Oral Argument Requested

In the
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 19-1085

Agency No. 18-182

THE IRREGULATORS, NEW NETWORKS INSTITUTE, BRUCE A. KUSHNICK, MARK N. COOPER, TOM ALLIBONE, KENNETH LEVY, FRED GOLDSTEIN, AND CHARLES W. SHERWOOD, JR.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

INITIAL BRIEF FOR PETITIONERS THE IRREGULATORS, ET AL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

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A. Parties and Amici.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The following are parties in this Court:

1. Petitioners: THE IRREGULATORS, NEW NETWORKS INSTITUTE, BRUCE A. KUSHNICK, MARK N. COOPER, TOM ALLIBONE, KENNETH LEVY, FRED GOLDSTEIN, AND CHARLES W. SHERWOOD, JR.

THE IRREGULATORS is an independent consortium of senior telecom experts, analysts, forensic auditors, and lawyers who are former senior staffers from the FCC, state advocate and Attorneys General Office experts and lawyers, and former and current telecom consultants. NEW NETWORKS INSTITUTE was established in 1992 as a market research and consulting firm, and now acts as the managing director. These two consortia are not incorporated; they are informal organizations that employ a "brand" owned by Bruce A. Kushnick to represent the Petitioners and other peoples' collaborative efforts in search of rational telecommunications policy. Since these consortia are not a "corporation, association, joint venture, partnership, syndicate, or other similar entity" the disclosure required by Circuit Rule 26.1 is not necessary.

The remaining Petitioners are each natural persons and sue in their individual capacity.

TOM ALLIBONE is an individual who resides at 1062 Embarcation Road, Washington Crossing, Pennsylvania 18977.

MARK N. COOPER is an individual who resides at 504 Highgate Terrace, Silver Spring Maryland 20904.

FRED GOLDSTEIN is an individual who resides at PO Box 920362, Needham Massachusetts 02492.

BRUCE A. KUSHNICK is an individual who resides at 185 Marine Ave, Apt 4E, Brooklyn, New York 11209.

KENNETH LEVY is an individual who resides at 2745 N Van Buren Ave., Tucson, Arizona 85712.

CHARLES W. SHERWOOD, JR. is an individual who resides at 3561 North Honeylocust Drive, Beverly Hills, Florida 34465.

All Petitioners are represented by W. Scott McCollough, MCCOLLOUGH LAW FIRM, P.C., 2290 Gatlin Creek Rd., Dripping Springs, TX 78620.

2. Respondent: Federal Communications Commission

Respondent Federal Communications Commission is an independent federal administrative agency, and the body that initiated the matter and rendered the final decision before the Court. The United States of America is also a named Respondent as required by law.

Current counsel of record for the Respondents Federal Communications Commission are Matthew J. Dunne, Thaila Sundaresan and Jacob M. Lewis, all employed by the FCC Office of General Counsel. Respondent United States of America is represented by Robert J. Wiggers, Kathleen Kiernan and Robert B. Nicholson, U.S. Department of Justice, Antitrust Division, Appellate Section.

3. Intervenors: None.

4. *Amici*:

The National Exchange Carrier Association, Inc. and the National Telecommunications Cooperative Association filed a consent motion for leave to file an amicus brief in support of Respondents.

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B. Ruling Under 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, 33 FCC Rcd 12743 (Dec. 17, 2018).

C. Related Cases.

This case has not previously been before this Court or any other court.

STATEMENT REGARDING ORAL ARGUMENT

This matter will require the Court to determine the meaning and continued applicability of several inter-related statutes and regulations. The rulemaking Order under review proclaimed that these statutes and regulations are increasingly irrelevant for all carriers and do not apply at all to "price-cap" carriers. The Commission refused to meaningfully deal with significant and uncontested evidence presented below showing that price-cap carriers and state regulators are still bound by and must continue applying and enforcing these statutes and regulations. Compliance has caused excessive intrastate and local rates and malformed interstate prices and has fostered an anti-competitive environment.

The Court must also resolve some basic, but potentially complicated, administrative law issues under the arbitrary/capricious/abuse of discretion standards. The FCC asserted Petitioners' uncontested evidence and argument was "beyond the scope" even though it was directly responsive to one of the available choices expressly listed in the Notice of Proposed Rulemaking. The Commission claimed Petitioners' did not explain how their proposals would resolve a universally-acknowledged "misallocation" problem, even though those proposals would plainly end the misallocation. Did the Commission fail to meaningfully respond to Petitioners' evidence and argument, or were its conclusory and counter-factual assertions inadequate and fatal?

Finally, the Order under review allowed certain carriers to unilaterally change their allocations if they perceived a private benefit. The issue is whether it is an abuse of discretion let a carrier decide whether to do the right thing instead of requiring *all* carriers to do the right thing.

Petitioner believes that oral argument would be helpful and is necessary. Argument will assist the Court in its analysis of the issues presented on appeal, and will enable counsel to address any questions the Court may have.

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* Authorities upon which we chiefly rely are marked with asterisks.

JURISDICTIONAL STATEMENT

Petitioners seek review of the FCC's Report and Order and Waiver, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, 33 FCC Rcd 12743 (Dec. 17, 2018)(*Freeze Order*). The matter was part of a long-running rulemaking proceeding involving "jurisdictional separations."

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*, 33 FCC Rcd 7261 (2018)("*2018 Freeze NPRM*"). 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 *Freeze 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 an "interim freeze" to all separations factors pending further study and analysis.

The *Order on Review* is an "order" and "agency action" under 5 U.S.C. §551(6) and (13), respectively. 5 U.S.C §702, 47 U.S.C. §402(a), 28 U.S.C. §2342(1) and 28 U.S.C. §2344, provide jurisdiction in the courts of appeals for review of final "orders" of the Commission. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984); *Sorenson Communs., LLC v. FCC*, 897 F.3d 214, 223 (D.C.

Cir. 2018); *Media Access Project v. FCC*, 883 F.2d 1063, 1066 (D.C. Cir. 1989). The Petition for Review was timely filed on April 18, 2019. Venue is proper in this Court pursuant to 28 U.S.C. §2343.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the decision to extend the separations "freeze" for another six years affected by legal error?

2. Was the articulated basis for rejecting some of Petitioners' proposals–that "the separations rules are irrelevant to price cap carriers"–affected by legal error?

3. Was the failure to meaningfully address Petitioners' evidence and proposals affected by legal error?

4. Was the failure to consider consumer interests in general and intrastate consumer interests in particular affected by legal error?

5. Was the failure to recognize that small-cell and "5G" wireless and continued broadband growth will magnify current misallocations affected by legal error?

6. Was the failure to consider the impact on competition affected by legal error?

7. Was the permissive waiver allowing rate-of-return carriers to choose whether to opt-out of the freeze affected by legal error?

STATEMENT OF THE CASE

A. Overview.

The *Freeze Order* maintained and extended separations rules that all concerned agree "necessarily misallocate network costs" given "today's network configurations and mix of broadband." *Freeze Order* ¶43. *See also 2018 Freeze NPRM*, 32 FCC Rcd at 7210, ¶25. The now-extended separations factors have a direct impact on the prices all consumers pay for intrastate and interstate telecommunications. *Intrastate* rates are artificially high, and will remain so, because they are being required to recover significant costs that the Commission openly admits are properly attributable to the interstate jurisdiction. Within the interstate jurisdiction two services–End User Common Line and Carrier Common Line–are also bearing more costs than the Commission agrees they should, while one service–Business Data Services ("BDS," also called "Special Access")–enjoys artificially low cost attribution. These "misallocations" punish all consumers, regardless of the retail supplier they use for local, long distance, wireless or Internet service, and this is so for both price-cap and rate-of-return incumbent Local Exchange Carriers ("ILECs").

The freeze extension is harming consumers today, and it will only get worse since the direction and speed of these ongoing changes to "network configurations and mix of broadband, video and voice services" are accelerating. The roll-out of

so-called "5G" wireless services will require local consumers to support even more costs that have nothing to do with basic local telephone service.

The Commission erred by extending the freeze in light of this situation. But it also significantly erred in its analysis and rationalization that led to its conclusion. The FCC based its decision on false legal and factual premises and it assumed that only its preferred outcome was possible, even though the *2018 Freeze NPRM* expressly noted that allowing the freeze to expire was an option. The Commission held its separations rules are "increasingly irrelevant" in general and "do not apply to price-cap carriers" in particular. This is incorrect. *Freeze Order* ¶18 admits that separations are still used by the FCC for some ratemaking and federal universal service programs and by the states for ratemaking, universal service and other purposes.

Separations are still extraordinarily important because they determine which regulator (state or federal) has oversight of the costs/revenues and services in issue. Separations will be essential for so long as communications policy and pricing is subject to cooperative federalism and the states control intrastate rates and services on behalf of their constituents using embedded costs as the measure.

Price-cap carriers have been bestowed forbearance from the Part 36 rules. *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, 23 FCC Rcd 7302 (2008)("*AT&T Forbearance Order*"); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering et al.*, 23 FCC Rcd 13647 (2008); *Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Enforcement of Certain Legacy Telecommunications Regulations et al.*, 28 FCC Rcd 7627 (2013), *pet. for rev. denied sub nom. Verizon v. FCC,* 770 F.3d 961 (D.C. Cir. 2014)(collectively "forbearance orders"). But forbearance does not mean the separations rules are entirely irrelevant or the prescribed outcomes "do not apply" for any purpose when it comes to price-cap carriers. *C.f. Freeze Order* ¶¶4, 16, 24, n.65, 28. The forbearance orders did not purport to, did not, and could not set the states free to decide what costs are "intrastate" and therefore subject to state commission oversight. The states must accept separations outcomes for all purposes, including but not limited to rate-setting, taxation, reporting and monitoring, when they are overseeing price-cap carriers' intrastate operations.

The decision to grant waivers allowing rate-of-return carriers to end the freeze and update their factors at their discretion was arbitrary and capricious and an abuse of discretion. Petitioners assert that *all carriers* should be required to do so, not just those that perceive some private benefit. Consumers served by carriers

that do not accept the waiver will be forced to suffer the continued negative effects of the freeze.

B. Introduction to Separations.

"'Jurisdictional separation' is a procedure that determines what proportion of jointly used plant should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes." *MCI Telecomm. Corp. v. FCC*, 750 F.2d 135, 137 (D.C. Cir. 1984); 47 C.F.R. §36.1(b). Separations impact both interstate and intrastate telecommunications rates and service availability, and determine which regulator sets the price consumers pay. Separations outcomes define the scope of state commission oversight of intrastate service costs, rates and revenues, intrastate universal service programs, intrastate regulatory reporting and other more prosaic matters like the tax base for purposes of intrastate gross receipts and other intrastate regulatory assessments.

47 U.S.C. §221 "empowers the FCC to prescribe uniform separations procedures." The Commission determines the value and amount that will be attributed to interstate operations, and the remainder is deemed to be intrastate. The states may exercise 47 U.S.C. §§152(b) and 221(b) jurisdiction over intrastate services only after the FCC's §221(c) determination of what costs belong in the interstate jurisdiction, and they must accept the outcome for intrastate purposes. "FCC separations orders control state regulatory bodies," *Hawaiian Tel. Co. v.*

PUC, 827 F.2d 1264, 1275 (9th Cir. 1987), *cert. den.*, 487 U.S. 1218 (1988), and "affect state ratemaking authority to the extent such rules apply to the telephone companies within their jurisdiction." *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1567 (1992).

Some regulated costs are directly assigned because they flow from activity in only one jurisdiction,[1] while others are "jointly used." "Joint" costs, including those for "nontraffic sensitive" ("NTS") plant"[2] are divided through "allocation factors."[3] State and federal regulators then oversee their portion of "separated" costs to develop or at least inform the development of the ultimate rates charged for intrastate and interstate telecommunications services. *Brookings Mun. Tel. Co.,* 822 F.2d at 1155; *Rural Tel. Coal.*, 838 F.2d at 1310-1311.

The FCC noted the zero-sum nature of separations and therefore the need for uniform separations treatment 50 years ago. *American Telephone & Telegraph Co. & Associated Bell System Cos*., 9 FCC 2d 30, 90-91 (1967). The "primary purpose" of the Part 36 rules is *still* to "prevent ILECs from recovering the same costs in the interstate and intrastate jurisdictions." *In the Matter of Comprehensive*

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[1] *See, e.g.*, 47 C.F.R. §§36.2(a)(1), 36.154(b).

[2] *See, NARUC v. FCC*, 737 F.2d 1095, 1104-1105 (D.C. Cir. 1984); *MCI Telecomm. Corp.*, 750 F.2d at 137; *Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1155-1156 (1987); *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1310-1311, 1313-1314 (D.C. Cir. 1988). 47 C.F.R.§§36.2(b)(3)(iv) and 36.154(c) prescribe the "gross allocator" whereby 25% of jointly-used subscriber plant costs go to the interstate jurisdiction and 75% are assigned to the intrastate jurisdiction. *Freeze Order*, 33 FCC Rcd at 12745, ¶6 n.12.

[3] *See* 47 C.F.R. §§36.1(c), 36.2(a)(1), (2), 36.3(a).

Review of the Part 32 Uniform System of Accounts, Jurisdictional Separations and Referral to the Federal-State Joint Board, 33 FCC Rcd 10195, 10197, ¶7 (2018). A cost allocation to the interstate jurisdiction "in effect transfers those costs to the rate bases of interstate carriers, forces them to recover those costs through their rates, and reduces their profitability." *Rural Tel. Coal.,* 838 F.2d at 1313. The same is true for intrastate. Allocating costs to the intrastate jurisdiction forces intrastate ratepayers to bear the costs, and reduces the profitability of intrastate rates. *See also* New Networks April 17, 2017 comments, Hartman Rate Setting Memorandum, pp. 9-10, 25-28 [JA __].

Supreme Court decisions in the 1800s showed the need for federal regulation of jurisdictionally interstate services. *See, e.g., Wabash, St. Louis & Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886). Congress created the Interstate Commerce Commission in 1887. It then became clear that federal regulators would have exclusive jurisdiction to determine what costs and revenues are interstate. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 149 (1930).

The separation of costs between the state and interstate jurisdictions creates the boundary marker dividing the states' authority over intrastate matters and the FCC's control over interstate services. Accounting is addressed in 47 U.S.C. §220 and 47 C.F.R. Part 32 while "separations" is treated in 47 U.S.C. §221(c) and 47 C.F.R. Part 36.

The FCC ruled in 1982 that "separations procedures are binding on carriers, the states, and ourselves." *American Telephone & Telegraph Co. (Manual and Procedures for Allocation of Costs)*, 84 FCC 2d 384, 391 (1981), *aff'd sub nom. MCI Telecommunications Corp. v. FCC*, 675 F.2d 408 (D.C. Cir. 1982). The Supreme Court agreed before holding that 47 U.S.C. §152(b) "fences off from FCC reach or regulation intrastate matters–indeed, including matters "in connection with" intrastate service. *Louisiana PSC v. FCC*, 476 U.S. 355, 370 (1986). The Supreme Court held that the states have "accounting" leeway but this is permitted only "once the correct allocation between interstate and intrastate use has been made." 476 U.S. at 375.

Under *Louisiana PSC* states can decide what to do after costs are separated but FCC separation prescriptions preempt and bind states even for intrastate purposes. The Ninth Circuit expressly so ruled in *Hawaiian Tel.*, 827 F.2d at 1276 ("Thus, it is only *after* a uniform separations formula has been applied that a state's independent depreciation rule for intrastate ratemaking can be protected from federal preemption."). The FCC's separations rules "bind and control state regulatory bodies," *Hawaiian Tel.* 827 F.2d at 1275, and "affect state ratemaking authority to the extent such rules apply to the telephone companies within their jurisdiction." *Crockett Tel.*, 963 F.2d at 1567. *See also id* at 1573 ("...when the

Commission has prescribed an applicable separation methodology, states are not free to ignore it").

The jurisdictional fence was once characterized as "horse-high, hog-tight, and bull-strong." *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev'd in pertinent part, AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).The Omnibus Budget Reconciliation Act of 1993 and Telecommunications Act of 1996, however, punched some holes. They allowed the FCC to derogate state authority over purely intrastate matters pursuant to 47 U.S.C. §§160(e), 251, 253(d), 332(c)(1)(A) and 332(c)(3). *Id.*

The Commission recently lost its ardor for cost accounting. It has taken action–including under §160–that it claims renders separations and cost accounting increasingly "irrelevant," unnecessary and no longer useful for interstate purposes. *Freeze Order* ¶¶16-18. But it has not–at least so far–let go of its statutory authority to make binding cost assignments to each side of the jurisdictional boundary. Even after the forbearance orders the states cannot "roam unfettered across the separations terrain," and there is no "path for unilateral State actions." *In the Matter of Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida PSC*, 93 FCC2d 1287, 1298-1299, ¶¶25, 26 (1983). The forbearance orders did not set states loose to do their own separations thing.

