

**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

The Irregulars, New Networks Institute,  
Bruce A. Kushnick, Mark N. Cooper, Tom  
Allibone, Kenneth Levy, Fred Goldstein,  
and Charles W. Sherwood, Jr.,  
Petitioners

Petition for Review of Order by the Federal  
Communications Commission

v.

Federal Communications Commission and  
United States of America,  
Respondents

**PETITION FOR REVIEW**

The Irregulars, New Networks Institute, Bruce Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr. (henceforth collectively the Irregulars) hereby petition the court for review of the Federal Communications Commission’s (“FCC”) “agency action” (which, for purposes of this Petition for Review, includes the Commission’s continued “failure to act” for over 19 years and counting, causing it to continue a 6 year “freeze” to certain rules) in the Report and Order and Waiver, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, FCC 18-182, CC Docket No. 80-286, \_\_ FCC Rcd \_\_ (rel. Dec. 17, 2018), published at 84 FR 4351 (Feb., 15, 2019), and effective March 1, 2019 (see 84 FR 6997 (Mar. 1, 2019)). 28 U.S.C §2344 and Federal Rules of Appellate Procedure Rule 15(a)(2)(C) require that the order be identified or attached. A copy of the challenged order is attached hereto as Attachment “A.”

The matter below was part of a long-running rulemaking proceeding involving “jurisdictional separations.” “Jurisdictional separations” “separates” each carrier’s “regulated” “costs” and “revenues” between “jurisdictions,” *e.g.*, “intrastate” costs and revenues subject to oversight by the relevant “state commission” as defined by 47 U.S.C. §153(48) and the

“interstate” costs and revenues controlled by the FCC under Title II of the Communications Act. Some regulated costs are directly assigned, while others are “common” and divided through use of “allocation factors.” The “separated” costs are then used to develop or at least inform the development of the ultimate rates charged by users of intrastate and interstate telecommunications services. Thus, the separations rules drive, or at least materially inform, the rates charged to consumers that are overseen by both state and federal regulators.

47 U.S.C. §221(c) of “[t]he Communications Act “empowers the FCC to prescribe uniform separations procedures.” “...FCC separations orders control state regulatory bodies,” *Hawaiian Tel. Co. v. Pub. Utils. Comm’n*, 827 F.2d 1264, 1275 (9th Cir. 1987), and “affect state ratemaking authority to the extent such rules apply to the telephone companies within their jurisdiction.” *Crockett Tel. Co. v. FCC*, 295 U.S. App. D.C. 397, 963 F.2d 1564, 1567 (1992). This significant impact and restriction on state regulation is why 47 U.S.C. §41(c) requires the FCC to “refer any proceeding regarding the jurisdictional separation of common carrier property and expenses, which it institutes pursuant to a notice of proposed rulemaking” to a “Federal-State Joint Board” that is then obliged to “prepare a recommended decision for prompt review and action by the Commission.”

The FCC action followed publication of a Further Notice of Proposed Rulemaking, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, FCC 18-99, CC Docket No. 80-286, 33 FCC Rcd 7261 (rel. Jul. 16, 2018). Several parties (including the Petitioners) participated through submission of comments, reply comments and *ex parte* presentations. The challenged agency action adopted a final rule extending a “separations freeze” and granting some waivers. Among other things the challenged order amended several rule provisions in Part 36 of the FCC’s rules (47 C.F.R. Part 36) by changing specific dates. This had

the effect of further extending a “freeze” to the separation rules pending further study and analysis.

This timely petition is brought pursuant to 5 U.S.C §702, 47 U.S.C. §402(a), 28 U.S.C. §2342(1) and 28 U.S.C. §2344. Venue is proper in this Court pursuant to 28 U.S.C. § 2343. The specific Petitioners, and their state and county of residence are:

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The Irregulators is an independent consortium of senior telecom experts, analysts, forensic auditors, former senior staffers from the FCC, state advocates and state Attorney General experts and lawyers and former and current telecom consultants. These individuals collaborate and take collective action on designated projects. New Networks Institute was established in 1992 as a market research and consulting firm, and now acts as the managing director for the Irregulators. The Irregulators and New Networks Institute are not incorporated, nor do either of them operate as a partnership. The brands “Irregulators” and “New Networks Institute” are owned by Bruce Kushnick. Inquiries concerning “the Irregulators” or “New Networks Institute” may be directed to Bruce Kushnick at 185 Marine Ave, Apt 4E, Brooklyn, NY, 11209. Service of pleadings or other papers associated with this matter for all petitioners, including Irregulators and New Networks Institute, may be accomplished through undersigned counsel.

Petitioners participated below, are aggrieved and harmed by the agency action and have standing to seek review in this court. Each Petitioner obtains and uses telecommunications services that are regulated by one or more state commission and the FCC, and the agency action (and inaction) challenged herein impacts the rates each Petitioner must pay for telecommunications service.

Petitioners seek relief from this Court on the grounds that the challenged agency action, including the determination to withhold or delay action, was:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence; and

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Petitioners respectfully request that this Court hold unlawful, vacate, enjoin, and set aside the challenged order, find the agency unlawfully or unreasonably withheld action and then remand the matter to the agency for further consideration and action. Petitioners further request that the Court provide such additional relief as may be appropriate, necessary or proper under the circumstances.

Respectfully Submitted

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Dated: April 15, 2019

**CERTIFICATE OF SERVICE**

I certify that consistent with FRAP Rule 15(c) each party that participated in the agency proceeding has been served with a copy of this document:

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**ATTACHMENT “A” TO PETITION FOR REVIEW**

Report and Order and Waiver, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, FCC 18-182, CC Docket No. 80-286, \_\_ FCC Rcd \_\_ (rel. Dec. 17, 2018), published at 84 FR 4351 (Feb., 15, 2019), and effective March 1, 2019 (see 84 FR 6997 (Mar. 1, 2019))

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

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

**REPORT AND ORDER AND WAIVER**

**Adopted: December 12, 2018**

**Released: December 17, 2018**

By the Commission: Commissioners O’Rielly and Carr issuing separate statements.

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**I. INTRODUCTION**

1. In 1970, when monopoly rate-of-return local exchange carriers (LECs) provided telephone services primarily over circuit-switched, voice networks, the Commission codified its jurisdictional separations rules. Those rules required each LEC to divide its cost of providing service between the interstate and intrastate jurisdictions in a manner reflecting each jurisdiction’s relative use of the LEC’s network. In an era when the Commission and its State counterparts set virtually all telephone rates based on actual costs, the separations rules helped ensure that each LEC had the opportunity to recover its expenses and earn a reasonable return on its investments.

2. Today, phone companies deliver voice, data, and video services that are increasingly being provided over Internet Protocol-based networks. New digital technologies blur the lines between interstate and intrastate communications, making last century’s jurisdictional separations rules inadequate and outmoded vis-à-vis their intended purpose. Moreover, the relevance of the cost-separation rules has diminished, as the Commission has incrementally replaced burdensome rate-of-return regulation with the efficiencies of incentive regulation. Currently, only a small percentage of Americans receive their telecommunications services from providers subject to rate-of-return regulation and the cost-separation



rules. Nevertheless, our separations rules continue to play an important role in determining how rate-of-return carriers recover some of their costs.

3. In 1997, the Commission recognized the need to comprehensively reform the separations rules and referred separations reform to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) for a recommended decision.<sup>1</sup> More than twenty years later, the Joint Board has not reached agreement on comprehensive separations reform. And so, starting in 2001, originally at the behest of the Joint Board,<sup>2</sup> the Commission has completed several rulemaking proceedings to freeze the separations rules to stabilize and simplify the separations process pending reform.<sup>3</sup> Most recently, the Commission extended the freeze until December 31, 2018.<sup>4</sup>

4. Today, we break this cycle. Because so little progress has been made on comprehensive separations reform over the past 20 years, we extend the separations freeze for up to six years so that the Commission and the Joint Board can devote their resources to substantive reform, rather than to extending artificial deadlines.<sup>5</sup> And because previous attempts at comprehensive reform have failed, we request that the Joint Board approach the challenge incrementally. We ask that, in the short term, the Joint Board focus on how best to amend the separations rules to recognize that they impact only rate-of-return carriers and on whether any other separations rules or recordkeeping requirements can be modified or eliminated in light of that limited application. Coming to a decision on these issues will reduce the Joint Board's work over the longer term as it seeks to replace the existing jurisdictional separations process with a simplified system for reasonably allocating costs between the interstate and intrastate jurisdictions. We begin this incremental reform by allowing rate-of-return carriers that elected to freeze their separations category relationships in 2001 to opt out of that freeze.

## II. BACKGROUND

### A. The Jurisdictional Separations Process

5. Jurisdictional separations is the third step in a four-step regulatory process. First, a rate-of-return carrier records its costs and revenues in various accounts using the Uniform System of Accounts prescribed by our Part 32 rules.<sup>6</sup> Second, the carrier divides the costs and revenues in these accounts between regulated and nonregulated activities in accordance with our Part 64 rules, a step that helps ensure that the costs of nonregulated activities will not be recovered through regulated interstate rates.<sup>7</sup> Third, the carrier separates the regulated costs and revenues between the interstate and intrastate

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<sup>1</sup> *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22122-24, paras. 2-5 (1997) (*1997 Separations Reform NPRM and Referral*).

<sup>2</sup> *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Recommended Decision, 15 FCC Rcd 13160 (Fed.-State Jt. Bd. 2000) (*Joint Board Recommended Decision*).

<sup>3</sup> See, e.g., *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11387, 11392-93, paras. 9, 17 (2001) (*2001 Separations Freeze Order*).

<sup>4</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 4219 (2017) (*2017 Separations Freeze Extension Order*) (extending the separations freeze for 18 months through December 31, 2018).

<sup>5</sup> See Letter from Sarah Hofmann, Commissioner, Vermont Public Utility Commission, and Joint Board State Chair; Wendy Moser, Commissioner, Colorado Public Utilities Commission (Colorado PUC), and Joint Board Member; Sally Talberg, Commissioner Michigan Public Service Commission, and Joint Board Member; and Travis Kavulla, Commissioner, Montana Public Service Commission, and Joint Board Member, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 1 (filed Dec. 7, 2018) (State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter).

<sup>6</sup> 47 CFR Part 32.

