for Clarification, CC Docket Nos. 80-286, 96-45 (Jan. 8, 2009).

For purposes of this proceeding, however, the Commission should take care in extending the separations freeze not to prejudice or limit its ability to respond to problems such as the one described by the Coalition with respect to the DEM weighting and LSS rules. Continuing the current separations factor freeze can be expected to convey substantial benefits to carriers and customers generally, in the form of reduced administrative costs and proper allocation of resources. In cases where adverse effects are clearly demonstrated, however, the Commission should make appropriate allowance for adjustments. Revising the DEM weighting and LSS rules to eliminate the ‘one way ratchet’ effect on small company support payments is an example where such flexibility is truly needed.

## **II. CONCLUSION**

The Associations support the Commission’s proposal to extend the current separations freeze, but respectfully suggest the freeze extension should not terminate on a specific date in 2010 but should instead extend for a period not to exceed one year following issuance of Commission orders reforming existing ICC and high-cost USF support rules. This will avoid the need for additional extension proceedings and will provide the Commission and the industry adequate time to analyze needed changes to existing separations rules in light of revised ICC and USF rules.

The Associations also request the Commission permit RoR carriers an immediate opportunity to readjust their category relationships for the remainder of the overall interim freeze. At a minimum, the Commission should permit those RoR carriers who originally elected to freeze their category relationships in 2001 to update their factors.

Finally, in extending the separations freeze, the Commission should take care not to prejudice or limit its ability to make needed interim changes in separations procedures. An example of one such change – relating to section 36.125(j) of the Commission’s rules – is under consideration in the context of WCB Docket No. 05-337. The Commission should not allow action in this proceeding to prevent it from taking positive action with respect to such petitions.

Respectfully submitted,

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By:

April 17, 2009



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 17<sup>th</sup> day of April, 2009 by electronic filing and email to the persons listed below.

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