C. Historical Context.

"Comprehensive separations reform" efforts started in 1997. The FCC instituted an "interim" separations "freeze" in 2001 to "be in effect for five years or until the Commission has completed comprehensive separations reform, whichever comes first." *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 16 FCC Rcd 11382, 11383, ¶2 (2001). Despite the passage of more than twenty years "comprehensive separations reform" has yet to occur and the freeze expiration has approached eight different times. The first seven times the Commission extended the freeze for periods ranging from one to three years.

The agency action before the Court is the eighth and most recent time the FCC has kicked the separations reform can down the road. The *Freeze Order* promulgated a set of final rules amending the then-current "jurisdictional" and "category relationships freeze" end dates. For the most part "December 31, 2024" replaced "December 31, 2018"–thus "extending" the "freeze" for six years, double the longest previous extension. The *Freeze Order* also granted a "one-time opportunity" for certain "rate-of-return" carriers to unilaterally "unfreeze" and "update" their factors if they perceived a company benefit from doing so. *Freeze Order* ¶¶29-40.

Petitioners opposed the proposed extension and argued for an end to the freeze. Petitioners contested the assertion in *2018 Freeze NPRM* ¶¶9, 10 and 11

that separations is irrelevant to price-cap carriers by producing evidence that the states still apply and enforce Part 36 outcomes for intrastate purposes. Petitioners provided extensive facts showing that current separations result in massive over-allocation of costs to local service, and this has lead to huge unwarranted rate increases. Price-cap carriers like Verizon and AT&T are manipulating costs, revenues and access line counts, underpaying state taxes and giving free service to (or at least significantly undercharging) their wireless and Internet affiliates in comparison to what they charge unaffiliated competitors. New Networks April 17, 2017 comments, pp. 3-4 and *passim* [JA __]. Petitioners showed that the present harms would be significantly magnified given ILEC plans to materially increase their support of wireless services in general and "5G" wireless in particular. Irregulators comments [JA __]; Irregulators Reply comments [JA __]; Irregulators April 28, 2018 comments [JA __]; Irregulators July 18, 2017 comments [JA __];. Irregulators May 25, 2017 comments [JA __]; Irregulators April 17, 2017 comments [JA __]. *See also* New Networks December 16, 2015 comments [JA __].

Petitioners suggested various short-term steps to mitigate any compliance burdens that would flow from expiration. Specifically, Petitioners indicated that representative benchmarks could be used on a temporary basis. In the alternative,

Petitioners suggested that the current frozen factors could be replaced with new revenue-based percentages. Irregulators' comments at 8-9 [JA __].

The Commission summarily declared that Petitioners' position and alternatives to extension were "beyond the scope" of the NPRM and the separations rules "do not apply" to price-cap carriers in any event. *Freeze Order* ¶24 and n.65. That is incorrect. Petitioners directly opposed the proposal to extend the freeze contained in *2018 Freeze NPRM* ¶19, answered the questions posed in ¶¶20, 26, 34 and 38 and proved current separations outcomes were directly causing excessive local rates, even for price-cap carriers. The *Freeze Order* essentially says proposals to let the freeze end (which *2018 Freeze NPRM* ¶17 expressly said was an option[4]) do not merit evaluation or discussion. The FCC assumed the only choice related to "how long." The Irregulators, however, gave options to extension that the FCC ignored. *But see Freeze Order* ¶¶20 and 24 (and their associated footnotes). The FCC may not have liked the Petitioners' position and recommendations but the comments were obviously within the scope defined in the *2018 Freeze NPRM* and the Commission refused to meaningfully deal with the Petitioners' points based on a patently incorrect premise and in the face of

[4] "...we must choose between extending the separations freeze and allowing long-unused separations rules to take effect on January 1, 2019."

overwhelming evidence that the states are still using Part 36 outcomes for price-cap carriers.

Freeze Order ¶24 asserts that Petitioners' "failed to explain how ending the freeze would alleviate any such misallocation." *Id.* ¶24. The contention is absurd. Ending the freeze and moving to factors and assignments that reflect reality would have "alleviated the misallocation" by ending the misallocation. It would require all carriers–not just those that perceived a private benefit–to "update" their factors and thereby go through the process of reallocating costs between jurisdictions and, ultimately interstate service categories. For the most part this would lead to significant *reductions* to the carriers' cost assignments to intrastate and increases to interstate. It would have also ultimately required cost assignment adjustments between interstate rate categories.

The Petitioners offered another "solution" that would have removed any need for separations at all, and thus moot the issue of whether to end or extend the freeze. Specifically, Irregulators' comments at 8-9 [JA __] advocated a declaration that the states are no longer bound by separations outcomes. This would allow states to abandon embedded costing in favor of incremental or forward-looking costs. The *Freeze Order* did not mention this alternative solution, but neither did it take any action consistent with it.

Freeze Order ¶24 and n.65[5] dismissed Petitioners' proposals by claiming Petitioners were primarily addressing "price-cap" carriers, and the separations rules "do not apply" to price-cap carriers. This summary rejection did not bother to address all of Petitioners evidence that the states were in fact routinely applying Part 36 outcomes to price-cap carriers. Petitioners' other proposals were implicitly denied without discussion since the final rule action was entirely incompatible with all of them.

D. Frozen Factors Cause Malformed Rates.

Current separations methods using frozen factors "necessarily misallocate network costs." *Freeze Order* ¶43. The result over-allocates costs to intrastate, which means higher intrastate retail consumer prices for basic local service, and an under-allocation of costs to interstate. Within the interstate jurisdiction (after the initial jurisdictional under-allocation) interstate End User Common Line (paid by consumers) and interstate carrier common line switched access (paid by the consumer's toll provider) receive an artificially high allocated amount, whereas the allocated amounts for BDS were and are far too low. WTA comments, p. 6 [JA __]; NARUC comments, pp. 4-7, 18-19 [JA ___]; NARUC Reply comments, pp. 2, 5-8 [JA __]; Irregulators comments pp. 3-8 [JA __]; ITTA comments p. 4 [JA

[5] "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."

__]. The FCC expressly agreed this was so in *Freeze Order* ¶¶31 and 43. *2018 Freeze NPRM* ¶25 acknowledged the same problem.

Malformed rates enable ILECs to undermine competition by putting price squeezes on potential and actual competitors. Properly allocating costs to more competitive services would lower rates for intrastate services and more vigorous competition would create downward pressure on prices for interstate services.

If the freeze were to expire some carriers might be annoyed because of the compliance burden.[6] They certainly would not welcome what happened next, but consumers would be overjoyed. The reallocation of costs between and within each jurisdiction would lead to reductions in retail end user local (intrastate) rates and to the interstate end user common line charge. Wholesale interstate carrier common line rates would go down. No commenter disagreed with WTA's comment on page 6 [JA __] that this would be so for rate-of-return carriers, or the Irregulators' demonstration of the same outcome for price-cap carriers for intrastate purposes. Irregulators' comments at 3-19 [JA __]. The FCC focused on industry burden but gave only a passing thought to the consumer benefits that would accrue if all carriers were required to update their factors to reflect reality. *Freeze Order* ¶33. Interestingly, the FCC did find large benefits if a carrier *voluntarily* updated its

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[6] The claimed compliance burden may be overstated. Terral Aug. 27, 2019 Comments p. 11 [JA __] indicated that it must perform much of the work described in *Freeze Order* ¶¶20-23 to meet other existing requirements.

factors, *id.* ¶¶25-32, but it never explained why these benefits should not flow to all ratepayers.

All of Petitioners' proposals would take material steps toward reducing the current extreme mismatches because they would lead to separated cost results that more closely resemble actual relative jurisdictional use and cost causation. The carriers would not be forced to conduct rushed full-blown studies, and the Joint Board could complete its recommendation on overall reform. The FCC chose to instead extend but allow carriers a waiver if they wanted to update. The Commission erred and the Court must vacate and remand.

SUMMARY OF THE ARGUMENT

The FCC's failure to respond in a reasoned manner to Petitioners' comments and evidence was plain and fatal error.

The Order's assertion that Part 36 "does not apply" to price cap carriers is contrary to the evidence, does not deserve *Auer* or *Chevron* deference and is incorrect as a matter of law. The states are still required to apply Part 36 outcomes to price-cap carriers for ratemaking and other regulatory matters.

Extending the freeze was arbitrary, capricious and an abuse of discretion. Maintaining the freeze harms consumers; small-cell and "5G" wireless deployment and continued broadband growth will magnify current misallocations.

The decision to allow rate-of-return carriers to choose whether to opt-out of the freeze was arbitrary, capricious and an abuse of discretion. The FCC should have completely ended the freeze, thereby requiring *all* carriers to update their separations allocations using truly representative data.

STANDING

Circuit Rule 28(a)(7) requires the petitioner to set forth the basis for the claim of standing. Addendum Standing contains Affidavits by each Petitioner adducing the necessary facts to demonstrate standing.

Each Petitioner is a telecommunications consumer, and all are directly impacted by the decision below because it materially affects the prices they pay and the competitive choices they have for the telecommunications they use. The several discrete impacts described by the Affidavits are varied and sometimes nuanced, but generally speaking the decision below (1) forces Petitioners to pay higher prices for basic intrastate telephone service because of inflated cost attribution; (2) under-allocates costs to ILEC services used by wireless and broadband Internet service providers; and (3) harms insurgent competitive providers that are not affiliated with incumbent local exchange carriers because it allows and obscures anti-competitive cross-subsidization. The Petitioners do not directly purchase service from any "rate-of-return" carriers, but they use retail providers that purchase wholesale services from rate-of-return carriers and indirectly provide the funds paid to the rate-of-return carrier. Each Petitioner pays a pass-through "universal service" surcharge that recovers assessments on their underlying providers. These assessments go to state and federal Universal Service

Funds, and monies from the Universal Service Funds flow to the rate-of-return carriers.

The separations rules determine what each Petitioner pays at retail. The separations rules determine what Petitioners' retail providers pay at wholesale for telecommunications inputs and this is passed on to Petitioners as part of their retail bill. When a petitioner makes a wireline or wireless toll call to a rate-of-return LEC's exchange the IXC or wireless provider pays wholesale access charges to the rate-of-return LEC and this amount is implicitly recovered through the retail price each Petitioner pays to his IXC or wireless provider. Separations also significantly affect the operation of state and federal universal service funds, and Petitioners pay USF pass-through charges each month. Each Petitioner desires and deserves competitive options that come with reasonable and rational prices, and competition also relies, at least in part, on proper separations.

In the aggregate each Petitioner suffers harm because the communications market is significantly skewed, in terms of prices for the various services and the availability and viability of actual and potential competition. A significant contributor to the current broken system is the entirely misaligned separations regime that leads to some services being overburdened and others receiving artificially low cost attribution. Cross-subsidization runs rampant between and within each jurisdiction. *See* Affidavit of Mark Cooper; Affidavit of Fred

Goldstein; Affidavit of Bruce A. Kushnick; Affidavit of Thomas Allibone; Affidavit of Kenneth A. Levy and Affidavit of Charles W. Sherwood (all contained in Addendum Standing).

In sum, the decision below negatively impacts consumers in several ways. Each Petitioner is a consumer suffering an injury in fact caused by the decision below. The requested relief, if granted, will redress the injury. Petitioners therefore have standing to bring this Petition for Review.

ARGUMENT

I. STANDARD OF REVIEW.

A. Standard Of Review For Rulemaking Decisions.

1. Arbitrary/Capricious/Abuse of Discretion; Substantial Evidence

5 U.S.C. §706 requires the Court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[7] After doing so the Court must "hold unlawful and set aside" if the "agency action, findings, and conclusions" are (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; or (E) unsupported by substantial evidence. The Court must review those parts of the record cited by the parties[8] to make the required legal determinations.

This Court is well-familiar with the "arbitrary and capricious" and "substantial evidence" standards:

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[7] 5 U.S.C. §551(13) defines "Agency action." It "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Thus, §706 obliges the Court to "determine the meaning or applicability of the terms" of the Part 36 rules *and* the *Freeze Order*. The Court will have to also interpret and apply the effect of several forbearance orders on the separations rules.

[8] The parties are preparing a Deferred Joint Appendix that will include the relevant portions of the record below.

> Under the Administrative Procedure Act, the reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."...
>
> Although the court's review entails a "narrow" standard of review, "an agency [must] 'examine the relevant data and articulate a satisfactory explanation for its action.'"

Nat'l Lifeline Ass'n v. FCC, 915 F.3d 19, 27-28 (D.C. Cir. 2019)(internal citations omitted); *See also FCC v. Fox Television Stations, Inc*., 556 U. S. 502, 513 (2009); *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1245 (D.C. Cir. 2018); *Nat. Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009).

The Court must consider the record supplied by the parties and determine whether the FCC's findings of fact are "unsupported by substantial evidence." 5 U.S.C. §706(E). If there is less than a scintilla of evidence or the evidence cannot logically support an agency finding based on the entirety of the evidence then the decision must be vacated. *World Color (USA) Corp. v. NLRB*, 776 F.3d 17, 20-21 (D.C. Cir. 2015); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1219-1220 (D.C. Cir. 2012); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1132-1133 (D.C. Cir. 2001); *Ethyl Corp. v. EPA*, 541 F.2d 1, 98 (D.C. Cir. 1978); *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996)("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *Genuine*

Parts Co. v. EPA, 890 F.3d 304, 312 (D.C. Cir. 2018)("[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation").

A "determination made in the absence of any evidence in the record to support it" represents a "clear error of judgment." *Ethyl*, 541 F.2d at 97-98 (emphasis added); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 51 (1983) *aff'ng in part State Farm Mut. Auto. Ins. Co. v. DOT*, 680 F.2d 206, 231 (D.C. Cir. 1982)("not one iota of evidence to support" agency determination).

> Ultimately, in their application to the requirement of factual support[,] the substantial evidence test and the arbitrary or capricious test are one and the same. An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence. Under both standards, an agency cannot ignore evidence contradicting its position.

Genuine Parts Co., 890 F.3d at 312 (internal citations and quotation marks omitted).

The Court must also determine whether the Commission abused its discretion. One "abuse of discretion" question pertains to the propriety of the decision to grant "one-time waivers" allowing rate-of-return carriers to "unfreeze" at their discretion. The most significant issue, however, is whether the decision to once again extend the interim "freeze" was an abuse of discretion or arbitrary and capricious.

The Court has dealt with cost accounting and universal service "freezes." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105-1106 (D.C. Cir. 2009); *MCI Telecomms. Corp.,* 750 F.2d at 141; *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 64-65 (D.C. Cir. 2011) and *AT&T, Inc.*, 886 F.3d at 1246 indicate that "substantial deference" is appropriate where the agency institutes an "interim" measure to address concerns about "industry upheaval." But even substantial deference to agency discretion has its limits. *See Competitive Telcoms. Ass'n. v. FCC,* 87 F.3d 522, 529-532 (D.C. Cir. 1996)(refusing to defer to an "interim" measure that had been in place for 13 years).

2. Agency response to commenters' material points.

Agencies are required to respond to comments that are "relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [because they] cast doubt on the reasonableness of a position taken by the agency." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977), *cert. den*., 434 U.S. 829 (1977). This requirement–which is supplemented by the demands of 5 U.S.C. §553(e)–may not be "particularly demanding," *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993), but the obligation to respond to significant comments represents the legally enforceable minimum and failing to meet it is arbitrary and capricious. *Sierra Club v. EPA*, 863 F.3d 834, 838-839 (D.C. Cir. 2017). The agency has to "respond in a reasoned manner to the

comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Action on Smoking & Health v. Civil Aeronautics Bd*., 699 F.2d 1209, 1216 (D.C. Cir. 1983). *See also Brookings Mun. Tel.,* 822 F.2d at 1166-1169. "[T]he Commission must do more than simply ignore comments that challenge its assumptions and must come forward with some explanation that its view is based on some reasonable analysis." *Alltel Corp. v. FCC*, 838 F.2d 551, 558 (D.C. Cir. 1988).