<sup>7</sup> The Part 64 cost allocation rules are codified in 47 CFR §§ 64.901-904.

jurisdictions using our Part 36 jurisdictional separations rules.<sup>8</sup> Finally, the carrier apportions the interstate regulated costs among the interexchange services and the rate elements that form the cost basis for its exchange access tariffs. Carriers subject to rate-of-return regulation perform this apportionment in accordance with our Part 69 rules.<sup>9</sup>

6. To comply with these rules, rate-of-return incumbent LECs perform annual cost studies that include jurisdictional separations. The jurisdictional separations analysis begins with the categorization of the incumbent LEC's regulated costs and revenues, requiring the incumbent LEC to assign the regulated costs and revenues recorded in its Part 32 accounts to various investment, expense, and revenue categories.<sup>10</sup> Part 36 (or separations) category relationships are percentages of costs recorded in a Part 32 account that are assigned to separations categories corresponding to that account. The incumbent LEC then allocates the costs or revenues in each category between the interstate and intrastate jurisdictions. Amounts in categories that are used exclusively for interstate or intrastate communications are directly assigned to the appropriate jurisdiction.<sup>11</sup> Amounts in categories that support both interstate and intrastate services are divided between the jurisdictions using allocation factors that reflect relative use or a fixed percentage.<sup>12</sup>

### **B. Attempts at Jurisdictional Separations Reform and the Separations Freeze**

7. In 1997, recognizing that “changes in the law, technology, and market structure of the telecommunications industry” necessitated a thorough reevaluation of the jurisdictional separations process, the Commission initiated a proceeding to comprehensively reform the separations rules.<sup>13</sup> At the same time, pursuant to section 410(c) of the Communications Act of 1934, as amended (the Communications Act),<sup>14</sup> the Commission referred the matter of jurisdictional separations reform to the Joint Board for a recommended decision.<sup>15</sup> Section 410(c) requires the Commission to “refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it initiates pursuant to a notice of proposed rulemaking” to a Joint Board.<sup>16</sup> Section 410(c) further specifies that after such a referral the Joint Board “shall prepare a recommended decision for prompt review and action by the Commission.”<sup>17</sup>

8. Since the Commission initiated this proceeding in 1997, the Joint Board—comprised of both State and federal members—has been attempting to develop recommendations for comprehensive reform. In response to the Commission's initial referral, the State members of the Joint Board filed a report identifying issues they believed should be addressed.<sup>18</sup> Over the years, the State members filed

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<sup>8</sup> 47 CFR Part 36; *see, e.g., id.* § 36.1(c) (“The fundamental basis on which separations are made is the use of telecommunications plant in [interstate and intrastate] operations.”).

<sup>9</sup> *Id.* Part 69.

<sup>10</sup> In some instances, the incumbent LEC further disaggregates costs and revenues among subcategories. For convenience, this *Order* uses “categories” to encompass both categories and subcategories.

<sup>11</sup> For example, the costs of private line service that is wholly intrastate are directly assigned to the intrastate jurisdiction. *See* 47 CFR § 36.154(a), (b).

<sup>12</sup> For example, 25% of the message loop costs are allocated to the interstate jurisdiction and 75% of the costs to the intrastate jurisdiction. *See id.* § 36.154(c).

<sup>13</sup> *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22122, para. 2.

<sup>14</sup> 47 U.S.C. § 410(c).

<sup>15</sup> *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22124, para. 5.

<sup>16</sup> 47 U.S.C. § 410(c).

<sup>17</sup> *Id.*

<sup>18</sup> State Members' Report on Comprehensive Review of Separations, CC Docket No. 80-286 (filed Dec. 21, 1998).

policy papers setting out options for reform, the Commission or the Joint Board sought comment, and the Joint Board held hearings and meetings to consider the various proposals.<sup>19</sup> In 2009, the Commission made a second referral of comprehensive jurisdictional separations reform to the Joint Board and asked that “the Joint Board prepare a recommended decision regarding whether, how, and when the Commission’s jurisdictional separations rules should be modified.”<sup>20</sup> In 2010, the State members of the Joint Board submitted a limited interim proposal,<sup>21</sup> and the Joint Board sought comment on their behalf.<sup>22</sup> Despite two Commission referrals seeking a recommended decision on comprehensive separations reform, the Joint Board has not advanced a recommended decision on comprehensive reform to the Commission.

9. In the course of considering comprehensive reform, the Joint Board did issue a recommendation, in 2000, that the Commission freeze the Part 36 category relationships and jurisdictional allocation factors pending resolution of comprehensive reform.<sup>23</sup> The Commission sought comment on that Recommended Decision; and based on the record before it, the Commission adopted the *2001 Separations Freeze Order*.<sup>24</sup> The Commission concluded that a freeze would stabilize the separations process pending reform by minimizing any impact of cost shifts on separations results due to circumstances—such as the growth of Internet usage, new technologies, and local competition—not contemplated by the rules.<sup>25</sup> The Commission also concluded that a freeze would simplify the separations process by eliminating the need for many separations studies until separations reform was implemented.<sup>26</sup>

10. The Commission agreed with the Joint Board’s Recommended Decision to freeze all Part 36 category relationships and allocation factors for price cap carriers and to freeze all allocation factors for rate-of-return carriers.<sup>27</sup> The Commission also agreed with the Joint Board that requiring rate-of-return carriers to freeze their category relationships could potentially harm these carriers.<sup>28</sup> The Commission therefore provided rate-of-return carriers a one-time option to freeze their category relationships, enabling each of these carriers to determine whether such a freeze would be beneficial

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<sup>19</sup> See, e.g., Letter from David J. Lynch, State Staff Chair, Federal-State Joint Board on Separations, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 80-286 (filed Dec. 17, 2001) (attaching “Options for Separations: A Paper Prepared by the State Members of the Separations Joint Board”); *Common Carrier Bureau Seeks Comment on “Glide Path” Policy Paper Filed by State Members of the Federal-State Joint Board on Jurisdictional Separations*, CC Docket No. 80-286, Public Notice, 16 FCC Rcd 22551 (Com. Car. Bur. 2001); *Federal-State Joint Board on Jurisdictional Separations to Hold En Banc Hearing on Comprehensive Separations Reform*, CC Docket No. 80-286, Public Notice, 17 FCC Rcd 2179 (Com. Car. Bur. 2002).

<sup>20</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 24 FCC Rcd 6162, 6167, para. 15 (2009) (*2009 Separations Freeze Extension Order and Second Referral*).

<sup>21</sup> Letter from Steve Kolbeck, State Chairman, Federal State Joint Board on Separations et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 5-15 (filed Mar. 5, 2010).

<sup>22</sup> *Federal-State Joint Board on Separations Seeks Comment on Proposal for Interim Adjustments to Jurisdictional Separations Allocation Factors and Category Relationships Pending Comprehensive Reform and Seeks Comment on Comprehensive Reform*, CC Docket No. 80-286, Public Notice, 25 FCC Rcd 3336 (Fed.-State Jt. Bd. 2010).

<sup>23</sup> *Joint Board Recommended Decision*, 15 FCC Rcd 13160.

<sup>24</sup> *Comment Sought on Recommended Decision Issued by Federal-State Joint Board on Jurisdictional Separations*, CC Docket No. 80-286, Public Notice, 15 FCC Rcd. 25580 (Com. Car. Bur. 2000). See generally *2001 Separations Freeze Order*, 16 FCC Rcd 11382.

<sup>25</sup> *2001 Separations Freeze Order*, 16 FCC Rcd at 11389, para. 12.

<sup>26</sup> *Id.* at 11390, para. 14.

<sup>27</sup> *Id.* at 11393, para. 18 (citing *Joint Board Recommended Decision*, 15 FCC Rcd at 13172, para. 20).

“based on its own circumstances and investment plans.”<sup>29</sup> Presently, rate-of-return carriers in about 45 study areas operate under the category relationships freeze.

11. In the *2001 Separations Freeze Order*, the Commission specified that the freeze would last for five years or until the Commission completed comprehensive separations reform, whichever came first.<sup>30</sup> The Commission also concluded that, prior to the expiration of the five-year period, the Commission would, in consultation with the Joint Board, determine whether the freeze period should be extended.<sup>31</sup> The Commission specified that “the determination of whether the freeze should be extended at the end of the five-year period shall be based upon whether, and to what extent, comprehensive reform of separations has been undertaken by that time.”<sup>32</sup>

12. Since then, the Commission has extended the separations freeze seven times, for periods ranging from one year to three years, with the most recent extension set to expire on December 31, 2018.<sup>33</sup> In advance of all but one of the freeze extensions, the Commission sought comment on extending the freeze, but it has not referred the specific issue of freeze extensions to the Joint Board. In the *2009 Separations Freeze Extension Order and Second Referral*, the Commission asked the Joint Board to consider whether the Commission should allow carriers to unfreeze their separations category relationships and requested that the Joint Board prepare a recommended decision on that matter.<sup>34</sup> The Joint Board has not made a recommendation on that request.

13. In repeatedly extending the freeze, the Commission has explained that the freeze would stabilize and simplify the separations process while the Joint Board and the Commission continued to work on separations reform.<sup>35</sup> In its most recent freeze extension order, the Commission also explained that an extension until December 31, 2018, would provide the Joint Board with sufficient time to consider what effects the Commission’s reforms to the high-cost universal service program and intercarrier compensation should have on the separations rules.<sup>36</sup>

14. Earlier this year, we issued a Further Notice of Proposed Rulemaking proposing to extend

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<sup>28</sup> *Id.* at 11393, para. 18 (citing *Joint Board Recommended Decision*, 15 FCC Rcd at 13172-73, para. 21).

<sup>29</sup> *Id.* at 11394, para. 21.

<sup>30</sup> *Id.* at 11387-88, para. 9.

<sup>31</sup> *Id.* at 11397, para. 29.

<sup>32</sup> *Id.*

<sup>33</sup> See *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, 5517, 5523, paras. 1, 16 (2006) (*2006 Separations Freeze Extension Order and Further Notice*) (extending the initial separations freeze for three years, through June 30, 2009); *2009 Separations Freeze Extension Order and Second Referral*, 24 FCC Rcd at 6162, para. 1 (extending the separations freeze for one year through June 30, 2010); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 25 FCC Rcd 6046, para. 1 (2010) (*2010 Separations Freeze Extension Order*) (extending the separations freeze for one year through June 30, 2011); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd 7133, para. 1 (2011) (*2011 Separations Freeze Extension Order*) (extending the separations freeze for one year through June 30, 2012); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 27 FCC Rcd 5593, para. 1 (2012) (*2012 Separations Freeze Extension Order*) (extending the separations freeze for two years through June 30, 2014); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 29 FCC Rcd 6470, para. 1 (2014) (*2014 Separations Freeze Extension Order*) (extending the separations freeze for three years through June 30, 2017); *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4219, para. 1 (extending the separations freeze for 18 months through December 30, 2018).

<sup>34</sup> *2009 Separations Freeze Extension Order and Second Referral*, 24 FCC Rcd at 6166, 6168, 6171, paras. 14, 19, 29.

the jurisdictional separations freeze for 15 years and inviting comment on that proposal.<sup>37</sup> We also sought comment on whether a shorter freeze extension would be preferable and on whether we should alter the scope of the referral to the Joint Board regarding comprehensive separations reform.<sup>38</sup> In so doing, we recognized that the issues before the Joint Board are extremely complex and stated our preference not to move forward on separations reform without a Joint Board recommendation on an approach to such reform.<sup>39</sup> We also recognized that as a practical matter we would have to choose between extending the separations freeze and requiring changes to long-unchanged allocation factors and, for some carriers, category relationships to take effect on January 1, 2019.<sup>40</sup>

15. We also proposed and sought comment on allowing rate-of-return carriers that had elected to freeze their category relationships in 2001 to opt out of that freeze.<sup>41</sup> We explained that the category relationships freeze has lasted 17 years instead of no more than five years as the Commission and the Joint Board originally had contemplated. We also explained that since opting into the category relationships freeze many rate-of-return carriers had invested in network upgrades or were considering doing so, and that, as a result of the category relationships freeze, these carriers may be unable to recover the costs of those investments from ratepayers that benefit from the upgrades or from the Universal Service Fund.<sup>42</sup> Consequently, we pointed out, these carriers may lack incentives to improve service and deploy advanced technologies like broadband for their customers.<sup>43</sup>

### C. Declining Applicability of Jurisdictional Separations Results

16. Over the course of the last decade, the jurisdictional separations rules have become irrelevant to the carriers that provide most Americans with telecommunications services. The separations rules were never applicable to wireless carriers.<sup>44</sup> In 2008, the Commission granted price cap carriers forbearance from the separations rules;<sup>45</sup> and recently the Commission extended this forbearance to rate-of-return carriers that receive fixed or model-based high-cost universal service support (fixed support carriers) and that elect incentive regulation for their business data services.<sup>46</sup> As a result, by the middle of

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<sup>35</sup> See, e.g., *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, paras. 10-11; *2001 Separations Freeze Order*, 16 FCC Rcd at 11388-90, paras. 10, 12.