As this Court noted long ago in *Home Box Office*, 567 F.2d at 35 "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." The reviewing court cannot assure itself that all relevant factors have been considered by the agency if the decision does not satisfactorily address contentions and arguments made in the course of the proceeding.

Failure to respond requires invalidation if the points raised in the comments were sufficiently "central," "significant" or "viable." Agency silence in such case renders the decision arbitrary and capricious. *See, e.g., ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987); *Farmers Union Cent. Exch., Inc. v. FERC*., 734 F.2d 1486, 1511-1513 (D.C. Cir. 1984); *Home Box*

Office, 567 F.2d at 35 n.58. The fundamental purpose of the response requirement is to show that the agency has indeed considered all significant points articulated by the public; in addition, agency responsiveness aids in the Congressionally sanctioned process of judicial review of agency action. *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 883-84 (D.C. Cir. 1979).

Failure to address material points about central issues raised in comments, "or at best its attempt to address them in a conclusory manner, is fatal..." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) *citing United Mine Workers v. Mine Safety, Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010). If substantive comments raised meritorious issues unanswered by the agency, then the Court must remand for further proceedings. *Sierra Club,* 863 F.3d at 838.

B. *Auer* Deference.

Kisor v. Wilkie, __ U.S. __, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019) is the most recent analysis of *Auer*[9] deference, where the Supreme Court has "often thought that a court should defer to the agency's construction of its own regulation." 204 L.Ed. at 853. The majority retained *Auer*, but made clear courts must still exercise the judicial function:

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[9] *See Auer v. Robbins*, 519 U.S. 452 (1997).

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. ... But if the law gives an answer–if there is only one reasonable construction of a regulation–then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Auer* does not, and indeed could not, go that far.
>
> And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. ... To make that effort, a court must "carefully consider[]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.
>
> If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." And let there no mistake: That is a requirement an agency can fail.

Kisor, 204 L.Ed. at 858-859 (ellipses added to denote removed text, internal citations and quotations omitted).

C. *Chevron* Deference.

Chevron[10] is usually treated as a two-step analysis. At step one the question is whether the statutory language is unclear. It there is no ambiguity then the inquiry ends. Step two (is the agency interpretation based on a permissible

[10] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

construction of the statute?) is reached only if there is indeed an ambiguity. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *Chevron*, 467 U.S. at 843, n.9; *Kisor*, 204 L.Ed. at 858.

The *Chevron* doctrine only applies if the agency "exercised its discretionary authority to interpret the statute," determine whether ambiguity exists, and then "show why, even if [the Commission's reading] is not the only possible interpretation of the statute, it is nonetheless a reasonable interpretation of the statute." When there is no true agency analysis the decision suffers from a "want of reasoned decision-making. *Pub. Citizen*, 332 F.3d at 661 (holding that 'even if we were prepared to accord Chevron deference to the [agency's] interpretation of the statute expressed in its [order], that document contains no interpretation of [the statute, the rules or its informal rulemaking orders] to which we might defer.'"(words in brackets changed from original); *Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012)(same). If the agency did not make these determinations in the first instance the court must remand so it can do so. *GTE Serv. Corp. v. FCC*, 224 F.3d 768, 775-76 (D.C. Cir. 2000), *citing Prill v. NLRB*, 755 F.2d 941, 956-57 (D.C. Cir. 1985).

Stated another way, when the Court is "'left wondering how the [agency] in these circumstances interprets' the statute, and when 'an agency fails to wrestle with the relevant statutory provisions, we cannot do its work for it.' 'Our general

practice in these sorts of situations is to remand the proceeding to enable the agency to interpret the statute in the first instance.'" *Hosp. of Barstow, Inc. v. NLRB*, 820 F.3d 440, 445 (D.C. Cir. 2016)(internal citations omitted).

II. THE SEPARATIONS RULES STILL APPLY TO STATES OVERSEEING PRICE-CAP CARRIERS.

A. The Commission Erred By Not Substantively Addressing Petitioners' Comments.

Petitioners opposed the proposed freeze extension. Petitioners rebutted the assertion in *2018 Freeze NPRM* ¶¶9, 10 and 11 that separations is irrelevant to price-cap carriers by producing uncontested evidence that the states still use and rely on Part 36 separations results to conduct their intrastate regulatory oversight of price-cap carriers. Petitioners also demonstrated that the freeze has led to extreme misallocations and grossly inflated local rates. Irregulators comments [JA __]; Irregulators Reply comments [JA __].

Petitioners suggested various short-term steps to mitigate any compliance burdens that might flow from expiration. Specifically, Petitioners indicated that representative benchmarks could be used on an interim basis. In the alternative, Petitioners suggested that the current frozen jurisdictional and category relationship freezes could be replaced with new revenue-based percentages. Irregulators' comments at 8-9 [JA __].

The Petitioners offered another "solution" that would have removed any need for separations at all, and thus moot the issue of whether to end or extend the freeze. Specifically, Irregulators' comments at 8-9 [JA __] advocated a declaration that the states are no longer bound by separations outcomes. This would allow states to abandon embedded costing in favor of incremental or forward-looking costs. The *Freeze Order* did not mention this alternative solution, but neither did it take any action consistent with it.

The FCC dismissed some of Petitioners' proposals by claiming Petitioners were primarily addressing "price-cap" carriers. The Commission summarily declared that Petitioners' position and alternatives to extension were "beyond the scope" of the NPRM and the separations rules "do not apply" to price-cap carriers in any event. *Freeze Order* ¶24 and n.65. That is incorrect. Petitioners directly opposed the proposal to extend the freeze contained in *2018 Freeze NPRM* ¶19 by answering the questions posed in ¶¶20, 26, 34 and 38 and showing that current separations outcomes were directly causing excessive local rates, even for price-cap carriers.

The *Freeze Order* essentially says proposals to let the freeze end (which *2018 Freeze NPRM* ¶17 expressly said was an option[11]) do not merit evaluation or

[11] "...we must choose between extending the separations freeze and allowing long-unused separations rules to take effect on January 1, 2019."

discussion. The FCC assumed there was not an "expiration" option after all and the only question was "how long." But even then it ignored the Petitioners short-term options to a multi-year extension. *Freeze Order* ¶¶20 and 24 (and associated footnotes). The comments were obviously within the scope defined in the *2018 Freeze NPRM*. The Commission refused to meaningfully deal with the Petitioners' points based on a patently incorrect premise and in the face of overwhelming evidence that Part 36 outcomes still matter to state oversight of price-cap carriers.

The Commission also incorrectly asserted that Petitioners' "failed to explain how ending the freeze would alleviate any such misallocation." *Id.* ¶24. The contention is absurd. Ending the freeze and moving to factors and assignments that reflect reality would have "alleviated the misallocation" by ending the misallocation.

Petitioners' comments were directly responsive to the *2018 Freeze NPRM*. They were "relevant to the agency's decision and [] if adopted, would require a change in an agency's proposed rule." They were "significant," "central" and "viable." But the agency failed to "respond in a reasoned manner," and chose to "address them in a conclusory manner." This was arbitrary, capricious and "fatal." *Home Box Office*, 567 F.2d at 35 n.58; *Sierra Club,* 863 F.3d at 838-839; *Action on Smoking & Health*, 699 F.2d at 1216; *Brookings Mun. Tel.,* 822 F.2d at 1166-1169; *ACLU*, 823 F.2d at 1581; *Baltimore Gas & Electric Co.*, 817 F.2d at 116; *Farmers*

Union Cent. Exch., Inc., 734 F.2d at 1511-1513; *Citizens to Save Spencer County*, 600 F.2d at 883-84; *Ass'n of Private Sector Colls. & Univs.*, 681 F.3d at 449. The *Freeze Order* "entirely failed to consider an important aspect of the problem" and "offered an explanation for its decision that runs counter to the evidence before the agency" *Nat'l Lifeline Ass'n*, 915 F.3d at 27.

The Court must vacate and require substantive and reasoned responses to Petitioners' evidence and argument on remand.

B. The Agency's Assertion That Part 36 "Does Not Apply" to Price Cap Carriers Is Not Supported By Substantial Evidence.

The separations rules still contain express language controlling price-cap carriers' separations obligations. A short and non-exhaustive list includes 47 C.F.R. §§36.3(b), 36.123(a)(5), 36.124(c), 36.125(h), 36.126(b)(6), 36.141(c) and 36.154(g). Section 36.3(b) unequivocally requires price-cap carriers to "assign costs from the accounts under part 32 of this chapter (part 32 account(s)) 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."[12] There are many different "accounts" that contain misallocations but one principal example is Account 6720, Corporate Operations Expense. *See* 47 C.F.R. §36.391. The

[12] These words basically implement the "freeze" that was instituted in 2001.

Verizon NY "frozen" interstate factor for Corporate Operations Expense is approximately 39%, which means 61% is left over for the states to deal with. Irregulators comments, pp. 10-11 [JA __]. That may have been appropriate in 2001, when local service constituted 65% of Verizon NY's revenue and Corporate Operations expense was "only" $121.83 per-line. But things changed, a lot. By 2017 local service was only 21.6% of Verizon NY's revenue, but Corporate Operations expense increased by 664%, to $930.59 per line. Irregulators Reply comments, p. 4-5, 7 [JA __]. The frozen factor for "access" (which includes interstate BDS) is around 30%, even though "access" revenues are now twice that of Local and comprise almost 50% of total revenues. *Id.*[13]

All these figures were used in the Irregulators' comments. No commenter contested or rebutted this evidence. The FCC did not find they were incorrect or misleading.

The forgoing information is available because New York requires that all telephone companies–including price cap carriers–file annual financial reports. *See* New York Codes, Rules and Regulations, 16 CRR-NY 641.1. The prescribed form is available from the state commission website at

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[13] In 2001 the FCC found the interstate jurisdiction was being increasingly overburdened with costs belonged to intrastate, and it took emergency action to freeze the growth. The problem has now reversed and intrastate is significantly overburdened. The Commission has no similar sense of urgency, likely because it allows for lower interstate rates and the state commissions get to take the heat from ratepayers upset with high local rates.

http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6a170f04862b0f7c85257687006f3938/$FILE/ATTAAOR7.xlsx/teleco%20revised.xlsx. "Schedule 9" requires submission of the amounts "Subject to Separations" (*e.g.*, the interstate portion), and then the "New York State" (intrastate) portion. New York employs alternative regulation for Verizon, but it still demands that Verizon (and all the other price-cap carriers in the state) provide separated data using Part 36 outcomes notwithstanding the forbearance orders. Petitioners extensively analyzed the Verizon New York reports in comments and showed how "misallocated network costs" were harming intrastate consumers. Not a single commenter challenged this evidence. A similar presentation demonstrating New York's reliance on Part 36 results was made by New Networks in its April 17, 2017 comments. *See, e.g.* Hartman Memorandum pp. 19-21 [JA __].

Despite all of Petitioners' evidence that states are still applying and enforcing Part 36 outcomes on Price Cap carriers, and without identifying any contrary evidence, the *Freeze Order* nakedly asserts that Part 36 is irrelevant to price-cap carriers. The Commission refused to consider the evidence belying its assertion. The finding is not supported by any evidence, much less substantial evidence. The *Freeze Order* must be vacated and the case remanded to the Commission.

C. The *Freeze Order* Contention That Separations Do Not Apply to Price-Cap Carriers Does Not Deserve Deference under *Kisor* or *Chevron*.

1. The Commission's Interpretation Does Not Deserve *Auer* Deference.

This case involves the FCC's "reading" of its separations regulations after the effect of informal "rules" implemented in the forbearance orders. The separations regulations' text is *not* ambiguous. Any "ambiguity" could only arise from the informal forbearance "rules." If there is no ambiguity in either the relevant separations rules or the forbearance orders *Kisor* commands that no deference be given and this Court's precedent commands *vacatur* and remand in any event.

Unlike average schedule companies[14] price-cap carriers are ***expressly included*** in most of the Part 36 rules. The "Commission decide[d] in its discretion to pursue a jurisdictional separation under §221(c) [for price-cap carriers] in compliance with § 221(c) procedures and presumably those in § 410(c)," *Crockett*, 963 F.2d at 1570 (bracketed words inserted). The rules are not ambiguous. There is no debate about what they say or even mean.

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[14] *Freeze Order* ¶16 n.47 notes that "[t]he separations rules do not apply to rate-of-return carriers that are 'average schedule companies.'" The Commission is likely basing this finding on *Mid-Plains Telephone Company, Inc.; Petition for Declaratory Ruling Regarding The Commission's Part 36 Separations Procedure*, 5 FCC Rcd 7050, 7053-7054, ¶¶32-39 (1990) *aff'd Crockett Tel. Co. v. FCC, supra*.

The issue arises from the forbearance orders. Forbearance proceedings are a "unique type of informal rulemaking." *Verizon & AT&T, Inc. v. FCC*, 770 F.3d 961, 966-967 n.7 (D.C. Cir. 2014). The *Freeze Order*–a formal rulemaking decision–relies on these informal rulemaking orders to assert in ¶¶16, 24 (and n.65) and 42 that the separations rules "do not apply to price-cap carriers." Petitioners' response is that under 47 U.S.C. §221 the separations rules still bind the states for intrastate purposes even if the price-cap carrier has been freed for interstate purposes, and the states therefore still apply and enforce the separations rules against price-cap carriers. The legal issue is which interpretation is correct. This interpretation of its rules brings into play the question of whether the FCC's interpretation deserves "*Auer* deference." It does not.

The majority portions of the *Kisor* opinion explain that some of the principles underlying *Chevron* deference (agency statutory interpretations) and *Auer* deference (agency interpretations of its regulations) are similar. Under both doctrines the agency has to directly analyze the provisions in issue and make the initial determination on ambiguity. Then, under both doctrines, the agency must make a conscious and reasoned effort to fill the gap and thereby resolve the ambiguity. Courts can "defer" to a "reasonable interpretation" only if there is an interpretation to review.

The *Freeze Order* contains bald conclusions that Part 36 "does not apply" to price-cap carriers on account of the forbearance orders. This is so despite the rule text, the evidence states are still applying Part 36 outcomes to price-cap carriers and notwithstanding the *Freeze Order* admission that the states still use separations for various purposes. It entirely ignores what the forbearance orders actually say.

The Commission merely cites the forbearance orders as the basis for the claim of irrelevance and inapplicability. *Freeze Order* ¶¶16, 24. But while it is true price-cap carriers received forbearance from "the Part 36 jurisdictional separations rules," *id.* n.45, this does not necessarily mean those rules do not apply for any purpose. The forbearance orders expressly contemplated some continued application. For example, the Commission did not "preempt state accounting requirements" and noted its understanding that states would still "rely on the Cost Assignment Rules and resulting data for state regulatory purposes." *AT&T Forbearance Order*, 23 FCC Rcd at 7322, ¶33. Despite these qualifications the Commission asserted in *AT&T Forbearance Order* ¶33 that "states will not have authority to enforce the federal Cost Assignment Rules." It rested this claim on an interpretation of §160(e), but it did so without recognizing that §160(e) only prohibits state application of *statutory* provisions the FCC has expressly decided are properly subject to forbearance, and the forbearance orders addressed only the "Part 36 jurisdictional separations rules." *Freeze Order* n. 45. The Commission

granted forbearance from a portion of 47 U.S.C. §220(a)(2)[15] but it has never done so for or any part of §221.

So what, exactly, *is* the outcome of the forbearance orders? The answer is entirely unclear. The states supposedly cannot "enforce" the Cost Assignment Rules, but they can still obtain similar information, "rely on the Cost Assignment Rules and resulting data for state regulatory purposes," require "jurisdictional information," secure "intrastate revenue data" and ultimately "obtain ... all cost accounting information needed for state regulatory purposes." *AT&T Forbearance Order* ¶¶33, 34. Petitioners' evidence in the case below conclusively proved that price-cap carriers in general and Verizon in particular have been required to, and do, routinely provide Part 36 based separations data to state commissions, which the states then "apply" and "enforce" as part of their regulatory oversight. Irregulators comments [JA __]; Irregulators Reply comments [JA __].

The *Freeze Order* did not address any of these inconsistencies or potential ambiguities; it merely declares total irrelevance and moves on. There is no analysis of the relevant statutory provisions (47 U.S.C. §§160 or 220) or the Part 36 rules; there is no claim any part of the statute, the rules or its informal rulemaking decisions are ambiguous. There is no effort to determine whether the verbiage in

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[15] *See AT&T Forbearance Order* ¶12.

AT&T Forbearance Order ¶¶33 and 34 is ambiguous. There is no reasoning, only unadorned conclusory assertion.

The *Freeze Order* must "fail for want of reasoned decisionmaking" *Pub. Citizen, Inc*., 332 F.3d at 661; *Fox*, 684 F.3d at 77. The Court is "'left wondering how the [FCC] in these circumstances interprets' the statute [and its rules], and when 'an agency fails to wrestle with the relevant statutory [and rule] provisions, we cannot do its work for it.' *Hosp. of Barstow, Inc.*, 820 F.3d at 445. 2016)(bracketed words inserted). Since the agency did not make these determinations in the first instance the court must remand so it can do so. *GTE Serv. Corp.*, 224 F.3d at 775-76; *Prill*, 755 F.2d at 956-57. This is so for any statutory interpretation and any agency interpretation of its rules.

If for some reason the agency's failure to make the initial determination of ambiguity and then supply a reasoned interpretation is excused, however, the *Freeze Order* still fails under *Chevron* and *Kisor*.

2. The Commission Interpretation Is Not Reasonable or Legally Supportable under *Kisor* or *Chevron*.

Even if we ignore the agency's failure to find and resolve any ambiguity all of the *Kisor* "limits" must be considered and applied. Here, the agency's interpretation is not reasonable and does not fall "within the bounds of reasonable interpretation." *Kisor*, 204 L.Ed. at 859. Nor would this reading even pass the pre-*Kisor* test for reasonableness. It does not "sensibly conform to the purpose and

wording of the regulations." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 729 (D.C. Cir. 2005), *aff'd BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006). Nor is it reasonably consistent with the applicable statutory provisions (47 U.S.C. §§160 and 221).

The *Freeze Order* contention of irrelevance and inapplicability grossly overstates even a casual reading of the forbearance orders. It also more generally understates the continuing importance of the separations rules on both interstate and interstate telecommunications.

It is true "price-cap" carriers no longer have to abide by these rules on the *interstate* side, but Petitioners' point is the separations rules still bind the state commissions for intrastate purposes, and this is important for each state that still uses costs (or revenues) for any purpose. *Hawaiian, supra*; *Crockett, supra*. The FCC forbearance orders gave relief *to the carriers* for interstate purposes but none expressly or impliedly let the states loose to do their own separations thing.

D. The States still apply Part 36 outcomes to price-cap carriers for ratemaking and other regulatory matters.

Petitioners made an exhausting showing that New York and other states still use Part 36 outcomes for intrastate purposes. Other authority confirms, Vermont, like New York, requires each telephone company to file regular reports revealing intrastate costs and revenues using the form at

https://publicservice.vermont.gov/sites/dps/files/Annual_Reports/PDF_forms/8%20ILEC%20020218.pdf.[16] Schedule B-2 is an Income Statement that requires the ILEC to disclose the total company amounts for a host of FCC Part 32 accounts. Schedule B-7 then requires submission of the separated intrastate equivalents, using Part 36.

If Part 36 truly "does not apply" to price-cap carriers no state is required to apply the factors in Part 36 and a state commission is entirely free to determine that far fewer costs should be recovered from intrastate ratepayers. New Networks April 17, 2017 comments, Hartman Memorandum p. 21 [JA __]. That is not how it works, however. New York, Vermont and a host of other states correctly understand they are still bound by Part 36 outcomes, even for price-cap carriers.

Assume a state commission–say the NYPSC–decided that its "incentive regulation" approach had failed and it should return to rate-of-return regulation. As part of that exercise the commission would have to determine the "intrastate" portion of Verizon's total operations. Assume that after doing so New York finds that intrastate ratepayers should not fund the level of corporate expenses indicated by Part 36. Perhaps the NYPSC decides that local should bear costs in relation to revenues, and so the "local" share should be only 21.6% rather than 60.6%. The

[16] *See* Code of Vermont Rules, CVR 30-000-3100. The statutory basis is 30 V.S.A. §22, which prescribes a regulatory assessment based on intrastate gross revenues and allows the state commission to require reports that will reveal the amount owed.

local share would go down $1,137,920,311–from $1,768,187,616 to $630,267,305. Irregulators comments, p. 10 [JA __]. The NYPSC could require a $1.14 billion prospective reduction to intrastate local rates to reflect its revised intrastate cost calculation.[17]

Petitioners strongly suspect that Verizon would seek judicial relief from the rate reduction. It could go to state court by way of administrative appeal, and it very well might seek relief under 47 U.S.C. §401, just as in *Hawaiian*. Even though Verizon received "forbearance" from 36.3(b) and 36.391, it would still claim that the NYPSC cannot craft its own intrastate allocation factor and is bound by the "frozen" intrastate 60.6%. Verizon would fiercely cling to its interstate forbearance cake but also take vigorous action to ensure that intrastate consumers could not enjoy the intrastate "non-enforcement" piece.

The foregoing does not illustrate the only problem. States that do not engage in rate-of-return ratemaking still have a need for separated data for other intrastate regulatory functions. Universal service is a good example. Maine has its own intrastate USF program that "use[s] separations results to determine the amount of intrastate universal service support. *Freeze Order* ¶18. Maine also rate-regulates the designated "provider of last resort" and it consistently reserves the right to base

[17] The state commission would probably require more than one factor change, but let us assume this is the only one and there are no offsetting intrastate cost adjustments.

rates on separated intrastate costs, even for price cap carriers. Consolidated (previously Fairpoint) operates in that state, and it is a price-cap carrier. *Northern New England Telephone Operations LLC d/b/a Fairpoint Communications-NNE; Request for POLR Relief Certificate*, Docket 2018-00027, n.3, 2018 Me. PUC LEXIS 106 *6 (May 2018); *Northern New England Telephone Operations LLC d/b/a Fairpoint Communications-NNE; Request for Approval of Tariff Pertaining to Northern New England d/b/a FairPoint Communications*, Docket No. 2014-00344, 2015 Me. PUC LEXIS 91, *1[18] (Jun 2015); *Northern New England Telephone Operations LLC d/b/a Fairpoint Communications-NNE; Request for Increase in Rates and for Maine Universal Service Fund Support for Provider of Last Resort Service*, Docket No. 2013-00340, 2014 Me. PUC LEXIS 179, *1, *59-*61 (Nov. 2014).[19]

The Maine 2014 case is particularly instructive. Some parties proposed "to abandon the 'ossified' cost allocation and separations methodology established in Parts 36 and 64 of the FCC's rules in favor of some alternative up-to-date approach that would more accurately correspond to the way in which FairPoint is actually using its existing network facilities." They asserted the forbearance orders "gave to

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[18] "...the Commission may, but is not required to, utilize a cost-based, revenue requirement analysis with regard to determining whether a rate filing that is not a "general increase in rates:" under Section 307, or a "general rate case" under Chapter 120 is just and reasonable.

[19] *See also* *72-*74, where the Maine commission discusses the significant change in the mix of network services since 2000.

state regulators broad authority to establish state-specific cost allocation rules." 2014 Me. PUC LEXIS 179, *15-*16, 25-27. Fairpoint vigorously asserted that the Maine commission was "preempted from deviating from the FCC's cost allocation and separations rules" even though Fairpoint was (and is) a price-cap carrier. *Id.* *12-*17. The Maine commission agreed and held that the state was "likely preempted" and could not make the requested "attempt at reforming the cost allocations rules." *Id.* *86.

E. A state commission that fails to follow Part 36 can be compelled under 47 U.S.C. §401(a) or (b).

The states are stuck with current "frozen" separations for intrastate ratemaking purposes for all carriers that have interstate operations, including price-cap carriers, and they will be until Congress or the FCC removes the §221 separations shackles. The forbearance orders granted "non-enforcement" to the price cap carriers but did not (and could not) forbear from enforcing 47 U.S.C. §221 or the Part 36 rules as against the states.[20] The states were not released from the binding effect of §221(c) and Part 36 outcomes. A state that tries to use its own separations method can still be sued and forced to hew to Part 36, even though the Commission has chosen to not apply the separations rules against price cap carriers for interstate purposes.

[20] Section 160 on its face offers relief to carriers only. It does not provide a path for consumers or state commissions to secure relief from binding provisions in the Communications Act or any FCC regulation.

Hawaiian was not the first or last authority for the proposition a state commission can be sued under §401 for not following FCC cost accounting prescriptions. *Lousiana PSC* held that the states are bound by Part 36 outcomes. Other cases have allowed §401 actions seeking compliance with FCC accounting and separations prescriptions. *Chesapeake & Potomac Tel. Co. v. PSC*, 748 F.2d 879, 880-81 (4th Cir. 1984*), vacated and remanded,* 476 U.S. 1167 (1986)(depreciation); *South Central Bell Tel. Co. v. Louisiana PSC*, 744 F.2d 1107, 1115 (5th Cir. 1984), *vacated and remanded,* 476 U.S. 1167 (1986) (depreciation); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n.*, 740 F.2d 566, 571 (7th Cir. 1984)(separations); *Southwestern Bell Tel. Co. v. Arkansas PSC*, 738 F.2d 901 (8th Cir. 1984), *vacated and remanded,* 476 U.S. 1167 (1986) (depreciation); *Alltel Tenn. v. Tenn. PSC*, 913 F.2d 305, 308 (6th Cir. 1990)(separations). The only court of appeals holding that a cost accounting "rulemaking" order is not an "order" for purposes of §401 is *New England Tel. & Tel. Co. v. PUC of Maine*, 742 F.2d 1, 4-7 (1st Cir. 1984), *cert. den.*, 476 U.S. 1174 (1986).

The forbearance orders did not grant any relief from §221. Equally important, the *AT&T Forbearance Order* ¶33 assertion that "states will not have authority to enforce the federal Cost Assignment Rules" is directly inconsistent with §160(e). The U.S. Code version of Communications Act §10(e) at 47 U.S.C.

§160(e) provides that "[a] State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a)(emphasis added). "This chapter" is 47 U.S.C. Chapter 5, which includes §§151-624.[21] The FCC did not explain how it could claim to preempt states from enforcing Part 36 given that §160(e) only mentions forborne statutory provisions but does not preclude state enforcement of forborne FCC "regulations."

The restriction is *only* to statutory provisions; it does not expressly prohibit a state from applying or enforcing an FCC "regulation" after forbearance. This omission is important and determinative, especially since Congress specifically listed both "any regulation" or "any provision of this chapter" in §160(a). A simple textual reading of §§160(a), (e) and 221 in combination compels the conclusion that not only can the states "continue to apply or enforce" the Part 36 rules, they ***must*** do so, or suffer judicial compulsion under §401.

Once the FCC has prescribed a separations method–as it has done in Part 36–§221 the state commissions are bound to the results for intrastate purposes. *Hawaiian Tel.*, 827 F.2d at 1274-1277. Indeed, *Hawaiian* held that a state using

[21] The statutory note explains that "[t]his chapter, referred to in subsecs. (a) and (e), was in the original "this Act", meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter."

some other method can be sued in federal court and forced to comply with the FCC method under 47 U.S.C. §401(b). *Id.* at 1268-1270.

This outcome is also evident from the practical effect of what is said in the forbearance orders. Each of the forbearance orders expressly noted that the states retain the right to obtain cost information, classify costs and set intrastate rates. The FCC held that states can demand intrastate "separated" cost information, even if the carrier has been bestowed forbearance from enforcement of the separations rules for interstate regulatory purposes. *AT&T Forbearance Order* ¶33; *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, 23 FCC Rcd at 13665, ¶31; *USTelecom Forbearance Order*, 28 FCC Rcd at 7646-54, ¶49 and n. 154. There is no indication the states would have free rein to decide what portion of a price-cap carriers total costs and revenues are "intrastate" for ratemaking or any other intrastate regulatory purpose.

No deference is owed to the holding that separations rules "do not apply" to price cap carriers. This naked assertion has no analysis and is unreasonable. It leads to irrational and conflicting statutory mandates for state commissions exercising intrastate regulation.

F. The Commission Abused its Discretion by Extending the Freeze.

"Substantial deference" is appropriate where the agency institutes an "interim" measure to address concerns about "industry upheaval." *Rural Cellular*

Ass'n, *supra*; *MCI Telecomms., supra*; *Vt. Pub. Serv. Bd.*, *supra*; *AT&T*, *supra*. "Substantial deference" is not, however, "total deference"; there are limits. The freeze is not longer legitimately labeled "interim." *Competitive Telcoms. Ass'n.*, 87 F.3d at 529-532 ("The Commission can not expect to avoid judicial scrutiny so easily–especially when the 'interim' is measured in years and follows almost a decade of 'transition.'"). There is no indication the FCC has any sense of urgency.

The only thing that appears to matter to the FCC is the perceived burdens on the industry; consumers' interests and benefits were barely mentioned or included in the "costs and benefits" analysis performed by the FCC.[22] The *Hope*[23] standard for rate-setting requires a delicate balance between investor and consumer interests. *FPC v. Memphis Light, Gas & Water Division*, 411 U.S. 458, 474 (1973)("under *Hope* Natural Gas rates are 'just and reasonable' only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong"); *see also Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 952 (1951); *Jersey Central Power & Light*, 810 F.2d 1168, 1178 (D.C. Cir. 1987). The FCC obviously forgot that consumers are the "agency's prime constituency." *See Maryland People's Counsel*

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[22] The clear overriding concern was minimizing burden on carriers. *Freeze Order* ¶¶4, 11, 18, 19. Retail consumers get only passing mention in ¶¶33 and 39.The *2018 Freeze NPRM* reveals the same bias in ¶¶16, 18 (33 FCC Rcd at 7267).

[23] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1943).

v. FERC, 761 F.2d 780, 781, 787 n.16 (D.C. Cir. 1985); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1207 (D.C. Cir. 1987)(Mikva, J Dissenting).

A measure is no longer "interim" after substantial passage of time; "industry" concerns cannot forever predominate and override consumer interests. Repeatedly extending and maintaining a harmful "interim" measure the agency expressly intended to replace with a permanent solution in relatively short order becomes arbitrary, capricious and an abuse of discretion at some point.

The freeze in issue here was instituted in 2001 and was supposed to last no more than five years. The *Freeze Order* allows it to stay in place until 2024, at which time this "interim measure" will be 23 years old, even though the record is clear the frozen factors lead to significant misallocations and have negative consumer impacts. Industry may be happy, but that is merely another indication that consumer interests received short shrift and ever-longer delays until proper rates can be developed.

The decision to extend the "interim" freeze for six more years was arbitrary, capricious and an abuse of discretion.

III. MAINTAINING THE FREEZE HARMS CONSUMERS.

Freeze Order ¶18 admits that separated costs are still used for several important purposes:

> ... 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. 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 certain non-fixed support carriers, but without applying jurisdictional allocations. 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.

(notes omitted)

Even if one accepts *arguendo* that the freeze applies only to rate-of-return carriers the *Freeze Order* still impacts all communications consumers, even those that do not directly purchase service at retail from a rate-of-return carrier. That is because all IXCs and wireless providers must pay wholesale rates that still rely on separated interstate costs, and the providers pass the wholesale costs on to their own retail customers. For example, a consumer that makes long distance calls using wireline or wireless service is impacted by the prices their long distance provider or CMRS provider must pay rate-of-return carriers for wholesale services. The costs are passed on to consumers.

Separations data are also used for both state and interstate USF purposes. Every telecommunications provider must "contribute" to the interstate USF program and the state USF program if there is one. *See* 47 C.F.R. §54.709. The

rules then allow each "contributor" to recover its pro-rata "contribution" amount from each end user via a line item on the customer's bill. 47 C.F.R. §54.712. This means every telecommunications consumer–even those served by non-regulated entities–is an indirect contributor to the program and supplies the money that goes to carriers that receive USF support. Urban consumers of all stripes supply monies that are then given to rural and high-cost carriers throughout the country, including "non-fixed support carriers" that receive high-cost loop support.

Separated costs are used for state USF programs as well. State USF programs are similar to the federal program, in that consumers of intrastate services supply the funds that are used by the state program via a "pass-through" line item on their monthly bill. The state program then distributes the funds to support various carriers that provide rural and high-cost communications services and networks. As the Commission notes in *Freeze Order* ¶18, state program support amounts are determined using reported intrastate separated costs. Thus, a Verizon end user pays money that is redistributed to other carriers in the state. Every end user in a state that has its own separate USF program is therefore directly impacted by separations, and the freeze.