<sup>36</sup> *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, para. 10.

<sup>37</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Further Notice of Proposed Rulemaking, FCC 18-99 (rel. July 18, 2018) (*Further Notice*).

<sup>38</sup> *Id.* at 8, paras. 20, 22.

<sup>39</sup> *Id.* at 7-8, paras. 17, 21.

<sup>40</sup> *Id.* at 7, para. 17.

<sup>41</sup> *Id.* at 9, para. 23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See 47 U.S.C. § 332(c)(3).

<sup>45</sup> In 2008, the Commission conditionally granted petitions for forbearance from the Part 36 jurisdictional separations rules to AT&T, BellSouth, Verizon, and Qwest. See *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*; *Petition of BellSouth Telecommunications, Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302, 7307, para. 12 (2008); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering et al.*, WC Docket No. 08-190 et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647, 13662-63, para. 27 (2008). In 2013, the Commission extended the conditional forbearance grant to the remaining price cap incumbent LECs. *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations et al.*, WC Docket No. 12-61 et al., Memorandum

next year, the separations rules will apply only to rate-of-return carriers serving about 800 study areas.<sup>47</sup>

17. Even for the carriers that remain subject to the separations rules, separations results have only limited applicability because of recent reforms by the Commission. As part of comprehensive reform and modernization of the universal service and intercarrier compensation systems, the Commission adopted rate caps (including a transition to bill-and-keep for certain rate elements) for switched access services for rate-of-return carriers, thereby severing the relationship between costs and switched access rates.<sup>48</sup> In addition, in 2016, the Commission gave rate-of-return carriers the option of receiving high-cost universal service support based on the Alternative Connect America Cost Model (A-CAM).<sup>49</sup> More than 200 carriers opted to receive A-CAM support, which eliminated the need for those carriers to perform cost studies that required jurisdictional separations to quantify the amount of high-cost support for their common line offerings.<sup>50</sup> Also as part of universal service reform, the Commission established rules to provide support for loop costs associated with broadband-only services offered by rate-of-return carriers.<sup>51</sup>

18. As a result of these reforms, the Commission currently uses separations results only for carriers subject to rate-of-return regulation and only for the following limited purposes of calculating: (a) business data services rates; (b) the charge assessed on residential and business lines, known as a subscriber line charge, allowing carriers to recover part of the costs of providing access to the telecommunications network; (c) the rate for Consumer Broadband-Only Loop service; and (d) the interstate common line and Consumer Broadband-Only Loop support for non-fixed support carriers.<sup>52</sup> The administrator of the universal service support program, the Universal Service Administrative Company (USAC), also uses separations categorization results for calculating high-cost loop support for

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Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7646-54, paras. 31-51 (2013), *pet. for rev. denied sub nom. Verizon v. FCC*, 770 F.3d 961 (D.C. Cir. 2014). In 2017, the Commission terminated the conditions placed on these carriers when they were granted forbearance. *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 1735, 1748-49, para. 44 (2017) (*Part 32 Reform Order and Referral to the Joint Board*).

<sup>46</sup> *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket No. 17-144, Report and Order, Further Notice of Proposed Rulemaking, and Second Further Notice of Proposed Rulemaking, FCC 18-146, 7-13, paras. 16-30 (rel. Oct. 24, 2018) (*Rate-of-Return Business Data Services Order*). Fixed support carriers include rate-of-return carriers that receive support based on the Alternative-Connect America Cost Model (A-CAM carriers), rate-of-return carriers that receive fixed support under the Commission's Alaska Plan, price cap affiliated rate-of-return carriers receiving support based on the Connect America Cost Model, and rate-of-return carriers that accept future offers of A-CAM support. *Id.* at 2 n.1. We refer to these carriers collectively as "fixed support carriers." The Commission also provided carriers subject to the category relationships freeze that accept future offers of A-CAM support or otherwise transition away from legacy support mechanisms and elect incentive regulation the opportunity to opt out of that freeze. *Id.* at 20, para. 45.

<sup>47</sup> The separations rules do not apply to rate-of-return carriers that are "average schedule companies." These companies do not perform jurisdictional separations; they receive pool revenues, or settlements, from the National Exchange Carrier Association, Inc. (NECA) for interstate telecommunications services based on a series of

certain non-fixed support carriers, but without applying jurisdictional allocations.<sup>53</sup> States also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs.

### III. DISCUSSION

19. Based on the record before us, and cognizant of the impacts, both on rate-of-return carriers subject to the separations freeze and on the Commission, of the seven separations freeze extensions over the last 17 years, we now extend for up to six years the freeze on Part 36 category relationships and jurisdictional cost allocation factors that the Commission adopted in the *2001 Separations Freeze Order*. This extension will begin on January 1, 2019, and will continue until the earlier of December 31, 2024, or the completion of comprehensive reform of the Part 36 jurisdictional separations rules. We also provide carriers that opted to freeze their separations category relationships in 2001 a one-time opportunity to unfreeze and update those relationships so that they can categorize their costs based on current circumstances.

#### A. Further Extending the Separations Freeze

20. We find, consistent with the recommendation of the State members of the Joint Board and the overwhelming consensus among the commenters, that an extension of the separations freeze beyond its scheduled December 31, 2018, expiration date will serve the public interest.<sup>54</sup> As we recognized in the *Further Notice*, this impending deadline compels us to make a choice between extending the freeze further or allowing long-unused separations rules to take effect on January 1, 2019.<sup>55</sup> We find that permitting the freeze to expire would impose significant burdens on rate-of-return carriers that would far exceed the benefits, if any, of requiring those carriers to comply with rules that they have not implemented since 2001.<sup>56</sup>

21. In particular, we agree with those commenters that argue that rate-of-return carriers,

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statistical formulas, approved by the Commission, that approximate the amounts received by a similar cost company. *See* 47 CFR § 69.606.

<sup>48</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

<sup>49</sup> *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3094-117, paras. 17-79 (2016) (*Rate-of-Return Reform Order*); *see also Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 13775 (2016).

<sup>50</sup> *See Wireline Competition Bureau Authorizes 182 Rate-of-Return Companies to Receive \$454 Million Annually in Alternative Connect America Cost Model Support to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, 32 FCC Rcd 842 (2017) (explaining a total of 207 rate-of-return carriers are authorized to receive model-based support); *Rate-of-Return Reform Order*, 31 FCC Rcd at 3097, para. 21.

<sup>51</sup> *Rate-of-Return Reform Order*, 31 FCC Rcd at 3119-24, paras. 86-94.

<sup>52</sup> *See Rate-of-Return Business Data Services Order* at 8-9, para. 19; *Rate-of-Return Reform Order*, 31 FCC Rcd at 3118-21, paras. 82, 86-88; 47 CFR § 69.104 (end user common line charge for non-price cap incumbent LECs); *id.* § 69.132 (end user Consumer Broadband-Only Loop charge for non-price cap incumbent LECs).

<sup>53</sup> 47 CFR § 54.1310.

<sup>54</sup> State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1; *see, e.g.*, Concerned Rural LECs Comments at 2-3 (supporting a fifteen-year extension); NECA Comments at 1 (same); NTCA Comments at 4 (same); WTA Comments at 1 (same); USTelecom Comments at 3 (supporting permanent freeze); NARUC Comments at 1, 9, 25 (arguing for a two-year extension and a referral to the Joint Board prior to issuing the extension); Letter from Jeffrey Ackerman et al., Chairman, Colorado Public Utility Commission, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 2 (Sept. 5, 2018) (Colorado PUC Sept. 5, 2018 *Ex Parte* Letter). *But see* Irregulars Comments at 3

particularly smaller rural carriers, would find it extremely difficult, if not impossible, to perform all of the studies needed for full compliance.<sup>57</sup> The Commission has previously found that allowing the existing freeze to lapse and frozen separations rules to be reinstated would impose undue instability and administrative burdens on affected carriers.<sup>58</sup> The record before us confirms that is still the case.

22. First, we agree with commenters that developing “traffic factors” to jurisdictionally separate costs assigned to voice-related services is “an arcane science” and that, after 17 years of not performing traffic factor studies, carriers would be required to incur substantial training and other costs to reestablish the expertise necessary to perform them.<sup>59</sup> This expense would hit smaller, rural carriers with limited resources the hardest.<sup>60</sup> We cannot justify imposing such a burden on small carriers particularly given that the impact of such traffic factors is continuing to diminish as investment in voice services decreases due to growing deployment of broadband services.<sup>61</sup>

23. Moreover, as NTCA explains, even if full compliance were possible, “these smaller providers would be forced to return to a regulatory environment that last operated in full nearly two decades ago.”<sup>62</sup> We cannot justify the costs of such compliance, given the outdated nature of the rules with which these small providers would have to comply. Furthermore, as the Commission previously explained, reinstating these largely outmoded rules in full measure could produce negative consequences by causing significant disruptions in carriers’ regulated rates, cost recovery, and other operating conditions.<sup>63</sup>

24. We therefore reject the Irregulators’ argument that we should not extend the freeze.<sup>64</sup> The Irregulators express concern that the freeze has led “to improper decision-making at various levels,” with, for example, State governments basing policy on obsolete numbers that over-allocate costs to the intrastate jurisdiction.<sup>65</sup> Yet, they fail to explain how ending the freeze would alleviate any such misallocation. Instead, the Irregulators propose two options for completely revamping the jurisdictional

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(arguing that the freeze “should not be extended”). We use “Irregulators” to refer jointly to the New Networks Institute and the Irregulators.

<sup>55</sup> *Further Notice* at 7, para. 17.

<sup>56</sup> *See, e.g., 2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, para. 11; *2001 Separations Freeze Order*, 16 FCC Rcd at 11390, para. 13.

<sup>57</sup> *See* NECA Comments at 4-5 (explaining that “[a]fter 18 years of not performing such studies, it is highly questionable whether small companies would be able to gain access to internal or external personnel with the expertise needed to perform annual cost studies”); WTA Comments at 2 (observing that “17 years of retirements and industry changes since the inception of the 2001 freeze have significantly reduced the availability and need for such expertise”).

<sup>58</sup> *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, para. 11 (citing commenters); *see also 2014 Separations Freeze Extension Order*, 29 FCC Rcd at 6474-75, para. 12; *2011 Separations Freeze Extension Order*, 26 FCC Rcd at 7137-38, paras. 13-14.