The *Freeze Order* obviously has a direct impact on intrastate matters for all ILECs and their customers. It also has a direct and discernible impact on competitive alternatives. This is so for consumers interacting with price-cap

carriers or rate-of-return carriers and even consumers that obtain or want to obtain service from alternative providers that are not an ILEC or its affiliate. Consumers that pay interstate rates are also affected, and negatively so. This is no minor thing and absent action by this Court consumers will have to suffer in the cold of the "freeze" for another six years.

Freeze Order ¶24 implies that ending the freeze would not "alleviate any misallocation" but that is not correct. "Ending the freeze" would manifest through expiration and effective repealer of 47 C.F.R. §36.3 and all other Part 36 regulations that "froze" assignments as of December 21, 2000. All carriers would be required to update their assignments so as to properly attribute costs to each jurisdiction. They would then "more closely align their business data services and Consumer Broadband-Only Loop service rates with the underlying costs of these services." Doing so would "encourage [] carriers to expand and upgrade their networks, thus enhancing their capability to provide these services" and "enable these carriers to take better advantage of universal service programs that promote broadband growth." *Freeze Order* ¶¶31-32.

The difference between the *Freeze Order* result and Petitioners' result (including Petitioner's short-term recommendations) is that *all carriers* would have to change their current frozen amounts rather than just those that perceive a private individual benefit. And, of course, this would result in significant steps toward

ending excessive "residual" intrastate cost dumping. For *all carriers*. Costs would begin to move from intrastate to interstate, and then between interstate service categories. They would start to go where they actually belong.

IV. THE EXTENSION WILL FURTHER HARM CONSUMERS AS SMALL-CELL AND "5G" WIRELESS AND CONTINUED BROADBAND GROWTH MAGNIFY CURRENT MISALLOCATIONS.

The freeze extension provides cold comfort to intrastate basic local consumers. But it gets worse: the freeze is about to double down with more harm. "The wireless industry is prepared to invest billions of dollars in small cell and "Fifth Generation" ("5G") networks." Irregulators July 17, 2017 Reply Comments, p. 9 (quoting AT&T executive) [JA __]. ILECs supply high-capacity local transmission links between wireless cells, and they do the same for 5G. The associated costs will not be related to "local" or "intrastate" service; they are instead interstate and probably BDS or some form of special access. Part 36 factors, however, will still be applied. Intrastate and "local" will receive around 60% of the factored amounts. Irregulators comments pp. 4, 6, 7, 10 [JA __]; Attachment to comments, pp. 7, 8 [JA __]; Irregulators Reply comments, pp. 9, 10, 23 [JA __]; Irregulators May 25, 2017 comments, "Special Report-Wireless" [JA __]; Irregulators April 17, 2018 Comments, "Fixing Telecommunications," pp. 2-3, 8, 12 [JA __] and Massachusetts Wireless-Wireline "Bait-n-Switch" [JA __]; Irregulators April 17, 2017 comments [JA __].

Petitioners' evidence also indicates the same problem for "broadband" service. *Id.* Other commenters agreed. Broadband is jurisdictionally interstate, but "almost all of this cost [is] reflected as last mile loop cost." Terral comments, pp. 4-5 & n.14, 6 & n.15, 8 [JA __]; NARUC comments, p. 6 & n.12 [JA __]. A huge and entirely inappropriate portion of the costs ILECs incur to provide broadband or support wireless services are allocated to "intrastate" and "local" even though broadband and wireless is entirely interstate and mostly BDS.

The transition to small cell and 5G wireless services and continued broadband deployment will further skew local and intrastate separations outcomes despite the fact none of the costs have anything to do with local or intrastate services. Consumers will pay higher intrastate rates and pass-throughs. The anti-competitive impacts will accelerate. The *Freeze Order* did not acknowledge that extension would allow for even more massive misallocations, or consider whether extension is justified in light of it, despite Petitioners' evidence of this problem. The FCC's freeze extension was arbitrary, capricious and an abuse of discretion.

VI. THE DECISION TO ALLOW RATE-OF-RETURN CARRIERS TO CHOOSE WHETHER TO END THE FREEZE WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION.

Petitioners have no quarrel with those carriers that have chosen to update their factors as a result of the *Freeze Order* permissive waiver. The problem relates to the permissive rather than mandatory nature of any "unfreeze." The *Freeze*

Order permissive approach allows any rate-of-return carrier to maintain frozen factors and therefore continue overcharging for local and other intrastate services, and then for interstate end user and carrier common line, while attributing artificially low costs to BDS. The FCC found large benefits from carriers' *voluntarily* updating factors, *Freeze Order* ¶¶25-32, but it never explained why these benefits should flow only to some, but not all, ratepayers.

The Commission effectively delegated its power to prescribe separation factors to individual companies, which can unilaterally decide whether to give relief to their local and intrastate ratepayers. This delegation impermissibly binds state commissions that want the rate-of-return carrier to "unfreeze" to allow lower intrastate rates. The "unfreeze" should have been mandatory for all carriers.

CONCLUSION AND RELIEF SOUGHT

The Commission order is arbitrary and capricious, is not supported by substantial evidence and is not the result of reasoned decision-making. The finding that the Freeze Extension will only apply to "rate-of-return carriers serving only about 800 study areas" is plainly erroneous. The extension means every state commission and all intrastate ratepayers are still bound by Part 36 outcomes, even when it relates to oversight of price-cap carriers.

But more generally it is clear that the "frozen" separations factors do not remotely reflect the current reality of relative jurisdictional use. There is far more

jurisdictionally interstate traffic than was the case in 2001. This means more costs should go to the interstate jurisdiction than are assigned under the "frozen" factors. The *Order* acknowledged that the current rules over-assign costs to the intrastate jurisdiction and under-assign costs to the interstate jurisdiction, and then misallocate costs between interstate services. Intrastate rates are higher than they should be. Within the interstate jurisdiction "carrier common line" and "end user common line" prices are too high, whereas BDS is assigned an artificially low portion of costs. Consumers are suffering from these distortions and it is about to get much worse. All carriers should have been required to update their direct allocations and their factors. Allowing those rate-of-return carriers that perceive a benefit to end the freeze while leaving all other consumers in the cold was arbitrary, capricious and an abuse of discretion.

Petitioners request that the Court vacate the *Order* and remand to the FCC with instructions that the Commission reconsider its decision and then make all necessary and appropriate rule revisions. The Commission must be required to re-assess what to do about separations now that it is clear that a significant premise underlying the decision is wrong and its decision to extend the freeze was arbitrary, capricious, an abuse of discretion and contrary to law in any event. On remand the FCC must be required to actually address the issues raised by the Petitioners below that the Commission erroneously rejected based on its false premise. The

Commission must revise the separations rules so they once again obtain their primary purpose.

SIGNATURE OF COUNSEL

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I submitted the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by uploading to ECF.

/s/ W. Scott McCollough
W. Scott McCollough

CERTIFICATE OF COMPLIANCE

1. All required privacy redactions have been made.

2. The CM/ECF electronic submission is an exact copy of the paper document from which it was prepared.

3. This document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

4. Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Petitioner in the captioned case contains 12,941 words as calculated by the word processing program. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times Roman font and 12 point size Times New Roman Font for the footnotes.

/s/ W. Scott McCollough
W. Scott McCollough

Dated: July 22, 2019

In the
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 19-1085

Agency No. 18-182

THE IRREGULATORS, NEW NETWORKS INSTITUTE, BRUCE A. KUSHNICK, MARK N. COOPER, TOM ALLIBONE, KENNETH LEVY, FRED GOLDSTEIN, AND CHARLES W. SHERWOOD, JR.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

ADDENDA TO PETITIONERS' INITIAL BRIEF

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ADDENDUM DECISION ON 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, 33 FCC Rcd 12743 (Dec. 17, 2018)

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

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

REPORT AND ORDER AND WAIVER

Adopted: December 12, 2018 **Released: December 17, 2018**

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

TABLE OF CONTENTS

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.[1] 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,[2] the Commission has completed several rulemaking proceedings to freeze the separations rules to stabilize and simplify the separations process pending reform.[3] Most recently, the Commission extended the freeze until December 31, 2018.[4]

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.[5] 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.[6] 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.[7] Third, the carrier separates the regulated costs and revenues between the interstate and intrastate

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[1] *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*).

[2] *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*).

[3] *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*).

[4] *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).

[5] *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).

[6] 47 CFR Part 32.

[7] The Part 64 cost allocation rules are codified in 47 CFR §§ 64.901-904.

jurisdictions using our Part 36 jurisdictional separations rules.[8] 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.[9]

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.[10] 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.[11] 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.[12]

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.[13] At the same time, pursuant to section 410(c) of the Communications Act of 1934, as amended (the Communications Act),[14] the Commission referred the matter of jurisdictional separations reform to the Joint Board for a recommended decision.[15] 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.[16] 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."[17]

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.[18] Over the years, the State members filed

[8] 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.").

[9] *Id.* Part 69.

[10] 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.

[11] 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).

[12] 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).

[13] *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22122, para. 2.

[14] 47 U.S.C. § 410(c).

[15] *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22124, para. 5.

[16] 47 U.S.C. § 410(c).

[17] *Id.*

[18] 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.[19] 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."[20] In 2010, the State members of the Joint Board submitted a limited interim proposal,[21] and the Joint Board sought comment on their behalf.[22] 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.[23] The Commission sought comment on that Recommended Decision; and based on the record before it, the Commission adopted the *2001 Separations Freeze Order*.[24] 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.[25] 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.[26]

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.[27] The Commission also agreed with the Joint Board that requiring rate-of-return carriers to freeze their category relationships could potentially harm these carriers.[28] 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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[19] *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).

[20] *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*).

[21] 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).

[22] *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).

[23] *Joint Board Recommended Decision*, 15 FCC Rcd 13160.

[24] *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.

[25] *2001 Separations Freeze Order*, 16 FCC Rcd at 11389, para. 12.

[26] *Id. at* 11390, para. 14.

[27] *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."[29] 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.[30] 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.[31] 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."[32]

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.[33] 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.[34] 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.[35] 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.[36]

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

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[28] *Id.* at 11393, para. 18 (citing *Joint Board Recommended Decision*, 15 FCC Rcd at 13172-73, para. 21).

[29] *Id.* at 11394, para. 21.

[30] *Id.* at 11387-88, para. 9.

[31] *Id.* at 11397, para. 29.

[32] *Id.*

[33] *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).

[34] *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.[37] 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.[38] 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.[39] 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.[40]

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.[41] 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.[42] Consequently, we pointed out, these carriers may lack incentives to improve service and deploy advanced technologies like broadband for their customers.[43]

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.[44] In 2008, the Commission granted price cap carriers forbearance from the separations rules;[45] 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.[46] As a result, by the middle of

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[35] *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.

[36] *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, para. 10.

[37] *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*).

[38] *Id*. at 8, paras. 20, 22.

[39] *Id.* at 7-8, paras. 17, 21.

[40] *Id.* at 7, para. 17.

[41] *Id.* at 9, para. 23.

[42] *Id.*

[43] *Id.*

[44] *See* 47 U.S.C. § 332(c)(3).

[45] 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.[47]

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.[48] 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).[49] 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.[50] 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.[51]

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.[52] 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

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*).

[46] *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.

[47] 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.[53] 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.[54] 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.[55] 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.[56]

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.

[48] *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).

[49] *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).

[50] *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.

[51] *Rate-of-Return Reform Order*, 31 FCC Rcd at 3119-24, paras. 86-94.

[52] *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).

[53] 47 CFR § 54.1310.

[54] 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* Irregulators 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.[57] 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.[58] 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.[59] This expense would hit smaller, rural carriers with limited resources the hardest.[60] 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.[61]

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."[62] 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.[63]

24. We therefore reject the Irregulators' argument that we should not extend the freeze.[64] 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.[65] 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

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

[55] *Further Notice* at 7, para. 17.

[56] *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.

[57] *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").

[58] *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.

[59] Concerned Rural LECs Comments at 11; *see also* NECA Comments at 5; WTA Comments at 2.

[60] *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.

[61] *See* Concerned Rural LECs Comments at 11.

[62] NTCA Comments at 4.

separations process.[66] 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.[67] By contrast, NARUC and the Colorado PUC both advocate for a freeze of no more than two years.[68] 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.[69] 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.[70] 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.[71] 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.[72] 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.[73] 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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[63] *2017 Separations Freeze Extension Order*, 32 FCC Rcd at 4223, para. 11 (citing commenters).

[64] Irregulators Comments at 3.

[65] *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.

[66] *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").

[67] *See, e.g.*, Concerned Rural LECs Comments at 2-3; NECA Comments at 1; NTCA Comments at 4; WTA Comments at 1.

[68] *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.

[69] State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1.

[70] *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22125, 22128, paras. 8, 12.

[71] *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."[74] 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.[75] 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.[76] 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.[77] 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.[78] 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.[79] 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.[80] 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*).

[72] *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.

[73] *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").

[74] *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.

[75] *See* NTCA Comments at 5.

[76] *See* USTelecom Comments at 2-3.

[77] *See id.*

[78] 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).

[79] *Rate-of-Return Business Data Services Order* at 20, para. 45.

[80] *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.[81] Yet, our current rules prohibit carriers that elected the freeze from withdrawing from it.[82] 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.[83]

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.[84] As commenters point out, the category relationships freeze undermines incentives for certain carriers to move toward broadband-only services.[85] 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.[86] 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.[87] 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.[88] 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.[89] Other carriers may find that updating their category

[81] *See, e.g.*, ITTA Comments at 5-6; Pioneer Comments at 4.

[82] *See* 47 CFR § 36.3(b).

[83] *Rate-of-Return Business Data Services Order* at 21-22, para. 49.

[84] *See, e.g.*, WTA Comments at 6.

[85] *See, e.g.*, Endeavor Comments at 4; WTA Comments at 6.

[86] Endeavor Comments at 4.

[87] *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).

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

[89] *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.[90] 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.[91]

34. Consistent with Commission precedent, we adopt July 1, 2019, as the effective date for opting out of the freeze.[92] We find it important to implement the unfreeze option "efficiently and swiftly" while at the same time giving carriers enough time to prepare.[93] Commenters generally agree that July 1, 2019, is a reasonable effective date.[94] 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.[95] This deadline provides the same advance notice that carriers exiting the NECA pool must give NECA under section 69.3 of our rules.[96] 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.[97]

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.[98] 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.[99] 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.[100] We agree

[90] *See, e.g.*, ITTA Comments at 3-4; NTCA Comments at 7; WTA Comments at 4.

[91] *See, e.g.*, ITTA Comments at 3.

[92] *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).

[93] *2001 Separations Freeze Order*, 16 FCC Rcd at 11397, para. 30.

[94] *Further Notice* at 11, para. 32; *see* ITTA Comments at 6; NECA Comments at 7; WTA Comments at 4-5.

[95] *See Rate-of-Return Business Data Services Order* at 43, para. 119.

[96] *See* 47 CFR § 69.3.

[97] *See Rate-of-Return Business Data Services Order* at 43-44, para. 119.

[98] *Further Notice* at 11-12, paras. 33, 36-37.

[99] *Id.* at 12, para. 39.

[100] *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.[101] 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.[102] 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.[103] Carriers subject to section 61.38 shall include the results of these studies in their tariff review plans.[104] 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.[105] 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.[106] 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.[107] 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.[108]

38. To prevent this over-recovery, we follow the approach we took in the *Rate-of-Return Business Data Services Order*.[109] 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.[110] 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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[101] *See* NECA Comments at 7.

[102] *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").

[103] 47 CFR §§ 61.38-39.

[104] *Id.* § 61.38.

[105] *Id.* § 61.39(b).

[106] 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.

[107] *USF/ICC Transformation Order*, 26 FCC Rcd at 17678, para. 39.

[108] *See Rate-of-Return Business Data Services Order* at 24, para. 57.

[109] *Id.* at 24-25, paras. 57-60.

[110] *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.[111] 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*.[112]

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.[113]

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,[114] whether specific separations categories should be consolidated or disaggregated,[115] and how certain types of costs should be allocated between the jurisdictions.[116] 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.[117] 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.[118] The Joint Board issued its Recommended Decision eight

[111] *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.

[112] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17678, para. 39.

[113] *See* ITTA Comments at 6-7.

[114] *1997 Separations Reform NPRM and Referral*, 12 FCC Rcd at 22136-41, paras. 32-42.

[115] *Id.* at 22147-49, paras. 55-61.

[116] *Id.* at 22154-62, paras. 74-92.

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

[118] *Part 32 Reform Order and Referral to the Joint Board*, 32 FCC Rcd at 1749, para. 46.

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

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?[122] 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.[123] We also share NARUC's and the Irregulators' concern that those rules necessarily misallocate network costs.[124] 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.[125] 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

[119] *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).

[120] *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).

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

[122] *Rate-of-Return Business Data Services Order* at 45-50, paras. 125-37.

[123] 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.

[124] NARUC Comments at 18; *see* Irregulators Comments at 3-8.

[125] *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.[126] In so arguing, NARUC ignores the fact that the Commission has twice referred comprehensive separations reform to the Joint Board.[127] 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.[128] 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.[129] 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.[130] 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.[131]

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.[132] 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.[133] 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.[134] 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.[135] 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.[136]

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[126] 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").

[127] *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").

[128] *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").

[129] *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").

[130] *See Joint Board Recommended Decision*, 15 FCC Rcd 13160.

[131] *2001 Separations Freeze Order*, 16 FCC Rcd at 11383, 11397, paras. 2, 29.

[132] *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.[137] 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,"[138] 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.[139] 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.[140]

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,[141] 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."[142] 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).

[133] *See 2006 Separations Freeze Extension Order*, 21 FCC Rcd at 5525, para. 21.

[134] *See* NARUC Comments at 10, 15-16; NARUC Reply at 5.

[135] *2001 Separations Freeze Order*, 16 FCC Rcd at 11397, para. 29.

[136] *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).

[137] NARUC Comments at 15.

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

[139] State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1.

[140] *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.[143]

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.[144] 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.[145] 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.[146] 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.[147] 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.[148] 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).

[141] State Joint Board Members Dec. 7, 2018 *Ex Parte* Letter at 1-2.

[142] 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").

[143] *Rate-of-Return Business Data Services Order* at 23, para. 54.

[144] *See* NARUC Comments at 17-23.

[145] 47 U.S.C. § 201(b).

[146] 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).

[147] *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).

[148] 47 CFR § 1.3.

strict compliance inconsistent with the public interest.[149] 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.[150]

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.[151] 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.[152] 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.[153] 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,[154] we sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.[155] 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.[156]

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."[157] 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.[158] The FRFA is set forth in Appendix B.

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[149] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d. 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

[150] 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.

[151] *See infra* para. 57 (Effective Date).

[152] *See supra* paras. 21-23.

[153] *See* 44 U.S.C. §§ 3501-21.

[154] Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

[155] *Further Notice* at 14, para. 44. No comments were filed in response to our request.

[156] *See* 5 U.S.C. § 801(a)(1)(A).

[157] 5 U.S.C. § 605(b).

[158] *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.

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.[159] 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.

[159] 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.[160]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[160] *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),[1] 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).[2] An Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Further Notice of Proposed Rulemaking.[3] The Commission sought written public comment on the proposals in this rulemaking proceeding, including comment on the IRFA.[4] 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.[5] 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.[6] 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.[7] The Commission has extended the freeze seven times, with the most recent extension set to expire on December 31, 2018.[8] 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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[1] *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).

[2] *See* 5 U.S.C. § 604.

[3] *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).

[4] *Id.* at Appx. C, para. 4.

[5] 47 CFR Part 36.

[6] *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).

[7] *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*).

[8] *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.[9] 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,[10] 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.[11] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[12] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[13] 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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[9] *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.

[10] 5 U.S.C. § 604(a)(3).

[11] *See* 5 U.S.C. § 603(b)(3).

[12] *See* 5 U.S.C. § 601(6).

[13] *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.[14] Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.[15]

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.[16] Under the SBA definition, a carrier is small if it has 1,500 or fewer employees.[17] 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.[18] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[19] 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."[20] 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.[21] 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

[14] *See* 15 U.S.C. § 632.

[15] *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.

[16] *See* 13 CFR § 121.201, NAICS code 513310.

[17] *See* 13 CFR § 121.201, NAICS code 517110.

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

[19] *See id*.

[20] *See* 5 U.S.C. § 601(3).

[21] *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.[22]

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.[23] But, the freeze has now lasted 17 years, and carriers that elected it are prohibited from withdrawing from that election.[24] 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.[25] 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.[26]

[22] *See* 5 U.S.C. § 603(c)(1)-(4).

[23] *2001 Separations Freeze Order*, 16 FCC Rcd at 11383, 11392, paras. 2, 17.

[24] *See* 47 CFR § 36.3 (carriers electing the category relationships freeze are not eligible to withdraw their elections).

[25] 5 U.S.C. § 801(a)(1)(A).

[26] *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.

ADDENDUM PERTINENT STATUTES AND REGULATIONS

STATUTES

FEDERAL STATUTES

5 U.S.C. §551

§551. Definitions

For the purpose of this subchapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title-

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; 1

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of

valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency-

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
(B) withholding of relief;
(C) imposition of penalty or fine;
(D) destruction, taking, seizure, or withholding of property;
(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
(F) requirement, revocation, or suspension of a license; or
(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency-
(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) “agency proceeding” means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

5 U.S.C §702
§702. Right of review
A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §706
§706. Scope of review
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(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 in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

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

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

28 U.S.C. §2342
§2342. Jurisdiction of court of appeals
The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of-
(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and
(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. §2344

§2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of-

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. §160
§160. Competition in provision of telecommunications service
(a) Regulatory flexibility
Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that-

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed
In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance
Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of

subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation
Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after Commission forbearance
A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a).

References in Text

This chapter, referred to in subsecs. (a) and (e), was in the original "this Act", meaning act June 19, 1934, ch. 652, 48 Stat. 1064 , known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

47 U.S.C. §220
§220. Accounts, records, and memoranda
(a) Forms

(1) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(2) The Commission shall, by rule, prescribe a uniform system of accounts for use by telephone companies. Such uniform system shall require that each common carrier shall maintain a system of accounting methods, procedures, and techniques (including accounts and supporting records and memoranda) which shall ensure a proper allocation of all costs to and among telecommunications services, facilities, and products (and to and among classes of such services, facilities, and products) which are developed, manufactured, or offered by such common carrier.

(b) Depreciation charges

The Commission may prescribe, for such carriers as it determines to be appropriate, the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) Access to information; burden of proof; use of independent auditors

The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents

shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section. The Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits under this section. While so employed or engaged in conducting an audit for the Commission under this section, any such person shall have the powers granted the Commission under this subsection and shall be subject to subsection (f) in the same manner as if that person were an employee of the Commission.

(d) Penalty for failure to comply
In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $6,000 for each day of the continuance of each such offense.

(e) False entry; destruction; penalty
Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) Confidentiality of information

No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) Use of other forms; alterations in prescribed forms
After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) Exemption; regulation by State commission
The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) Consultation with State commissions
The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) Report to Congress on need for further legislation
The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

47 U.S.C. §221
§221. Consolidations and mergers of telephone companies
(a) Repealed. Pub. L. 104–104, title VI, §601(b)(2), Feb. 8, 1996, 110 Stat. 143
(b) State jurisdiction over services
Subject to the provisions of sections 225 and 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) Determination of property used in interstate toll service
For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) Valuation of property
In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

47 U.S.C. §251
§251. Interconnection
(a) General duty of telecommunications carriers
Each telecommunications carrier has the duty-

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers
Each local exchange carrier has the following duties:

(1) Resale
The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability
The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity
The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way
The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation
The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers
In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate
The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.

The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty-

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether-

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that-

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9–1–1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9–1–1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the

exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification-

(A) is necessary-

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information

access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that-

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if-

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. §253
§253. Removal of barriers to entry
(a) In general
No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority
Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority
Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption
If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers
Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets
It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an

eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply-

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

47 U.S.C. §332
§332. Mobile services
(a) Factors which Commission must consider
In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will-

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201,

202, or 208 of this title, and may specify any other provision only if the Commission determines that-

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the

preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that-

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such

petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph-

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section-

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C. §402
§402. Judicial review of Commission's orders and decisions
(a) Procedure
Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) Right to appeal
Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record
Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention
Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs
The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and

shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure
The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) Remand
In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs
The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court
The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

STATE STATUTES

VERMONT
30 V.S.A. §22
Title 30 : Public Service
Chapter 001 : Appointment, General Powers, And Duties
(Cite as: 30 V.S.A. § 22)
§ 22. Tax to finance Department and Commission

(a) For the purpose of maintaining the Department of Public Service and Public Utility Commission, including expenses related to maintaining an adequate engineering, legal, and administrative force in the Department of Public Service and paying all the expenses incident thereof, including rents, each person, partnership, association, or private or municipal corporation conducting a business subject to the supervision of the Department of Public Service and Public Utility Commission, including electric cooperatives, shall pay into the State Treasury on or before April 15 annually, in addition to the taxes now required by law to be paid, a tax, at the rate hereinafter named, according to the nature of the public service business engaged in by such person, partnership, association, or private or municipal corporation, based on the gross operating revenue received by such person, partnership, association, or private or municipal corporation in the conduct of such business in the State during the year next preceding, as shown by the annual report filed on or before such date with the Department of Public Service on the form prescribed by it and containing such information as may be necessary to enable the Department to determine the amount of the tax payable. The rate of tax for each type of public service company shall be the following:

(1) for companies, cooperative, municipal or privately owned, generating, distributing, selling, or transmitting electric energy, 0.0050 of gross operating revenue;

(2) for telephone companies, 0.0050 of gross operating revenue or $500.00, whichever is greater;

(3) for gas companies, 0.0030 of gross operating revenue;

(4) for water companies, 0.001 of gross operating revenue or $5.00, whichever is greater;

(5) for companies owning or operating a cable television system, 0.005 of gross operating revenue or $25.00, whichever is greater, $25,000.00 of which shall be used each year by the Department for special planning functions relating to cable television systems;

(6) for companies whose sole telephone business consists of owning customer-owned, coin-operated telephones with total annual revenues of less than $5,000.00, the choice of either 0.0050 of gross operating revenue from telephone revenues or the amount of $20.00; and

(7) for all other companies named in section 203 of this title, 0.001 of gross operating revenues.

(b) The tax levied under this section shall not apply to sales of electrical power for resale.

(c) Of the revenue deposited into the special fund for the maintenance of engineering and accounting forces, 40 percent shall be allocated to the Public Utility Commission and 60 percent shall be allocated to the Department of Public Service.

(d)(1) On June 30 of each year, any balance in the amount allocated to the Public Utility Commission from the special fund for the maintenance of engineering and accounting forces, after accounting for expenditures and encumbrances, in excess of 20 percent of the Commission's allocation for that year shall be used in the manner provided by subdivision (3) of this subsection.

(2) On June 30 of each year, any balance in the amount allocated to the Department of Public Service from the special fund for the maintenance of engineering and accounting forces, after accounting for expenditures and encumbrances, in excess of 20 percent of the Department's allocation for that year shall be used in the manner provided by subdivision (3) of this subsection.

(3) The excess balances determined under subdivisions (1) and (2) of this subsection shall be used in the next succeeding year to directly reduce the rates otherwise collected from the ratepayers of this State for the costs of the telephone Lifeline program authorized by subsection 218(c) of this title.

REGULATIONS

FEDERAL REGULATIONS

47 C.F.R. Part 36 (Current as of July 12, 2019)

PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES[1]

Contents

noncurrent deferred operating income taxes—Account 4340.
§36.507 Other jurisdictional liabilities and deferred credits—Net—Account 4370.

Subparts F-G [Reserved]

Appendix to Part 36—Glossary

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[1]The Commission has determined that the same jurisdictional separations used in the contiguous states are to be used for Alaska, Hawaii, Puerto Rico and the Virgin Islands. *Integration of Rates and Services,* Docket No. 21263, 87 FCC 2nd 18 (1981); *Integration of Rates and Services,* Docket No. 21264, 72 FCC 2nd 699 (1979).

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.

SOURCE: 52 FR 17229, May 6, 1987, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 36 appear at 74 FR 23956, May 22, 2009, 77 FR 30411, May 23, 2012, 82 FR 25538, June 2, 2017, and corrected at 83 FR 4153, Jan. 30, 2018. Nomenclature changes to part 36 also appear at 83 FR 63587, Dec. 11, 2018, 84 FR 4360, Feb. 15, 2019.

Subpart A—General

§36.1 General.

(a) This part contains an outline of separations procedures for telecommunications companies on the station-to-station basis. These procedures are applicable either to property costs, revenues, expenses, taxes, and reserves as recorded on the books of the company or to estimated amounts.

(1) Where a value basis is used instead of book costs, the "costs" referred to are the "values" of the property derived from the valuation.

(b) The separations procedures set forth in this part are designed primarily for the allocation of property costs, revenues, expenses, taxes and reserves between state and interstate jurisdictions. For separations, where required, of the state portion between exchange and toll or for separations of individual exchanges or special services, further analyses and studies may be required to adapt the procedures to such additional separations.

(c) The fundamental basis on which separations are made is the use of telecommunications plant in each of the operations. The first step is the

assignment of the cost of the plant to categories. The basis for making this assignment is the identification of the plant assignable to each category and the determination of the cost of the plant so identified. The second step is the apportionment of the cost of the plant in each category among the operations by direct assignment where possible, and all remaining costs are assigned by the application of appropriate use factors.

(d) In assigning book costs to categories, the costs used for certain plant classes are average unit costs which equate to all book costs of a particular account or subaccount; for other plant classes, the costs used are those which either directly approximate book cost levels or which are equated to match total book costs at a given location.

(e) The procedures outlined herein reflect "short-cuts" where practicable and where their application produces substantially the same separations results as would be obtained by the use of more detailed procedures, and they assume the use of records generally maintained by Telecommunications Companies.

(f) The classification to accounts of telecommunications property, revenues, expenses, etc., set forth in this manual is that prescribed by the Federal Communications Commission's Uniform System of Accounts for Telecommunications Companies.

(g) In the assignment of property costs to categories and in the apportionment of such costs among the operations, each amount so assigned and apportioned is identified as to the account classification in which the property is included. Thus, the separated results are identified by property accounts and apportionment bases are provided for those expenses which are separated on the basis of the apportionment of property costs. Similarly, amounts of revenues and expenses assigned each of the operations are identified as to account classification.

(h) The separations procedures described in this part are not to be interpreted as indicating what property, revenues, expenses and taxes, or what items carried in the income, reserve and retained earnings accounts, should or should not be considered in any investigation or rate proceeding.

§36.2 Fundamental principles underlying procedures.

(a) The following general principles underlie the procedures outlined in this part:

(1) Separations are intended to apportion costs among categories or jurisdictions by actual use or by direct assignment.

(2) Separations are made on the "actual use" basis, which gives consideration

to relative occupancy and relative time measurements.

(3) In the development of "actual use" measurements, measurements of use are (i) determined for telecommunications plant or for work performed by operating forces on a unit basis (e.g., conversation-minute-kilometers per message, weighted standard work seconds per call) in studies of traffic handled or work performed during a representative period for all traffic and (ii) applied to overall traffic volumes, i.e., 24-hour rather than busy-hour volumes.

(b) Underlying the procedures included in this manual for the separation of plant costs is an over-all concept which may be described as follows:

(1) Telecommunications plant, in general, is segregable into two broad classifications, namely, (i) interexchange plant, which is plant used primarily to furnish toll services, and (ii) exchange plant, which is plant used primarily to furnish local services.

(2) Within the interexchange classification, there are three broad types of plant, i.e., operator systems, switching plant, and trunk transmission equipment. Within the exchange classification there are four board types of plant, i.e., operator systems, switching plant, truck equipment and subscriber plant. Subscriber plant comprises lines to the subscriber.

(3) In general, the basis for apportioning telecommunications plant used jointly for state and interstate operations are:

(i) Operator work time expressed in weighted standard work seconds is the basis for measuring the use of operator systems.

(ii) Holding-time-minutes is the basis for measuring the use of local and toll switching plant.

(iii) Conversation-minute-kilometers or conversation minutes is the basis for measuring the use of interexchange circuit plant and holding-time minutes is the basis for measuring the use of exchange trunk plant. While the use of holding-time-minute-kilometers is the basic fundamental allocation factor for interexchange circuit plant and exchange trunk plant, the use of conversation-minute-kilometers or conversation-minutes for the allocation of interexchange circuit plant and holding-time minutes for the allocation of exchange trunk plant are considered practical approximations for separations between state and interstate operations when related to the broad types of plant classifications used herein.

(iv) Message telecommunications subscriber plant shall be apportioned on the basis of a Gross Allocator which assigns 25 percent to the interstate jurisdiction

and 75 percent to the state jurisdiction.