<sup>59</sup> Concerned Rural LECs Comments at 11; *see also* NECA Comments at 5; WTA Comments at 2.

<sup>60</sup> *See* WTA May 24, 2017 Comments at 8-9. WTA notes that its typical member company only has 10-to-20 full-time employees and serves fewer than 3,500 access lines in the aggregate and fewer than 500 access lines per exchange. *Id.* at 2. Most of its members would have to engage consultants to analyze and calculate the impact upon their operations. *Id.* at 3.

<sup>61</sup> *See* Concerned Rural LECs Comments at 11.

<sup>62</sup> NTCA Comments at 4.



separations process.<sup>66</sup> While those proposals may be useful to the Joint Board's consideration of comprehensive separations reform, they are beyond the scope of the question before us today of whether we should extend the separations freeze before it expires at the end of this year.

25. We also find that another short-term freeze extension will not provide the Joint Board, the Commission, and interested stakeholders sufficient time to complete comprehensive separations reform. Indeed, several commenters support a fifteen-year freeze.<sup>67</sup> By contrast, NARUC and the Colorado PUC both advocate for a freeze of no more than two years.<sup>68</sup> In considering how long to extend the freeze, we agree with the State members of the Joint Board that an extension of up to six years is appropriate.<sup>69</sup> A freeze of up to six years balances the competing considerations—the difficulty of comprehensive separations reform and the need to focus on that reform rather than on repeated freeze extensions—better than a longer or shorter extension period.

26. The difficulty of comprehensively reforming the separations rules cannot be overstated. The current rules focus on allocating between the interstate and intrastate jurisdictions the costs of circuit-switched voice services provided over primarily copper networks.<sup>70</sup> Those rules have largely been in place since 1969, with some revisions in 1987, and minor revisions earlier this year to harmonize the Part 36 rules with changes the Commission made to the Part 32 rules.<sup>71</sup> Since the freeze was first put in place, many rate-of-return carriers have converted much of their networks to packet-based technologies that provide telecommunications, information, and video services over fiber facilities.<sup>72</sup> Comprehensive reform, as previously envisioned by the Commission, would entail rewriting the separations rules in a manner that recognizes these technological changes and is consistent with changes to the high-cost universal service program and intercarrier compensation systems.<sup>73</sup> As our track record of repeated extensions demonstrates, such reform is not a short-term project.

27. Accordingly, we reject NARUC's argument that we should extend the freeze "on an interim basis for no more than two years to engage timely and substantively [with the Joint Board] on

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<sup>63</sup> 2017 Separations Freeze Extension Order, 32 FCC Rcd at 4223, para. 11 (citing commenters).

<sup>64</sup> Irregulators Comments at 3.

<sup>65</sup> *Id.*; see also *id.* at 7-8. Notably, the Irregulators' comments appear to focus on State treatment of Verizon's and other price cap carriers' intrastate offerings. *Id. passim*. Because our separations rules do not apply to price cap carriers, expiration or extension of the freeze will not affect State or federal treatment of price cap carriers.

<sup>66</sup> *Id.* at 8 (contending that instead of restarting "the entire study process" the Commission or the Joint Board either "should undertake a study to arrive at a more accurate representative set of numbers, which would become a new benchmark for state and federal use" or "reset the separations percentages based upon the actual percentages of revenue generated in each jurisdiction").

<sup>67</sup> See, e.g., Concerned Rural LECs Comments at 2-3; NECA Comments at 1; NTCA Comments at 4; WTA Comments at 1.

<sup>68</sup> See NARUC Reply at 3; Colorado PUC Sept. 5, 2018 *Ex Parte* Letter at 2. Subsequently, the State members of the Joint Board, including Colorado PUC Commissioner Wendy Moser, filed an *ex parte* letter recommending that the Commission extend the current separations freeze rules for up to six years to allow more time for the Joint Board to conclude its work on comprehensive separations reform. State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1.

<sup>69</sup> State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1.

<sup>70</sup> 1997 Separations Reform NPRM and Referral, 12 FCC Rcd at 22125, 22128, paras. 8, 12.

<sup>71</sup> *Id.* at 22125, para. 8; see generally *Amendments of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board*, CC Docket No. 86-297, Report and Order, 2 FCC Rcd 2639 (1987); *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the*

separations issues.<sup>74</sup> Given our past experience with short-term separations freezes and stalled attempts at separations reform, we find that a two-year extension would almost certainly do nothing more than continue the cycle of repeated short-term freeze extensions that has diverted industry, State, and Commission resources away from substantive reform, forcing a break in whatever momentum toward meaningful separations reform the Commission and the Joint Board achieve, long before that reform is complete.<sup>75</sup> We believe instead that an extension of up to six years makes separations reform more likely because it will halt that cycle and provide sufficient time for the Joint Board to focus on short-term and long-term steps toward comprehensive reform.

28. We also decline to extend the freeze indefinitely, as USTelecom urges.<sup>76</sup> USTelecom argues that the separations rules “have become increasing[ly] irrelevant and unnecessary” and that we should therefore focus on substantive intercarrier compensation and universal service reforms, rather than on separations reform.<sup>77</sup> Although we agree that the separations rules are irrelevant to price cap carriers, they remain applicable to, and impose substantial obligations on, rate-of-return carriers serving about 800 study areas.<sup>78</sup> We therefore believe that there is value to continuing to work towards reform of those rules.

### **B. Allowing a One-Time Category Relationships Unfreeze**

29. In the *Rate-of-Return Business Data Services Order*, we allowed carriers subject to the category relationships freeze that receive model-based and other forms of fixed high-cost support and elect incentive regulation for business data services to opt out of that freeze and update their category relationships.<sup>79</sup> In this proceeding, we grant all other rate-of-return carriers operating under the category-relationships freeze the opportunity to opt out of it and update their category relationships—enabling those carriers to better recover network upgrade costs from ratepayers that benefit from those upgrades and to take greater advantage of universal service programs that incent broadband deployment.

30. *Category Relationships Unfreeze.* The rate-of-return carriers that elected to freeze their category relationships in 2001 did so based, in part, on the Commission’s representation that the freeze would last no more than five years.<sup>80</sup> Those carriers did not and could not have anticipated that the

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*Federal-State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, Report and Order, FCC 18-141 (rel. Oct. 17, 2018) (*Separations Harmonization Order*).

<sup>72</sup> See, e.g., Endeavor Comments at 3 (since 2001 Endeavor has “replaced outdated copper plant and invested in Fiber-to-the-Home” technology); NARUC Comments at 4-5; Terral Comments at 5.

<sup>73</sup> See *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, para. 10; NTCA Comments at 4-5 n.12 (pointing out that “if the Commission revises its separations mechanisms, it will need to make a series of corresponding and complex changes to a variety of ratemaking and cost recovery mechanisms predicated upon the current framework to address the resulting shifts in costs”).

<sup>74</sup> See NARUC Reply at 3; see also Colorado PUC Sept. 5, 2018 *Ex Parte* Letter at 2; NARUC Comments, Appx. A, *Resolution on FCC Release of Notice of Proposed Rulemaking on Separations*, at 28.

<sup>75</sup> See NTCA Comments at 5.

<sup>76</sup> See USTelecom Comments at 2-3.

<sup>77</sup> See *id.*

<sup>78</sup> These carriers are all rate-of-return carriers other than average schedule companies. See *National Exchange Carrier Association, Inc., Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, 13 FCC Rcd 10116, 10118-19, para. 5 (Com. Car. Bur. 1997).

<sup>79</sup> *Rate-of-Return Business Data Services Order* at 20, para. 45.

<sup>80</sup> See, e.g., Concerned Rural LECs Comments at 4; Terral Comments at 3.

category relationships freeze would be in place for more than 17 years.<sup>81</sup> Yet, our current rules prohibit carriers that elected the freeze from withdrawing from it.<sup>82</sup> The result is that some, if not all, carriers with frozen category relationships are unable to recover their business data services costs from business data services customers or from NECA traffic sensitive pool settlements.<sup>83</sup>

31. Rate-of-return carriers that chose to freeze their category relationships in 2001 assign costs within Part 32 accounts to categories using their separations category relationships from 2000. Consequently, these companies are still categorizing their costs based on the technologies and services that were in place in 2000, instead of being able to adjust the amounts assigned to separations categories to reflect current network costs and services. This circumstance, in turn, distorts revenue requirements and resulting rates. Allowing carriers to unfreeze and update their category relationships will enable them to more closely align their business data services and Consumer Broadband-Only Loop service rates with the underlying costs of these services. It also will encourage those carriers to expand and upgrade their networks, thus enhancing their capability to provide these services.

32. We also agree with commenters that allowing affected carriers to opt out of the freeze will enable these carriers to take better advantage of universal service programs that promote broadband growth.<sup>84</sup> As commenters point out, the category relationships freeze undermines incentives for certain carriers to move toward broadband-only services.<sup>85</sup> Endeavor, for example, explains that, without an opportunity to unfreeze and re-categorize investment levels, the ability of carriers to qualify for support of broadband-capable network loops through the Connect America Fund – Broadband Loop Service (CAF-BLS) program is significantly reduced.<sup>86</sup> Unfreezing category relationships will allow a carrier to assign broadband-only loop costs to the consumer broadband-only revenue requirement and also receive CAF-BLS support based on these costs, as carriers seek to meet consumer demand for broadband-only lines.

33. In addition, consistent with our finding in the *Rate-of-Return Business Data Services Order* and the consensus of commenters in this proceeding including the State Members of the Federal-State Joint Board, we conclude that affected carriers should be given the flexibility to choose whether to unfreeze their category relationships.<sup>87</sup> Were we instead to require all affected carriers to unfreeze and update their category relationships, the burden on some affected carriers could outweigh any potential benefits. As the Commission has recognized, the size, cost structures, and investment patterns of rate-of-return carriers vary widely.<sup>88</sup> Certain rate-of-return carriers' cost structures may not have changed significantly enough since the freeze began to warrant the administrative costs that these carriers would incur in updating their category relationships, costs that would be borne by their customers and the high-cost universal service support program.<sup>89</sup> Other carriers may find that updating their category

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<sup>81</sup> See, e.g., ITTA Comments at 5-6; Pioneer Comments at 4.

<sup>82</sup> See 47 CFR § 36.3(b).

<sup>83</sup> *Rate-of-Return Business Data Services Order* at 21-22, para. 49.

<sup>84</sup> See, e.g., WTA Comments at 6.

<sup>85</sup> See, e.g., Endeavor Comments at 4; WTA Comments at 6.

<sup>86</sup> Endeavor Comments at 4.

<sup>87</sup> *Rate-of-Return Business Data Services Order* at 22, para. 51; see, e.g., NTCA Comments at 7; WTA Comments at 4; see also State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 2 (recommending that the Commission provide carriers with a one-time opportunity to unfreeze their separations category relationships).

<sup>88</sup> *Rate-of-Return Business Data Services Order* at 22, para. 51; *2001 Separations Freeze Order*, 16 FCC Rcd at 11393-94, paras. 18, 21.

<sup>89</sup> See WTA Comments at 4-5 (pointing out that, in a small study area, the per-customer costs of the studies needed to unfreeze category relationships “can outweigh any gains in the accuracy of cost allocations and any changes in the resulting rates” that would otherwise benefit the company and its customers).

relationships would disrupt business plans made based on a continuation of the category relationships freeze since it has been in effect for such a long period.<sup>90</sup> Allowing affected carriers the flexibility to choose whether to unfreeze their category relationships properly recognizes that some carriers will embrace the opportunity to more accurately categorize their investments, while others would find updating their category relationships to be unduly costly or disruptive.<sup>91</sup>

34. Consistent with Commission precedent, we adopt July 1, 2019, as the effective date for opting out of the freeze.<sup>92</sup> We find it important to implement the unfreeze option “efficiently and swiftly” while at the same time giving carriers enough time to prepare.<sup>93</sup> Commenters generally agree that July 1, 2019, is a reasonable effective date.<sup>94</sup> We require that carriers currently in the NECA traffic-sensitive pool notify NECA by March 1, 2019, of their decision to opt out of the category relationships freeze.<sup>95</sup> This deadline provides the same advance notice that carriers exiting the NECA pool must give NECA under section 69.3 of our rules.<sup>96</sup> We also require carriers that file their own tariffs to provide the Wireline Competition Bureau with notice of their intent to opt out of the category relationships freeze by May 1, 2019.<sup>97</sup>

35. We find there is insufficient basis in the record to modify any other aspects of the separations freeze. We sought detailed input on several other possible modifications to the freeze, including whether carriers that unfreeze their category relationships should be permitted to refreeze them and whether carriers that did not freeze their category relationships in 2001 should be permitted to freeze them.<sup>98</sup> In addition, carriers now apportion their categorized costs using jurisdictional allocation factors for the year 2000, and we sought input on whether we should allow or require carriers to reset these factors using current data.<sup>99</sup> The record provides insufficient information, however, about the impact of allowing such a reset of jurisdictional allocation factors or about how best to implement such a reset. Moreover, requiring all rate-of-return carriers to reset their jurisdictional allocation factors would impose substantial burdens on small rural carriers. And requiring or allowing all rate-of-return carriers to reset their jurisdictional allocation factors would impose a substantial burden on NECA and the Commission in reviewing such changes. Some commenters support other modifications to the separations freeze, such as giving carriers the opportunity to unfreeze and then refreeze their category relationships.<sup>100</sup> We agree

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<sup>90</sup> See, e.g., ITTA Comments at 3-4; NTCA Comments at 7; WTA Comments at 4.

<sup>91</sup> See, e.g., ITTA Comments at 3.

<sup>92</sup> See *Rate-of-Return Business Data Services Order* at 42-43, paras. 117-18 (noting that “July 1 is the most efficient effective date” for opting out of the category relationships freeze because our rules already require annual access charge tariffs to be filed with a July 1 effective date, and thus carriers can use that filing to implement all tariff rate changes at once); see also *2001 Separations Freeze Order*, 16 FCC Rcd at 11397, para. 30 (adopting July 1, 2001 as the effective date of the initial freeze).

<sup>93</sup> *2001 Separations Freeze Order*, 16 FCC Rcd at 11397, para. 30.

<sup>94</sup> *Further Notice* at 11, para. 32; see ITTA Comments at 6; NECA Comments at 7; WTA Comments at 4-5.

<sup>95</sup> See *Rate-of-Return Business Data Services Order* at 43, para. 119.

<sup>96</sup> See 47 CFR § 69.3.

<sup>97</sup> See *Rate-of-Return Business Data Services Order* at 43-44, para. 119.

<sup>98</sup> *Further Notice* at 11-12, paras. 33, 36-37.

<sup>99</sup> *Id.* at 12, para. 39.

<sup>100</sup> See Concerned Rural LECs Comments at 10 (arguing that carriers that did not freeze their category relationships in 2001 should have the option to do so now); ITTA Comments at 5 (supporting the unfreeze, refreeze, and first-time freeze options); WTA Comments at 3-4 (supporting a one-time option to unfreeze and refreeze for carriers with frozen category relationships and a one-time option to freeze for carriers that did not freeze their category relationships in 2001).

with NECA, however, that allowing companies to unfreeze and then refreeze their category relationships would risk gamesmanship, a risk that we cannot adequately address on the current record.<sup>101</sup> Indeed, the record lacks sufficient information to accurately assess the benefits and drawbacks of making changes to the separations freeze, other than to the category relationships freeze.

36. *Implementation of the Unfreeze.* We adopt the suggestion that carriers that file their own tariffs and unfreeze their category relationships be required to update their Part 36 category relationships in new cost studies on which their interstate tariffed rates, other than switched access rates, will be based going forward, beginning with the 2019 annual filing.<sup>102</sup> Rate-of-return carriers subject to sections 61.38 and 61.39 of the Commission's rules shall explain the impact of the unfreeze and describe these studies in the "Description & Justification" sections of their filings.<sup>103</sup> Carriers subject to section 61.38 shall include the results of these studies in their tariff review plans.<sup>104</sup> Carriers subject to section 61.39 are not required to submit the supporting data at the time of filing, but the Commission and interested parties may request the data.<sup>105</sup> NECA carriers that elect to unfreeze their category relationships must reflect these unfrozen relationships in the cost studies on which their pool settlements are based beginning with the last six months of studies for calendar year 2019.

37. We conclude, consistent with the view of nearly all commenters addressing the issue, that we should take steps to prevent double-recovery of costs.<sup>106</sup> Unfreezing separations category relationships could result in a carrier's recovery of the same costs through higher business data services rates and unchanged switched access recovery. Updated category relationships will change the costs assigned to common line, to interstate switched access, and to business data services. The *USF/ICC Transformation Order* capped all interstate switched access rates at 2011 levels, subject to specified reductions over time.<sup>107</sup> We do not with this action make changes to the carefully-balanced transition to bill-and-keep set forth in that *Order*. Unless cost reductions to interstate switched access are reflected in a carrier's revised base period revenue, however, a carrier will over-recover costs through its capped interstate switched access rates.<sup>108</sup>

38. To prevent this over-recovery, we follow the approach we took in the *Rate-of-Return Business Data Services Order*.<sup>109</sup> There, we adopted a method similar to the approach the Bureau followed in waiving the category relationships freeze in the *Eastex Waiver Order*, which commenters generally agree is a reasonable approach to prevent double-recovery.<sup>110</sup> Thus, a carrier subject to sections 61.38 or 61.39 of our rules must calculate the difference between the interstate switched access costs in

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<sup>101</sup> See NECA Comments at 7.

<sup>102</sup> See WTA Comments at 4 (noting as an option that carriers "calculate their unfrozen category relationships going forward using the same types of studies and procedures employed by those [rural LEC] study areas that did not freeze their category relationships in 2001").

<sup>103</sup> 47 CFR §§ 61.38-39.

<sup>104</sup> *Id.* § 61.38.

<sup>105</sup> *Id.* § 61.39(b).

<sup>106</sup> Concerned Rural LECs Comments at 8-9; Endeavor Comments at 5; NECA Comments at 6; NTCA Comments at 6; Terral Comments at 12; WTA Comments at 6. *But see* ITTA Comments at 6-7.

<sup>107</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17678, para. 39.

<sup>108</sup> See *Rate-of-Return Business Data Services Order* at 24, para. 57.

<sup>109</sup> *Id.* at 24-25, paras. 57-60.

<sup>110</sup> *Petition by Eastex Telephone Cooperative, 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, Order, 27 FCC Rcd 6357 (WCB 2012) (*Eastex Waiver Order*); see, e.g., Endeavor Comments at 5; NTCA Comments at 6.

two cost studies—one based on unfrozen category relationships that is the basis for its tariff-year 2019-2020 rates and a second study that is the same except that it is based on frozen category relationships.<sup>111</sup> Each carrier must then adjust its base period revenue by an amount equal to the interstate switched access cost difference between the two cost studies before applying the annual 5% reduction to the base period revenue, as required by the *USF/ICC Transformation Order*.<sup>112</sup>

39. A carrier that participates in the NECA interstate switched access tariff must report to NECA the interstate switched access cost difference between the two calendar year 2018 studies and its base period revenue as revised to reflect the cost difference. These procedures protect both carriers and customers from any unintended consequences of unfreezing category relationships. Finally, we require NECA to reflect these base period revenue changes in its settlement procedures.

40. We find that these measures provide a reasonable and not unduly burdensome method for preventing double-recovery of costs when a carrier chooses to unfreeze its category relationships. Each carrier will need to perform detailed calculations to implement its choice to update category relationships. Because we have an obligation to protect ratepayers against the harms of double-recovery, we reject ITTA's assertion that the procedure carriers are required to follow to prevent double-recovery is too burdensome, particularly since ITTA poses no alternative.<sup>113</sup>

### C. Declining to Alter the Scope of the Referral

41. We decline to alter the scope of the referral to the Joint Board, and instead ask the Joint Board to adopt an incremental approach to separations reform by focusing first on cleaning up the existing separations rules and then on long-term steps toward comprehensive reform of the remaining rules. As previously articulated by the Commission, those issues include whether the separations rules are still needed,<sup>114</sup> whether specific separations categories should be consolidated or disaggregated,<sup>115</sup> and how certain types of costs should be allocated between the jurisdictions.<sup>116</sup> Although the Commission has never retreated from its goal of comprehensive separations reform, over the years it has asked the Joint Board to focus on certain specific issues within that broad area.<sup>117</sup> Most recently, the Commission referred to the Joint Board the harmonization of the Commission's Part 32 jurisdictional separations rules with previous amendments to its Part 32 accounting rules and asked the Joint Board to issue a recommended decision on that matter.<sup>118</sup> The Joint Board issued its Recommended Decision eight

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<sup>111</sup> See *Rate-of-Return Business Data Services Order* at 24, paras. 56-58. Carriers subject to section 61.38 rules set their rates to recover projected costs. As part of its annual tariff filing, each of these carriers is required to submit an historical cost study for the most recent 12-month period, and a study containing a projection of costs for a representative 12-month period. 47 CFR 61.38(b)(1). We require that each such carrier that chooses to update its category relationships use the updated relationships in the historical cost study its submits with its annual filing for tariff-year 2018-2019 and apply these updated relationships in its study of projected costs. The carrier must base the difference between the interstate switched access costs (calculated in order to adjust base period revenue) on the costs in the historical cost study that reflects unfrozen category relationships and the costs in a second study that is the same except that it reflects frozen category relationships. See 47 CFR § 61.38(b)(1)(i), (ii); see also *Rate-of-Return Business Data Services Order* at 24, para. 56.

<sup>112</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17678, para. 39.

<sup>113</sup> See ITTA Comments at 6-7.

<sup>114</sup> *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22136-41, paras. 32-42.

<sup>115</sup> *Id.* at 22147-49, paras. 55-61.

<sup>116</sup> *Id.* at 22154-62, paras. 74-92.

<sup>117</sup> See, e.g., *2009 Separations Freeze Extension Order and Second Referral*, 24 FCC Rcd at 6167-69, paras. 15-20.