(c) Property rented to affiliates, if not substantial in amount, is included as used property of the owning company with the associated revenues and expenses treated consistently: Also such property rented from affiliates is not included with the used property of the company making the separations; the rent paid is included in its expenses. If substantial in amount, the following treatment is applied:

(1) In the case of property rented to affiliates, the property and related expenses and rent revenues are excluded from the telephone operations of the owning company, and

(2) In the case of property rented from affiliates, the property and related expenses are included with, and the rent expenses are excluded from, the telephone operations of the company making the separation.

(d) Property rented to or from non-affiliates is usually to be included as used property of the owning company with the associated revenues and expenses treated consistently. In the event the amount is substantial, the property involved and the revenues and expenses associated therewith may be excluded from or included in the telecommunications operations of the company. When required, the cost of property rented to or from non-affiliates is determined using procedures that are consistent with the procedures for the allocation of costs among the operations.

(e) Costs associated with services or plant billed to another company which have once been separated under procedures consistent with general principles set forth in this part, and are thus identifiable as entirely interstate or State in nature, shall be directly assigned to the appropriate operation and jurisdiction.

[52 FR 17229, May 6, 1987, as amended at 58 FR 44905, Aug. 25, 1993; 71 FR 65745, Nov. 9, 2006]

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

(a) Effective July 1, 2001, through December 31, 2024, all local exchange carriers subject to part 36 rules shall apportion costs to the jurisdictions using their study area and/or exchange specific jurisdictional allocation factors calculated during the twelve-month period ending December 31, 2000, for each of the categories/sub-categories as specified herein. Direct assignment of private line service costs between jurisdictions shall be updated annually. Other direct assignment of investment, expenses, revenues or taxes between jurisdictions shall be updated annually. Local exchange carriers that invest in telecommunications

plant categories during the period July 1, 2001, through December 31, 2024, for which it had no separations allocation factors for the twelve-month period ending December 31, 2000, shall apportion that investment among the jurisdictions in accordance with the separations procedures in effect as of December 31, 2000 for the duration of the freeze.

(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 accounts under part 32 of this chapter (part 32 account(s)) 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 this paragraph (b). 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 this paragraph (b) 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 through 69.610 of this chapter, and that elected to be subject to this paragraph (b) 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 this paragraph (b) shall not be eligible to withdraw from such regulation for the duration of the freeze.

(c) Effective July 1, 2001, through December 31, 2024, any local exchange carrier that sells or otherwise transfers exchanges, or parts thereof, to another carrier's study area shall continue to utilize the factors and, if applicable, category relationships as specified in paragraphs (a) and (b) of this section.

(d) Effective July 1, 2001, through December 31, 2024, any local exchange carrier that buys or otherwise acquires exchanges or part thereof, shall calculate new, composite factors and, if applicable, category relationships based on a weighted average of both the seller's and purchaser's factors and category

relationships calculated pursuant to paragraphs (a) and (b) of this section. This weighted average should be based on the number of access lines currently being served by the acquiring carrier and the number of access lines in the acquired exchanges.

(1) To compute the composite allocation factors and, if applicable, the composite category percentage relationships of the acquiring company, the acquiring carrier shall first sum its existing (pre-purchase) access lines (A) with the total access lines acquired from selling company (B). Then, multiply its factors and category relationship percentages by (A/(A + B)) and those of the selling company by (B/(A + B)) and sum the results.

(2) For carriers subject to a freeze of category relationships, the acquiring carrier should remove all categories of investment from the selling carrier's list of frozen category relationships where no such category investment exists within the sold exchange(s). The seller's remaining category relationships must then be increased proportionately to total 100 percent. Then, the adjusted seller's category relationships must be combined with those of the acquiring carrier as specified in §36.3(d)(1) to determine the category relationships for the acquiring carrier's post-transfer study area.

(e) Any local exchange carrier study area converting from average schedule company status, as defined in §69.605(c) of this chapter, to cost company status during the period July 1, 2001, through December 31, 2024, shall, for the first twelve months subsequent to conversion categorize the telecommunications plant and expenses and develop separations allocation factors in accordance with the separations procedures in effect as of December 31, 2000. Effective July 1, 2001 through December 31, 2024, such companies shall utilize the separations allocation factors and account categorization subject to the requirements of paragraphs (a) and (b) of this section based on the category relationships and allocation factors for the twelve months subsequent to the conversion to cost company status.

[66 FR 33204, June 21, 2001, as amended at 79 FR 36235, June 26, 2014; 84 FR 4360, Feb. 15, 2019]

§36.4 Streamlining procedures for processing petitions for waiver of study area boundaries.

Effective January 1, 2012, local exchange carriers seeking a change in study area boundaries shall be subject to the following procedure:

(a) *Public Notice and Review Period.* Upon determination by the Wireline Competition Bureau that a petitioner has filed a complete petition for study area

waiver and that the petition is appropriate for streamlined treatment, the Wireline Competition Bureau will issue a public notice seeking comment on the petition. Unless otherwise notified by the Wireline Competition Bureau, the petitioner is permitted to alter its study area boundaries on the 60th day after the reply comment due date, but only in accordance with the boundary changes proposed in its application.

(b) *Comment Cycle.* Comments on petitions for waiver may be filed during the first 30 days following public notice, and reply comments may be filed during the first 45 days following public notice, unless the public notice specifies a different pleading cycle. All comments on petitions for waiver shall be filed electronically, and shall satisfy such other filing requirements as may be specified in the public notice.

[76 FR 73853, Nov. 29, 2011]

Subpart B—Telecommunications Property

GENERAL

§36.101 Section arrangement.

(a) This subpart is arranged in sections as follows:

GENERAL

Telecommunications Plant in Service—Account 2001—36.101 and 36.102.

General Support Facilities—Account 2110—36.111 and 36.112.

Central Office Equipment—Accounts 2210, 2220, 2230—36.121 thru 36.126.

Information Origination/Termination Equipment—Account 2310—36.141 and 36.142.

Cable and Wire Facilities—Account 2410—36.151 thru 36.157.

Amortization Assets—Accounts 2680 and 2690—36.161 and 36.162.

Telecommunications Plant—Other Accounts 2002 thru 2005—36.171.

Rural Telephone Bank Stock—36.172.

Material and Supplies—Accounts 1220, and Cash Working Capital—36.181 and 36.182.

Equal Access Equipment—36.191.

[60 FR 12138, Mar. 6, 1995]

§36.102 General.

(a) This section contains an outline of the procedures used in the assignment of Telecommunications Plant in Service—Account 2001 to categories and the apportionment of the cost assigned to each category among the operations.

(b) The treatment of rental plant is outlined in §§36.2(c) through 36.2(e). If the amount of such plant is substantial, the cost may be determined by using the general procedures set forth for the assignment of the various kinds of property to categories.

(c) The amount of depreciation deductible from the book cost or "value" is apportioned among the operations in proportion to the separation of the cost of the related plant accounts.

GENERAL SUPPORT FACILITIES

§36.111 General.

(a) The costs of the general support facilities are contained in Account 2110, Land and Support Assets. This account contains land, buildings, motor vehicles, aircraft, special purpose vehicles, garage work equipment, other work equipment, furniture, office equipment and general purpose computers.

§36.112 Apportionment procedure.

(a) The costs of the general support facilities of local exchange carriers that had annual revenues from regulated telecommunications operations equal to or greater than $157 million for calendar year 2016 are apportioned among the operations on the basis of either the method in paragraph (a)(1) of this section or the method in paragraph (a)(2) of this section, at the election of the local exchange carrier:

(1) The separation of the costs of the combined Big Three Expenses which include the following accounts:

TABLE 1 TO PARAGRAPH (a)(1)

Plant Specific Expenses	
Central Office Switching Expenses	Account 6210.
Operators Systems Expenses	Account 6220.
Central Office Transmission Expenses	Account 6230.
Information Origination/Termination Expenses	Account 6310.

Cable and Wire Facilities Expenses	Account 6410.
Plant Non-Specific Expenses	
Network Operations Expenses	Account 6530.
Customer Operations Expenses	
Marketing	Account 6610.
Services	Account 6620.

(2) The separation of the costs of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, combined.

(b) The costs of the general support facilities of local exchange carriers that had annual revenues from regulated telecommunications operations less than $157 million for calendar year 2016 are apportioned among the operations on the basis of the separation of the costs of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, combined.

[83 FR 63584, Dec. 11, 2018]

CENTRAL OFFICE EQUIPMENT

§36.121 General.

(a) The costs of central office equipment are carried in the following accounts:

TABLE 1 TO PARAGRAPH (a)

Central Office Switching	Account 2210.
Operator Systems	Account 2220.
Central Office Transmission	Account 2230.

(b) Records of the cost of central office equipment are usually maintained for each study area separately by accounts. However, each account frequently includes equipment having more than one use. Also, equipment in one account frequently is associated closely with equipment in the same building in another account. Therefore, the separations procedures for central office equipment have been designed to deal with categories of plant rather than with equipment in an account.

(c) In the separation of the cost of central office equipment among the operations, the first step is the assignment of the equipment in each study area to

categories. The basic method of making this assignment is the identification of the equipment assignable to each category, and the determination of the cost of the identified equipment by analysis of accounting, engineering and other records.

(1) The cost of common equipment not assigned to a specific category, e.g., common power equipment, including emergency power equipment, aisle lighting and framework, including distributing frames, is distributed among the categories in proportion to the cost of equipment, (excluding power equipment not dependent upon common power equipment) directly assigned to categories.

(i) The cost of power equipment used by one category is assigned directly to that category, *e.g.,* 130-volt power supply provided for circuit equipment. The cost of emergency power equipment protecting only power equipment used by one category is also assigned directly to that category.

(ii) Where appropriate, a weighting factor is applied to the cost of circuit equipment in distributing the power plant costs not directly assigned, in order to reflect the generally greater power use per dollar of cost of this equipment.

(d) The second step is the apportionment of the cost of the equipment in each category among the operations through the application of appropriate use factors or by direct assignment.

[52 FR 17229, May 6, 1987, as amended at 69 FR 12549, Mar. 17, 2004; 83 FR 63584, Dec. 11, 2018]

§36.122 Categories and apportionment procedures.

(a) The following categories of central office equipment and apportionment procedures therefore are set forth in §§36.123 through 36.126.

Operator Systems Equipment	Category 1.
Tandem Switching Equipment	Category 2.
Local Switching Equipment	Category 3.
Circuit Equipment	Category 4.

§36.123 Operator systems equipment—Category 1.

(a) Operator systems equipment is contained in Account 2220. It includes all types of manual telephone switchboards except tandem switchboards and those used solely for recording of calling telephone numbers in connection with customer dialed charge traffic. It includes all face equipment, terminating relay circuits of trunk and toll line circuits, cord circuits, cable turning sections,

subscriber line equipment, associated toll connecting trunk equipment, number checking facilities, ticket distributing systems, calculagraphs, chief operator and other desks, operator chairs, and other such equipment.

(1) Operator systems equipment is generally classified according to operating arrangements of which the following are typical:

(i) Separate toll boards

(ii) Separate local manual boards

(iii) Combined local manual and toll boards

(iv) Combined toll and DSA boards

(v) Separate DSA and DSB boards

(vi) Service observing boards

(vii) Auxiliary service boards

(viii) Traffic service positions

(2) If switchboards as set forth in §36.123(a) are of the key pulsing type, the cost of the key pulsing senders, link and trunk finder equipment is included with the switchboards.

(3) DSB boards include the associated DSB dial equipment, such as link and sender equipment.

(4) Traffic service position systems include the common control and trunk equipment in addition to the associated groups of positions wherever located.

(5) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the average balance of Account 2220, Operator Systems, to the categories/subcategories, as specified in paragraph (a)(1) of this section, based on the relative percentage assignment of the average balance of Account 2220 to these categories/subcategories during the twelve-month period ending December 31, 2000.

(6) Effective July 1, 2001 through December 31, 2024, all study areas shall apportion the costs assigned to the categories/subcategories, as specified in paragraph (a)(1) of this section, among the jurisdictions using the relative use measurements for the twelve-month period ending December 31, 2000 for each of the categories/subcategories specified in paragraphs (b) through (e) of this section.

(b) The cost of the following operator systems equipment is apportioned among the operations on the basis of the relative number of weighted standard

work seconds handled at the switchboards under consideration.

(1) The following types of switchboards at toll centers are generally apportioned individually:

(i) *Separate toll boards.* These usually include outward, through and inward positions in separate lines and associated inward toll switchboard positions in line.

(ii) Switchboards handling both local and toll, either combined or having segregated local and toll positions in the same line.

(iii) Switchboards handling both toll and DSA, either combined or having segregated toll and DSA positions in the same line.

(iv) Traffic service positions, including separately located groups of these positions when associated with a common basic control unit.

(2) The following types of switchboards at toll centers are apportioned individually, or by groups of comparable types of boards for each exchange:

(i) *Separate local manual boards.* This includes the local positions of manual boards where inward toll positions are in the same line.

(ii) Separate DSA boards.

(iii) Separate DSB boards.

(3) Tributary boards may be treated individually if warranted or they may be treated on a group basis.

(c) Auxiliary service boards generally handle rate and route, information, and intercept service at individual or joint positions. The cost of these boards is apportioned as follows:

(1) The cost of separate directory assistance boards is apportioned among the operations on the basis of the relative number of weighted standard work seconds handled at the boards under consideration. Directory assistance weighted standard work seconds are apportioned among the operations on the basis of the classification of these weighted standard work seconds as follows:

(i) Directory assistance weighted standard work seconds first are classified between calls received over toll directory assistance trunks from operators or customers and all other directory assistance calls.

(ii) The directory assistance weighted standard work seconds of each type further are classified separately among the operations on the basis of an analysis of a representative sample of directory assistance calls of each type with reference to the locations of the calling and called stations for each call.

(2) The cost of separate intercept boards and automated intercept systems in the study area is apportioned among the operations on the basis of the relative number of subscriber line minutes of use.

(3) The cost of separate rate and route boards is generally included with the cost of the toll boards served and is apportioned with those boards.

(4) Where more than one auxiliary service is handled at an auxiliary board, the cost of the board is apportioned among the auxiliary services on the basis of the relative number of weighted standard work seconds for each service. The cost of that part of the board allocated to each auxiliary service is apportioned among the operations in the same manner as for a separate auxiliary board.

(d) The cost of joint exchange and toll service observing boards is first apportioned between exchange and toll use on the basis of the relative number of exchange and toll service observing units at these boards. The cost of separate toll service observing boards and the toll portion of joint service observing boards is apportioned between state and interstate operations on the basis of the relative number of toll minutes of use associated with the toll messages originating in the offices observed.

(e) Traffic Service Position System (TSPS) investments are apportioned as follows:

(1) Operator position investments are apportioned on the basis of the relative weighted standard work seconds for the entire TSPS complex.

(2) Remote trunk arrangement (RTA) investments are apportioned on the basis of the relative processor real time (i.e., actual seconds) required to process TSPS traffic originating from the end offices served by each RTA.

(3) The remaining investments at the central control location, such as the stored program control and memory, is apportioned on the basis of the relative processor real time (i.e., actual seconds) for the entire TSPS complex.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33205, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36236, June 26, 2014]

§36.124 Tandem switching equipment—Category 2.

(a) Tandem switching equipment is contained in Account 2210. It includes all switching equipment in a tandem central office, including any associated tandem switchboard positions and any intertoll switching equipment. Intertoll switching equipment includes switching equipment used for the interconnection of message toll telephone circuits with each other or with local or tandem telephone central

office trunks, intertoll dial selector equipment, or intertoll trunk equipment in No. 5 type electronic offices. Equipment, including switchboards used for recording of calling telephone numbers and other billing information in connection with customer dialed charge traffic is included with Local Switching Equipment—Category 3.

(1) At toll center toll offices, intertoll switching equipment comprises equipment in the toll office used in the interconnection of: Toll center to toll center circuits; toll center to tributary circuits; tributary to tributary circuits; toll center to tandem circuits or in the interconnection of the aforementioned types of circuits with trunks to local offices in the toll center city, i.e., interconnection with toll switching trunks, operator trunks, information trunks, testing trunks, etc. Equipment associated with the local office end of such trunks is included with local switching equipment or switchboard categories as appropriate.