<sup>118</sup> *Part 32 Reform Order and Referral to the Joint Board*, 32 FCC Rcd at 1749, para. 46.

months after receiving that referral;<sup>119</sup> and, after seeking public comment on the Joint Board's recommendations,<sup>120</sup> the Commission amended its separations rules consistent with those recommendations.<sup>121</sup>

42. Therefore, rather than narrowing the scope of the separations reform referral, we believe that the best course is to ask the Joint Board to focus on certain discrete issues in the short term. First, should we amend the separations rules to recognize that price cap carriers and rate-of-return carriers that have adopted the new incentive regulation framework for their business data services offerings are not subject to them—an action that would recognize the Commission's forbearance from application of the separations rules to these carriers?<sup>122</sup> Second, given that the separations rules apply only to certain rate-of-return carriers and only for certain purposes, are there rules or recordkeeping requirements that we should modify or eliminate in light of the freeze extension of up to six years? In highlighting these issues, we hope to draw on our recent experience with the Joint Board in amending the Part 36 separations rules to harmonize them with changes in the Part 32 accounting rules.

43. Longer term, we continue to seek the Joint Board's recommendations on how we might replace the existing jurisdictional separations process with a simplified system for reasonably allocating costs between the interstate and intrastate jurisdictions. We agree with NARUC that the existing separations rules, which presume circuit-switched, primarily voice networks, require updating to reflect today's network configurations and mix of broadband, video, and voice services.<sup>123</sup> We also share NARUC's and the Irregulars' concern that those rules necessarily misallocate network costs.<sup>124</sup> We know that any changes to the separations rules will need to be harmonized with the Commission's reforms to the universal service, intercarrier compensation, and business data services rules.<sup>125</sup> Indeed, we extend the separations freeze for up to six years to free resources to address these and other long-term separations problems. We look forward to working with the Joint Board in a more directed manner, addressing these important issues step-by-step. By addressing the separations procedures in a concerted fashion—through substantive reforms of the universal service, intercarrier compensation, and business data services rules on one hand, and focused revisions of specific areas in the separations rules on the other—we hope to resolve the complex separations issues that have proven so challenging well before the end of the maximum six-year extension period.

#### **D. Consistency with the Communications Act**

44. We reject NARUC's assertion that because we did not refer or receive a recommended decision from the Joint Board on the specific proposal to extend the freeze for 15 years, and because we did not receive a recommended decision from the Joint Board on allowing carriers subject to the category

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<sup>119</sup> See *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, Recommended Decision, 32 FCC Rcd 8678 (Fed.-State Jt. Bd. 2017).

<sup>120</sup> See *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 18-22 (rel. Feb. 22, 2018).

<sup>121</sup> See *Separations Harmonization Order* at 2-3, paras. 5-7 (amending the separations rules 19 months after referring the matter to the Joint Board).

<sup>122</sup> *Rate-of-Return Business Data Services Order* at 45-50, paras. 125-37.

<sup>123</sup> NARUC Comments at 4-5; see Endeavor Comments at 3 (since 2001 Endeavor has “replaced outdated copper plant and invested in Fiber-to-the-Home” technology); Terral Comments at 5; USTelecom Comments at 2.

<sup>124</sup> NARUC Comments at 18; see Irregulars Comments at 3-8.

<sup>125</sup> See, e.g., *USF/ICC Transformation Order*, 26 FCC Rcd 17663; *Rate-of-Return Reform Order*, 31 FCC Rcd at 3094-117, paras. 17-79; *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, WC Docket No. 16-143 et al., 32 FCC Rcd 3459 (2017).

relationships freeze the opportunity to update their category relationships, we are violating section 410(c) of the Communications Act.<sup>126</sup> In so arguing, NARUC ignores the fact that the Commission has twice referred comprehensive separations reform to the Joint Board.<sup>127</sup> The Joint Board clearly understood that these referrals encompassed a separations freeze; otherwise it would have sought an additional referral before recommending the initial freeze.<sup>128</sup> Moreover in 2009, the Commission referred the specific question of whether to allow carriers subject to the category relationships freeze the opportunity to unfreeze those relationships.<sup>129</sup> The Joint Board has never come to a recommended decision on the latter referral, and the only Recommended Decision the Joint Board has issued addressing any part of either comprehensive reform referral was the decision the Joint Board issued in 2000 recommending a separations freeze.<sup>130</sup> Following the Joint Board recommendation, the Commission adopted the separations freeze and recognized that it might need to extend the freeze if comprehensive reform were not completed before the freeze expired.<sup>131</sup>

45. Because the Commission has not completed comprehensive reform, consistent with the Commission's *2001 Separations Freeze Order*, the Commission has extended the separations freeze seven times without an additional referral to, or receiving an additional recommended decision from, the Joint Board.<sup>132</sup> The first time the Commission extended the freeze it explicitly found that the extension was within the scope of the Joint Board's previous recommendation.<sup>133</sup> NARUC's assertion that the Commission found in 2001 that it would be required to receive a specific recommendation from the Joint Board on each extension of the separations freeze is plainly wrong.<sup>134</sup> The Commission committed to consulting with the Joint Board on extensions of the initial five-year freeze; it did not commit to referring freeze extensions to the Joint Board.<sup>135</sup> For their part, State members of the Joint Board have repeatedly submitted letters supporting the freeze extensions; and, as part of this proceeding, the current State members recommend that we extend the separations freeze for up to six years and allow carriers a one-time opportunity to unfreeze their category relationships.<sup>136</sup>

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<sup>126</sup> 47 U.S.C. § 410(c); NARUC Reply at 2-5, 11; *see* NARUC Comments at 8-9; 15-16; *see also* Colorado PUC Sept. 5, 2018 *Ex Parte* Letter at 1 (stating that section 410(c) unambiguously requires that the Commission shall refer changes in the separations rules to the Joint Board for a recommended decision and the Commission "should not act . . . absent a Joint Board recommendation").

<sup>127</sup> *1997 Separations Reform NPRM and Referral* at 22124, para. 5; *2009 Separations Freeze Order and Second Referral*, 24 FCC Rcd at 6167, para. 15 (again asking the Joint Board "to consider comprehensive jurisdictional separations reform").

<sup>128</sup> *See Joint Board Recommended Decision*, 15 FCC Rcd 13160; *compare* State Members' Report on Comprehensive Review of Separations, CC Docket No. 80-286, at 1 (filed Dec. 21, 1998) (stating that the initial comprehensive reform referral "encompasses a broad range of issues" and is "not limited to those contained in the initial NPRM") *with id.* at 15 (recommending that the Joint Board consider a separations freeze "as an interim step to comprehensive separations reform").

<sup>129</sup> *2009 Separations Freeze Order and Second Referral*, 24 FCC Rcd at 6162, 6166, 6168, 6171, paras. 14, 19, 29; *see* Letter from James B. Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 6 (filed Sept. 19, 2018) (acknowledging that the issue whether to allow carriers to opt out of the category relationships freeze is "squarely within the scope of the existing referral"); *cf.* NARUC Comments at 23 (asserting that the "FCC should make clear the FNPRM's 'onetime category unfreeze option' proposals are within the scope of the current referral").

<sup>130</sup> *See Joint Board Recommended Decision*, 15 FCC Rcd 13160.

<sup>131</sup> *2001 Separations Freeze Order*, 16 FCC Rcd at 11383, 11397, paras. 2, 29.

<sup>132</sup> *See 2006 Separations Freeze Extension Order*, 21 FCC Rcd at 5523-25, paras. 18-21 (no referral to the Joint Board, no notice and comment proceeding, and no recommended decision from the Joint Board); *2009 Separations Freeze Extension Order and Second Referral*, 24 FCC Rcd 6162 (no referral to and no recommended decision from the Joint Board); *2010 Separations Freeze Extension Order*, 25 FCC Rcd 6046 (no referral to and no recommended decision from the Joint Board); *2011 Separations Freeze Extension Order*, 26 FCC Rcd 7133 (no referral to and no



46. In its comments, NARUC attempts to distinguish the proposed 15-year freeze from earlier, shorter freeze extensions by arguing that a freeze of up to 15 years is the “policy equivalent” of a permanent freeze.<sup>137</sup> Our decision to extend the freeze for only six years should alleviate NARUC’s concern. Moreover, our decision to extend the freeze for up to six years is consistent with the recommendation of the State members of the Joint Board and informed by the record of this proceeding and by the Joint Board’s failure to reach a recommendation on comprehensive reform for the last 21 years. Furthermore, the freeze we adopt today is not permanent; it will expire on a date certain absent further action by the Commission.

47. Regarding the Commission’s 2001 pledge to “consult[] with the Joint Board” to “determine whether the freeze period shall be extended,”<sup>138</sup> the notice and comment and ex parte periods for the *Further Notice* provided ample opportunity for the Joint Board, including its State members, to voice their opinions on the extension. The State members of the Joint Board have taken the opportunity to engage in extensive discussions with all the other Joint Board members.<sup>139</sup> These discussions meet any obligation the Commission may have under section 410(c) to afford the State members of the Joint Board an opportunity to participate in the Commission’s deliberations on this Order.<sup>140</sup>

48. Moreover, given the lack of action by the Joint Board on the Commission’s two referrals of comprehensive reform and separate referral of an unfreeze of the category relationships and the recommendations of the State Joint Board members,<sup>141</sup> our actions today are necessary and appropriate. Section 410(c) directs that, after a referral, the Joint Board “shall prepare a recommended decision for prompt review and action by the Commission.”<sup>142</sup> Nothing in section 410(c) obligates the Commission to wait indefinitely for a recommended decision before acting. We conclude that the only reasonable interpretation of the statutory language allows the Commission to act unilaterally where, as here, issues have been pending before the Joint Board for many years without a recommended decision. Any contrary interpretation would allow the Joint Board to indefinitely delay Commission action. Congress could not have intended that result while requiring that the Commission act promptly once the Joint Board issues a

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recommended decision from the Joint Board); *2012 Separations Freeze Extension Order*, 27 FCC Rcd 5593 (no referral to and no recommended decision from the Joint Board); *2014 Separations Freeze Extension Order*, 29 FCC Rcd 6470 (no referral to and no recommended decision from the Joint Board); *2017 Separations Freeze Extension Order*, 32 FCC Rcd 4219 (no referral to and no recommended decision from the Joint Board).

<sup>133</sup> See *2006 Separations Freeze Extension Order*, 21 FCC Rcd at 5525, para. 21.

<sup>134</sup> See NARUC Comments at 10, 15-16; NARUC Reply at 5.

<sup>135</sup> *2001 Separations Freeze Order*, 16 FCC Rcd at 11397, para. 29.

<sup>136</sup> See Letter from Steve Kolbeck, State Chair, Federal-State Joint Board on Jurisdictional Separations, et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 1 (Apr. 17, 2009); Letter from Steve Kolbeck, State Chair, Federal-State Joint Board on Jurisdictional Separations, et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 1 (Mar. 18, 2011); Letter from John D. Burke, State Chair, Federal-State Joint Board on Jurisdictional Separations, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 1 (Mar. 31, 2014); State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1-2. The Joint Board also sent a letter supporting the first extension of the freeze but did not request a referral. See Letter from Deborah Taylor Tate, Chair, Federal-State Joint Board on Separations, and Paul Kjellander, State Chair, Federal-State Joint Board on Separations, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286, at 1 (Apr. 18, 2006) (Joint Board Apr. 18, 2006 Letter).

<sup>137</sup> NARUC Comments at 15.

<sup>138</sup> See *2001 Separations Freeze Order*, 16 FCC Rcd at 11397, paras. 28-29; Colorado PUC Sept. 5, 2018 *Ex Parte* Letter at 1-2.

<sup>139</sup> State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1.

<sup>140</sup> See 47 U.S.C. § 410(c) (requiring that “[t]he Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding”); NARUC

recommended decision.<sup>143</sup>

49. Reducing the length of the freeze extension should also alleviate NARUC's concern that extending the freeze for up to 15 years would result in unjust and unreasonable rates because of the frozen allocation of the underlying costs to the interstate and intrastate jurisdictions.<sup>144</sup> A freeze extension of up to six years will free up resources to address whether the separations rules produce reasonable results within the meaning of section 201(b) of the Communications Act and determine the proper methodology if the rules need to be revised.<sup>145</sup> This is no easy undertaking, given the need to ensure that any changes to the separations rules are consistent with our high-cost universal service and intercarrier compensation rules.<sup>146</sup> Although we agree with NARUC on the need for separations reform, we find that extending the freeze for up to six years will accelerate that reform. Accordingly, we find that a freeze extension of up to six years, in combination with a one-time option to unfreeze category relationships, will increase the Commission's and the Joint Board's ability to ensure just and reasonable rates.

#### E. Waiver Petitions

50. In 2012 and 2013, respectively, Terral Telephone Company, Inc. (Terral) and Pioneer Telephone Cooperative, Inc. (Pioneer) filed petitions seeking waiver of the Commission's separations category relationships freeze rules.<sup>147</sup> Because this Order allows all carriers currently subject to the category relationships freeze to unfreeze and update their separations category relationships, we dismiss Terral's and Pioneer's petitions as moot.

#### IV. WAIVER

51. On our own motion, in the event that a summary of the *Separations Freeze Extension Report and Order* that we adopt today is not published in the Federal Register by December 31, 2018, we waive the jurisdictional separations rules to the extent that they would require carriers to update their category relationships and cost allocation factors. The Commission's rules may be waived for good cause shown.<sup>148</sup> The Commission may exercise its discretion to waive a rule where the particular facts make

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Comments at 16 (arguing that the Commission "should follow past practice and engage the State members to discuss the appropriate length of a freeze under the 'deliberative privilege'" in section 410(c)); NARUC Reply at 5 (same).

<sup>141</sup> State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1-2.

<sup>142</sup> 47 U.S.C. § 410(c); *see also In re FCC 11-161*, 753 F.3d at 1086 (finding the Commission has "the authority and discretion" to make the determination that a particular proceeding concerns substantive jurisdictional separations reform); *Crocket Telephone Co. v. FCC*, 963 F.2d 1564, 1571 (D.C. Cir. 1992) (concluding the procedures outlined in sections 221(c) and 410(c) of the Communications Act "are mandatory when the Commission chooses to adopt a formal separations methodology"); *State Corp. Comm'n of the State of Kansas v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (noting that the limits placed on State members in section 410(c) "confirm[] the purely advisory role of the states").

<sup>143</sup> *Rate-of-Return Business Data Services Order* at 23, para. 54.

<sup>144</sup> *See* NARUC Comments at 17-23.

<sup>145</sup> 47 U.S.C. § 201(b).

<sup>146</sup> NTCA Comments at 4-5 n.12 (observing that simply unfreezing the separations rules may result in unjust and unreasonable rates because reforms of cost recovery mechanisms since 2001 were all aimed at promoting just and reasonable rates).

<sup>147</sup> *Petition of Pioneer Telephone Cooperative, Inc. for Waiver of 47 CFR Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286 (filed Mar. 22, 2013); *Terral Telephone Company, Inc., Petition for Waiver of 47 CFR Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286 (filed Aug. 29, 2012).

<sup>148</sup> 47 CFR § 1.3.

strict compliance inconsistent with the public interest.<sup>149</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.<sup>150</sup>

52. In this case, we have already found that an extension of the separations rules freeze, subject to certain modifications, is warranted, and that extension will become effective upon publication of a summary of the *Separations Freeze Extension Order* in the Federal Register.<sup>151</sup> We cannot ensure publication by December 31, 2018 when the current extension expires, but requiring that carriers use updated category relationships and allocation factors for a short period of time between the expiration of the current separations freeze extension and publication of the new extension would impose significant and unjustifiable burdens on rate-of-return carriers while providing no countervailing benefit.<sup>152</sup> Under these circumstances, deviation from the rules is warranted and will serve the public interest. Pursuant to this waiver, carriers may continue applying the same separations category relationships and allocation factors they have used during the freeze. This waiver would expire on the date of publication in the Federal Register of a summary of the *Separations Freeze Extension Order* we adopt today.

## V. PROCEDURAL MATTERS

53. *Paperwork Reduction Act Analysis.* This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.<sup>153</sup> It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002,<sup>154</sup> we sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.<sup>155</sup> We describe impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis in Appendix B.

54. *Congressional Review Act.* The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>156</sup>

55. *Final Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980 (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>157</sup> Accordingly, we have prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in the Report and Order on small entities.<sup>158</sup> The FRFA is set forth in Appendix B.

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<sup>149</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>150</sup> The Commission may, on an individual basis, take into account considerations of hardship, equity, or more effective implementation of overall policy. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>151</sup> See *infra* para. 57 (Effective Date).

<sup>152</sup> See *supra* paras. 21-23.

<sup>153</sup> See 44 U.S.C. §§ 3501-21.

<sup>154</sup> Public Law 107-198, see 44 U.S.C. § 3506(c)(4).

<sup>155</sup> *Further Notice* at 14, para. 44. No comments were filed in response to our request.

<sup>156</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>157</sup> 5 U.S.C. § 605(b).

<sup>158</sup> See 5 U.S.C. § 604.

56. *Contact Person.* For further information regarding this proceeding, contact Marv Sacks, Pricing Policy Division, Wireline Competition Bureau, at (202) 418-2017, or [marvin.sacks@fcc.gov](mailto:marvin.sacks@fcc.gov).

57. *Effective Date.* We find good cause to make the extension of the separations freeze effective immediately upon publication of a summary of this Report and Order in the Federal Register.<sup>159</sup> The current freeze is scheduled to expire on December 31, 2018. To avoid unnecessary disruption to carriers subject to the separations rules, we preserve the status quo by making the extension of the freeze effective upon publication and granting a waiver in the event that the extension is not in effect by December 31, 2018.

## VI. ORDERING CLAUSES

58. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, 410, this Report and Order IS ADOPTED.

59. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 4(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, 410, and Part 36 of the Commission's rules, 47 CFR Part 36, IS AMENDED as set forth in Appendix A.

60. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 4(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, 410, except as otherwise provided in this Order, the amendments to 47 CFR Part 36 set forth in Appendix A shall be effective on the date of publication of a summary of this Order in the Federal Register.

61. IT IS FURTHER ORDERED that the amendments to 47 CFR § 36.3(b) specified in Appendix A, which contains new or modified information collection requirements that require approval by the OMB under the Paperwork Reduction Act, WILL BECOME EFFECTIVE after OMB review and approval, on the effective date specified in a notice that the Commission will publish in the Federal Register announcing such approval and effective date.

62. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, 410, Terral Telephone Company, Inc.'s Petition for Waiver in CC Docket No. 80-286 and Pioneer Telephone Cooperative, Inc.'s Petition for Waiver in CC Docket No. 80-286 ARE DISMISSED as moot.

63. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 4(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, 410, and section 1.3 of the Commission's rules, 47 CFR § 1.3, the Part 36 category relationships and jurisdictional cost allocation rules, 47 CFR Part 36, set to take effect on January 1, 2019, ARE WAIVED to the extent described above.

64. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

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<sup>159</sup> 5 U.S.C. § 553(d)(3).

65. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>160</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>160</sup> See 5 U.S.C. § 801(a)(1)(A).

**APPENDIX A  
FINAL RULES**

For the reasons set forth above, the Federal Communications Commission amends 47 CFR part 36 as follows:

**PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES  
FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES,  
EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES**

1. The authority citation for part 36 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 154(i) and (j), 201, 205, 220, 221(c), 254, 303(r), 403, 410, and 1302 unless otherwise noted.

2. Revise § 36.3(b) to read as follows:

**§ 36.3 Freezing of jurisdictional separations category relationships and/or allocation factors.**

\* \* \* \* \*

- (b) Effective July 1, 2001, through December 31, 2024, local exchange carriers subject to price cap regulation, pursuant to § 61.41 of this chapter, shall assign costs from the part 32 accounts to the separations categories/sub-categories, as specified herein, based on the percentage relationships of the categorized/sub-categorized costs to their associated part 32 accounts for the twelve-month period ending December 31, 2000. If a part 32 account for separations purposes is categorized into more than one category, the percentage relationship among the categories shall be utilized as well. Local exchange carriers that invest in types of telecommunications plant during the period July 1, 2001, through December 31, 2024, for which it had no separations category investment for the twelve-month period ending December 31, 2000, shall assign such investment to separations categories in accordance with the separations procedures in effect as of December 31, 2000. Local exchange carriers not subject to price cap regulation, pursuant to § 61.41 of this chapter, may elect to be subject to the provisions of paragraph (b) of this section. Such election must be made prior to July 1, 2001. Any local exchange carrier that is subject to § 69.3(e) of this chapter and that elected to be subject to paragraph (b) of this section may withdraw from that election by notifying the Commission by May 1, 2019, of its intent to withdraw from that election, and that withdrawal will be effective as of July 1, 2019. Any local exchange carrier that participates in an Association tariff, pursuant to § 69.601 et seq. of this chapter, and that elected to be subject to paragraph (b) of this section may withdraw from that election by notifying the Association by March 1, 2019, of such intent. Subject to these two exceptions, local exchange carriers that previously elected to become subject to paragraph (b) shall not be eligible to withdraw from such regulation for the duration of the freeze.

\* \* \* \* \*

3. Amend § 36.126(b)(5) by removing the date “June 30, 2014” and adding in its place “December 31, 2024.”

4. In 47 CFR part 36, remove the date “December 31, 2018” and add in its place everywhere it appears the date “December 31, 2024” in the following places:

- a. Section 36.3(a), (c), (d) introductory text, and (e);

- b. Section 36.123(a)(5) and (6);
- c. Section 36.124(c) and (d);
- d. Section 36.125(h) and (i);
- e. Section 36.126(b)(6), (c)(4), (e)(4), and (f)(2);
- f. Section 36.141(c);
- g. Section 36.142(c);
- h. Section 36.152(d);
- i. Section 36.154(g);
- j. Section 36.155(b);
- k. Section 36.156(c);
- l. Section 36.157(b);
- m. Section 36.191(d);
- n. Section 36.212(c);
- o. Section 36.214(a);
- p. Section 36.372;
- q. Section 36.374(b) and (d);
- r. Section 36.375(b)(4) and (5);
- s. Section 36.377(a) introductory text, (a)(1)(ix), (a)(2)(vii), (a)(3)(vii), (a)(4)(vii); (a)(5)(vii), and (a)(6)(vii);
- t. Section 36.378(b)(1);
- u. Section 36.379(b)(1) and (2);
- v. Section 36.380(d) and (e);
- w. Section 36.381(c) and (d); and
- x. Section 36.382(a).

**APPENDIX B**  
**Final Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Final Regulatory Flexibility Analysis (FRFA) on the possible significant economic impact on small entities by this Report and Order (Order).<sup>2</sup> An Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Further Notice of Proposed Rulemaking.<sup>3</sup> The Commission sought written public comment on the proposals in this rulemaking proceeding, including comment on the IRFA.<sup>4</sup> The Commission did not receive comments on the IRFA.

**A. Need for, and Objectives of, the Order**

2. The Commission's Part 36 jurisdictional separations rules originated more than 30 years ago when the Commission and its State counterparts used costs to set rates, and the rules were designed to help prevent local exchange carriers (LECs) from recovering the same costs from both the interstate and intrastate jurisdictions.<sup>5</sup> In 1997, the Commission initiated a proceeding to comprehensively reform those rules in light of the statutory, technological, and marketplace changes that had affected the telecommunications industry.<sup>6</sup> In 2001, the Commission, pursuant to a recommendation by the Federal-State Joint Board on Jurisdictional Separations (Joint Board), froze the Part 36 separations rules for a five-year period beginning July 1, 2001, or until the Commission completed comprehensive separations reform, whichever came first.<sup>7</sup> The Commission has extended the freeze seven times, with the most recent extension set to expire on December 31, 2018.<sup>8</sup> This impending deadline compels the Commission to make a choice between extending the freeze further or allowing long-unused separations rules to take effect on January 1, 2019.

3. The Commission finds that permitting the freeze to expire would impose significant burdens on rate-of-return carriers that would far exceed the benefits, if any, of requiring those carriers to comply with rules that they have not implemented since 2001. Accordingly, this Order extends for up to six years the freeze of Part 36 category relationships and jurisdictional cost allocation factors that the Commission adopted in the *2001 Separations Freeze Order* and subsequently extended until December 31, 2018. This additional extension will begin upon publication of the Order in the Federal Register, and will continue until the earlier of December 31, 2024, or the completion of comprehensive reform of the Part 36 jurisdictional separations rules.

4. Also, in the *2001 Separations Freeze Order*, the Commission granted rate-of-return carriers a one-time option to freeze their category relationships. Carriers that chose to freeze their category relationships in 2001 assign costs within Part 32 accounts to categories using their separations

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 604.

<sup>3</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 18-99, Appx. B (2018).

<sup>4</sup> *Id.* at Appx. C, para. 4.

<sup>5</sup> 47 CFR Part 36.

<sup>6</sup> See *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22126, para. 9 (1997).

<sup>7</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11393-408, paras. 18-55 (2001) (*2001 Separations Freeze Order*).

<sup>8</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 4219 (2017).



category relationships from 2000. Consequently, these companies are still separating their costs based on the technologies and services that were in place in 2000, instead of being able to adjust the amounts assigned to separations categories to reflect the current network costs and services.

5. In the *Rate-of-Return Business Data Services Order*, the Commission allowed carriers subject to the category relationships freeze that receive model-based and other forms of fixed high-cost support and elect incentive regulation for business data services to opt out of that freeze and update their category relationships.<sup>9</sup> In this Order, the Commission grants all other rate-of-return carriers operating under that freeze the opportunity to opt out of it—enabling carriers to better recover network upgrade costs from ratepayers that benefit from those upgrades and to take greater advantage of universal service programs that incent broadband deployment.

**B. Summary of Significant Issues Raised by Comments in Response to the IRFA**

6. There were no comments that specifically addressed the proposed rules and policies presented in the IRFA that was part of the *Further Notice*.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

7. Pursuant to the Small Business Jobs Act of 2010,<sup>10</sup> which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

**D. Description and Estimate of the Number of Small Entities to Which Rules May Apply**

8. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>11</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>12</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>13</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of

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<sup>9</sup> *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket No. 17-144, Report and Order, Further Notice of Proposed Rulemaking, and Second Further Notice of Proposed Rulemaking, FCC 18-146, 20-25, paras. 45-59 (rel. Oct. 24, 2018). Those carriers include rate-of-return carriers that receive support based on the Alternative-Connect America Cost Model (A-CAM carriers), rate-of-return carriers that receive fixed support under the Commission’s Alaska Plan, price cap affiliated rate-of-return carriers receiving support based on the Connect America Cost Model (CACM), and rate-of-return carriers that accept future offers of A-CAM support. *Id.* at 2 n.1. In that proceeding, the Commission also provided carriers subject to the category relationships freeze that accept future offers of A-CAM support or otherwise transition away from legacy support mechanisms and elect incentive regulation the opportunity to opt out of that freeze. *Id.* at 20, para. 45.

<sup>10</sup> 5 U.S.C. § 604(a)(3).

<sup>11</sup> *See* 5 U.S.C. § 603(b)(3).

<sup>12</sup> *See* 5 U.S.C. § 601(6).

<sup>13</sup> *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

operation; and (3) satisfies any additional criteria established by the SBA.<sup>14</sup> Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.<sup>15</sup>

9. *Incumbent Local Exchange Carriers.* The rules adopted in this Order affect the tariffed rates for interstate regulated services for incumbent LECs. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers.<sup>16</sup> Under the SBA definition, a carrier is small if it has 1,500 or fewer employees.<sup>17</sup> According to the FCC's Telephone Trends Report data, 1,307 incumbent LECs reported that they were engaged in the provision of local exchange services.<sup>18</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>19</sup> Consequently, the Commission estimates that most incumbent LECs are small entities that may be affected by the rules and policies adopted in this proceeding.

10. We have included small incumbent LECs in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>20</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.<sup>21</sup> Because our proposals concerning the Part 36 rules will affect all incumbent LECs, some entities employing 1,500 or fewer employees may be affected by the rule changes adopted in this Order. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

#### **E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

11. None. Carriers are not required to unfreeze their category relationships. Even if they choose to do so, affected carriers may adjust their category relationships in cost studies that generally are conducted prior to filing tariffed rates.

#### **F. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

12. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of

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<sup>14</sup> See 15 U.S.C. § 632.

<sup>15</sup> See SBA, Office of Advocacy, Frequently Asked Questions about Small Business 1 (2016), [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf).

<sup>16</sup> See 13 CFR § 121.201, NAICS code 513310.

<sup>17</sup> See 13 CFR § 121.201, NAICS code 517110.

<sup>18</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Tbl. 5.3 (Sept. 2010).

<sup>19</sup> See *id.*

<sup>20</sup> See 5 U.S.C. § 601(3).

<sup>21</sup> See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to Chairman William E. Kennard, FCC (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR § 121.102(b).

compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.<sup>22</sup>

13. The jurisdictional freeze has eliminated the need for all incumbent LECs, including incumbent LECs with 1,500 employees or fewer, to complete certain annual separations studies that otherwise would be required by the Commission's rules. Thus, an extension of this freeze avoids increasing the administrative burden of regulatory compliance for rate-of-return incumbent LECs, including small incumbent LECs.

14. Presently, rate-of-return carriers in a limited number of study areas operate under the category relationships freeze. When the Commission granted rate-of-return carriers the opportunity to elect the category relationships freeze, it specified the freeze would be an interim, "transitional measure" lasting no more than five years.<sup>23</sup> But, the freeze has now lasted 17 years, and carriers that elected it are prohibited from withdrawing from that election.<sup>24</sup> In this Order, the Commission grants affected carriers the opportunity to voluntarily opt out of this freeze, rather than requiring carriers to do so. The Commission recognizes that the size, cost structures, and investment patterns of these carriers vary widely, and therefore enables an individual carrier to decide for itself whether the economic benefits of unfreezing its category relationships outweigh any costs. The Commission therefore certifies that this Order will not have a significant economic impact on a substantial number of small entities.

**G. Federal Rules that May Duplicate, Overlap, or Conflict with the Final Rules**

15. None.

**H. Report to Congress**

16. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>25</sup> In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>26</sup>

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<sup>22</sup> See 5 U.S.C. § 603(c)(1)-(4).

<sup>23</sup> *2001 Separations Freeze Order*, 16 FCC Rcd at 11383, 11392, paras. 2, 17.

<sup>24</sup> See 47 CFR § 36.3 (carriers electing the category relationships freeze are not eligible to withdraw their elections).

<sup>25</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>26</sup> See *id.* § 604(b).

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

With the expiration of the current separations freeze rapidly approaching, and no consensus by the Federal-State Joint Board on how to pursue longer-term reform, our action today provides critical stability to the shrinking number of rate-of-return carriers subject to the jurisdictional separations rules. Certainly, it makes much more sense to spend the Commission's time and resources on substantive work than on repeated freeze extensions, and that is why I sought a much longer extension. However, I am willing to agree to Commissioner Carr's request for a reduced extension and look forward to his active participation on coming projects. It should be widely-recognized that the need for comprehensive reform has become increasingly irrelevant in view of technological and regulatory obsolescence, and that the separations rules may ultimately become defunct by the time the six-year extension lapses. Therefore, the Joint Board will likely consider certain discrete changes, such as eliminating unnecessary recordkeeping requirements, that would be helpful and achievable in the near-term.

I also appreciate that the State Members of the Joint Board have weighed in by voicing their support for the Commission's plan for a six-year freeze extension and an opt-out opportunity for carriers whose category relationships have been frozen since 2001. As Joint Board Chair, I am committed to working with State Members, and I am grateful that we are on the same page on this item. However, to be clear, the State Members' letter was in no way a necessary precondition for adopting this Report and Order. The Commission has full statutory authority to extend the current separations freeze in the absence of a new Joint Board referral, and the item gives no indication that new precedent has been established otherwise.

**STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

“Jurisdictional separations” is not a phrase one hears very often these days. In many ways, these rules are a remnant of a bygone era where monopolies dominated the market for local telephone exchange service. The telecom marketplace of today bears little resemblance to that world. Yet for a subset of carriers, the jurisdictional separations process still matters.

Since 2001, the Commission has frozen the separations rules to ensure stability for small, rate-of-return carriers and to give the Federal-State Joint Board the opportunity to pursue substantive separations reform. We have extended that freeze every few years ever since – an extension process that consumes resources and can detract time and attention away from efforts to complete broader and substantive reforms. With the most recent extension of the freeze due to expire on December 31, the Commission must again tackle how best to move forward.

I approached this most recent round with the goal of reaching common ground with my hardworking colleagues here on the Commission and our State counterparts, including those we serve with on the Joint Board. I appreciated the chance to hear directly from my fellow Joint Board members and learn from their perspectives. During this process, the State members of the Joint Board shared with me their concerns about the impact that a long-term extension would have on the prospect for substantive separations reform. So I appreciate that my fellow federal Joint Board Member, Commissioner O’Rielly, was willing to work with me to reach a compromise. In fact, the agreement we reached now aligns with the input provided by our State counterparts in this proceeding.

I want to thank the State members of the Joint Board for their input. I appreciated the opportunity to work with them through this process. And I look forward to continuing to work collaboratively with them on policies that will help bring more broadband to more Americans.