(2) At tributary offices, this category includes intertoll switching equipment similar to that at toll center toll offices if it is used in the interconnection of: Tributary to tributary circuits; tributary to subtributary circuits; subtributary to subtributary circuits; toll center to subtributary circuits; or if it is used jointly in the interconnection of any of the aforementioned types of circuits and in the interconnection of such toll circuits with trunk circuits for the handling of traffic terminating in the tributary office. Where comparable equipment has no joint use but is used only for the handling of traffic terminating in the tributary office, it is included in the local switching equipment category.

(3) At all switching entities, this category includes intertoll switching equipment similar to that at toll center toll offices if it is used in the interconnection of switched private line trunks or TWX switching plant trunks when these functions are in addition to the message telephone switching function. Switching entities wholly dedicated to switching of special services are assigned to Category 3—Local Switching Equipment.

(b) The costs of central office equipment items assigned this category are to be directly assigned when possible. When direct assignment is not possible the costs shall be apportioned among the operations on the basis of the relative number of study area minutes of use of this equipment.

(c) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the average balance of Account 2210 to Category 2, Tandem Switching Equipment based on the relative percentage assignment of the average balance of Account 2210 (or, if Accounts 2211, 2212, and 2215 were required to be maintained at the applicable

time, the average balances of Accounts 2211, 2212, and 2215) to Category 2, Tandem Switching Equipment during the twelve-month period ending December 31, 2000.

(d) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion costs in Category 2, Tandem Switching Equipment, among the jurisdictions using the relative number of study area minutes of use, as specified in paragraph (b) of this section, for the twelve-month period ending December 31, 2000. Direct assignment of any subcategory of Category 2 Tandem Switching Equipment between jurisdictions shall be updated annually.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33205, June 21, 2001; 69 FR 12549, Mar. 17, 2004; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36236, June 26, 2014; 83 FR 63584, Dec. 11, 2018]

§36.125 Local switching equipment—Category 3.

(a) Local switching equipment is included in account 2210. It comprises all central office switching equipment not assigned other categories. Examples of local switching equipment are basic switching train, toll connecting trunk equipment, interlocal trunks, tandem trunks, terminating senders used for toll completion, toll completing train, call reverting equipment, weather and time of day service equipment, and switching equipment at electronic analog or digital remote line locations. Equipment used for the identification, recording and timing of customer dialed charge traffic, or switched private line traffic (*e.g.*, transmitters, recorders, call identity indexers, perforators, ticketers, detectors, mastertimes) switchboards used solely for recording of calling telephone numbers in connection with customer dialed charge traffic, or switched private line traffic (or both) is included in this local switching category. Equipment provided and used primarily for operator dialed toll or customer dialed charge traffic except such equipment included in Category 2 Tandem Switching Equipment is also included in this local switching category. This includes such items as directors, translators, sender registers, out trunk selectors and facilities for toll intercepting and digit absorption. Special services switching equipment which primarily performs the switching function for special services (*e.g.*, switching equipment, TWX concentrators and switchboards) is also included in this local switching category.

(1) Local office, as used in §36.125, comprises one or more local switching entities of the same equipment type (e.g., step-by-step, No. 5 Crossbar) in an individual location. A local switching entity comprises that local central office equipment of the same type which has a common intermediate distributing frame, market group or other separately identifiable switching unit serving one or more

prefixes (NNX codes).

(2) A host/remote local switching complex is composed of an electronic analog or digital host office and all of its remote locations. A host/remote local switching complex is treated as one local office. The current jurisdictional definition of an exchange will apply.

(3) Dial equipment minutes of use (DEM) is defined as the minutes of holding time of the originating and terminating local switching equipment. Holding time is defined in the Glossary.

(4) The interstate allocation factor is the percentage of local switching investment apportioned to the interstate jurisdiction.

(5) The interstate DEM factor is the ratio of the interstate DEM to the total DEM. A weighted interstate DEM factor is the product of multiplying a weighting factor, as defined in paragraph (f) of this section, to the interstate DEM factor. The state DEM factor is the ratio of the state DEM to the total DEM.

(b) Beginning January 1, 1993, Category 3 investment for study areas with 50,000 or more access lines is apportioned to the interstate jurisdiction on the basis of the interstate DEM factor. Category 3 investment for study areas with 50,000 or more access lines is apportioned to the state jurisdiction on the basis of the state DEM factor.

(c)-(e) [Reserved]

(f) Beginning January 1, 1998, for study areas with fewer than 50,000 access lines, Category 3 investment is apportioned to the interstate jurisdiction by the application of an interstate allocation factor that is the lesser of either .85 or the sum of the interstate DEM factor specified in paragraph (a)(5) of this section, and the difference between the 1996 interstate DEM factor and the 1996 interstate DEM factor multiplied by a weighting factor as determined by the table below. The Category 3 investment that is not assigned to the interstate jurisdiction pursuant to this paragraph is assigned to the state jurisdiction.

Number of access lines in service in study area	**Weighting factor**
0-10,000	3.0
10,001-20,000	2.5
20,001-50,000	2.0

50,001-or above	1.0

(g) For purposes of this section, an access line is a line that does not include WATS access lines, special access lines or private lines.

(h) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the average balance of Account 2210 to Category 3, Local Switching Equipment, based on the relative percentage assignment of the average balance of Account 2210 (or, if Accounts 2211, 2212, and 2215 were required to be maintained at the applicable time, the average balances of Accounts 2211, 2212, and 2215) to Category 3, during the twelve-month period ending December 31, 2000.

(i) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion costs in Category 3, Local Switching Equipment, among the jurisdictions using relative dial equipment minutes of use for the twelve-month period ending December 31, 2000.

(j) If the number of a study area's access lines increases such that, under paragraph (f) of this section, the weighted interstate DEM factor for 1997 or any successive year would be reduced, that lowered weighted interstate DEM factor shall be applied to the study area's 1996 unweighted interstate DEM factor to derive a new local switching support factor. If the number of a study area's access lines decreases or has decreased such that, under paragraph (f) of this section, the weighted interstate DEM factor for 2010 or any successive year would be raised, that higher weighted interstate DEM factor shall be applied to the study area's 1996 unweighted interstate DEM factor to derive a new local switching support factor.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33011, 33012, Aug. 29, 1988; 62 FR 32946, June 17, 1997; 63 FR 2124, Jan. 13, 1998; 66 FR 33205, June 21, 2001; 69 FR 12549, Mar. 17, 2004; 71 FR 65745, Nov. 9, 2006; 75 FR 17874, Apr. 8, 2010; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36236, June 26, 2014; 83 FR 63585, Dec. 11, 2018]

§36.126 Circuit equipment—Category 4.

(a) For the purpose of this section, the term "Circuit Equipment" encompasses the Radio Systems and Circuit Equipment contained in Account 2230 . It includes central office equipment, other than switching equipment and automatic message recording equipment, which is used to derive communications transmission channels or which is used for the amplification, modulation, regeneration, testing, balancing or control of signals transmitted over communications transmission

channels. Examples of circuit equipment in general use include:

(1) Carrier telephone system terminals.

(2) Telephone repeaters, termination sets, impedance compensators, pulse link repeaters, echo suppressors and other intermediate transmission amplification and balancing equipment except that included in switchboards.

(3) Radio transmitters, receivers, repeaters and other radio central office equipment except message switching equipment associated with radio systems.

(4) Composite ringers, line signaling and switching pad circuits.

(5) Concentration equipment.

(6) Composite sets and repeating coils.

(7) Program transmission amplifiers, monitoring devices and volume indicators.

(8) Testboards, test desks, repair desks and patch bays, including those provided for test and control, and for transmission testing.

(b) For apportionment among the operations, the cost of circuit equipment is assigned to the following subsidiary categories:

(1) *Exchange Circuit Equipment—Category 4.1.* (i) Wideband Exchange Line Circuit Equipment—Category 4.11.

(ii) Exchange Trunk Circuit Equipment (Wideband and Non-Wideband)—Category 4.12.

(iii) Exchange Line Circuit Equipment Excluding Wideband—Category 4.13.

(2) *Interexchange Circuit Equipment—Category 4.2.* (i) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use—Category 4.21.

(ii) Interexchange Circuit Equipment Used for Wideband Services including Satellite and Earth Station Equipment used for Wideband Service—Category 4.22.

(iii) All Other Interexchange Circuit Equipment—Category 4.23.

(3) *Host/Remote Message Circuit Equipment—Category 4.3.*

(4) In addition, for the purpose of identifying and separating property associated with special services, circuit equipment included in Categories 4.12 (other than wideband equipment) 4.13 and 4.23 is identified as either basic circuit equipment, *i.e.,* equipment that performs functions necessary to provide and operate channels suitable for voice transmission (telephone grade channels), or special circuit equipment, *i.e.,* equipment that is peculiar to special service circuits.

Carrier telephone terminals and carrier telephone repeaters are examples of basic circuit equipment in general use, while audio program transmission amplifiers, bridges, monitoring devices and volume indicators are examples of special circuit equipment in general use. Cost of exchange circuit equipment included in Categories 4.12 and 4.13 and the interexchange circuit equipment in Categories 4.21, 4.22 and 4.23 are segregated between basic circuit equipment and special circuit equipment only at those locations where amounts of interexchange and exchange special circuit equipment are significant. Where such segregation is not made, the total costs in these categories are classified as basic circuit equipment.

(5) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41, shall assign the average balance of Account 2230 to the categories/subcategories as specified in §36.126(b)(1) through (b)(4) based on the relative percentage assignment of the average balance of Account 2230 (or, if Accounts 2231 and 2232 were required to be maintained at the applicable time, the average balances of Accounts 2231 and 2232) costs to these categories/subcategories during the twelve-month period ending December 31, 2000.

(6) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the average balance of Account 2230 to the categories/subcategories as specified in paragraphs (b)(1) through (4) of this section based on the relative percentage assignment of the average balance of Account 2230 (or, if Accounts 2231 and 2232 were required to be maintained at the applicable time, the average balances of Accounts 2231 and 2232) costs to these categories/subcategories during the twelve-month period ending December 31, 2000.

(c) Apportionment of Exchange Circuit Equipment Among the Operations:

(1) Wideband Exchange Line Circuit Equipment—Category 4.11—The cost of exchange circuit equipment in this category is determined separately for each wideband facility. The respective costs are allocated to the appropriate operation in the same manner as the related exchange line cable and wire facilities described in §36.155.

(2) Exchange Trunk Circuit Equipment (Wideband and Non-Wideband)—Category 4.12—The cost of exchange circuit equipment associated with this category for the study area is allocated to the appropriate operation in the same manner as the related exchange trunk cable and wire facilities as described in §36.155.

(3) Exchange Line Circuit Equipment Excluding Wideband—Category 4.13—

The cost of Circuit Equipment associated with exchange line plant excluding wideband for the study area is assigned to subcategories and is allocated to the appropriate operation in the same manner as the related exchange line cable and wire facilities for non-wideband service as described in §36.154.

(4) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion costs in the categories/subcategories, as specified in paragraphs (b)(1) through (4) of this section, among the jurisdictions using the relative use measurements or factors, as specified in paragraphs (c)(1) through (3) of this section for the twelve-month period ending December 31, 2000. Direct assignment of any subcategory of Category 4.1 Exchange Circuit Equipment to the jurisdictions shall be updated annually.

(d) Apportionment of Interexchange Circuit Equipment among the Operations: Procedures to be Used by Interexchange Carriers. (1) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use—Category 4.21—This category comprises that circuit equipment provided for the use of another company as an integral part of its interexchange circuit facilities used wholly for interstate services. This category includes such circuit equipment as telephone carrier terminals and microwave systems used wholly for interstate services. The total cost of the circuit equipment in this category for the study area is assigned to the interstate operation.

(2) Interexchange Circuit Equipment Used for Wideband Service—Category 4.22—This category includes the circuit equipment portion of interexchange channels used for wideband services. The cost of interexchange circuit equipment in this category is determined separately for each wideband channel and is segregated between message and private line services on the basis of the use of the channels provided. The respective costs are allocated to the appropriate operation in the same manner as the related interexchange cable and wire facilities as described in §36.156.

(3) All Other Interexchange Circuit Equipment—Category 4.23—This category includes the cost of all interexchange circuit equipment not assigned to Categories 4.21 and 4.22. Interexchange carriers shall freeze the allocation factors for Category 4.23 investment at levels reached on December 31, 1985, derived by using the procedures in effect at that time. On January 1, 1988, and thereafter, that frozen allocation factor shall be applied to each interexchange carrier's Category 4.23 investment to derive the interstate allocation. On January 1, 1988, and thereafter, the amount of investment allocated to the interstate jurisdiction will vary but the relative proportion of the total investment that is allocated to the interstate jurisdiction will remain frozen at 1985 levels.

(e) Apportionment of Interexchange Circuit Equipment among the Operations: Procedures To Be Used by Exchange Carriers. (1) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use Category—4.21—This category comprises that circuit equipment provided for the use of another company as an integral part of its interexchange circuit facilities used wholly for interstate services. This category includes such circuit equipment as telephone carrier terminals and microwave systems used wholly for interstate services. The total cost of the circuit equipment in this category for the study area is assigned to the interstate operation.

(2) Interexchange Circuit Equipment Used for Wideband Service—Category 4.22—This category includes the circuit equipment portion of interexchange channels used for wideband services. The cost of interexchange circuit equipment in this category is determined separately for each wideband channel and is segregated between message and private line services on the basis of the use of the channels provided. The respective costs are allocated to the appropriate operation in the same manner as the related interexchange cable and wire facilities described in §36.156.

(3) All Other Interexchange Circuit Equipment—Category 4.23—This category includes the cost of all interexchange circuit equipment not assigned to Categories 4.21 and 4.22. The cost of interexchange basic circuit equipment used for the following classes of circuits is included in this category: Jointly used message circuits, *i.e.*, message switching plant circuits carrying messages from the state and interstate operations; circuits used for state private line service; and circuits used for state private line services.

(i) An average interexchange circuit equipment cost per equivalent interexchange telephone termination for all circuits is determined and applied to the equivalent interexchange telephone termination counts of each of the following classes of circuits: Private Line, State Private Line, Message. The cost of interstate private line circuits is assigned directly to the interstate operation. The cost of state private line circuits is assigned directly to the state operation. The cost of message circuits is apportioned between the state and interstate operations on the basis of the relative number of study area conversation-minutes applicable to such facilities.

(ii) [Reserved]

(iii) The cost of special circuit equipment is segregated among private line services based on an analysis of the use of the equipment and in accordance with §36.126(b)(4). The special circuit equipment cost assigned to private line services

is directly assigned to the appropriate operations.

(4) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion costs in the categories/subcategories specified in paragraphs (e)(1) through (3) of this section among the jurisdictions using relative use measurements or factors, as specified in paragraphs (e)(1) through (3) for the twelve-month period ending December 31, 2000. Direct assignment of any subcategory of Category 4.2 Interexchange Circuit Equipment to the jurisdictions shall be updated annually.

(f) Apportionment of Host/Remote Message Circuit Equipment Among the Operations.

(1) Host/Remote Message Circuit Equipment—Category 4.3. This category includes message host/remote location circuit equipment for which a message circuit switching function is performed at the host central office associated with cable and wire facilities as described in §36.152(c).

(i) The category 4.3 cost of host/remote circuit equipment assigned to message services for the study area is apportioned among the exchange, intrastate toll, and interstate toll operations on the basis of the assignment of host/remote message cable and wire facilities as described in §36.157.

(ii) [Reserved]

(2) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion costs in the subcategory specified in paragraph (f)(1) of this section among the jurisdictions using the allocation factor, as specified in paragraph (f)(1)(i) of this section, for this subcategory for the twelve-month period ending December 31, 2000. Direct assignment of any Category 4.3 Host/Remote Message Circuit Equipment to the jurisdictions shall be updated annually.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33012 Aug. 29, 1988; 66 FR 33205, June 21, 2001; 69 FR 12550, Mar. 17, 2004; 71 FR 65745, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36236, June 26, 2014; 82 FR 48776, Oct. 20, 2017; 83 FR 63585, Dec. 11, 2018; 84 FR 4360, Feb. 15, 2019]

INFORMATION ORIGINATION/TERMINATION (IOT) EQUIPMENT

§36.141 General.

(a) Information Origination/Termination Equipment is maintained in Account 2310 and includes station apparatus, embedded customer premises wiring, large private branch exchanges, public telephone terminal equipment, and other terminal

equipment.

(b) The costs in Account 2310 shall be segregated between Other Information Origination/Termination Equipment—Category 1, and New Customer Premises Equipment—Category 2 by an analysis of accounting, engineering and other records.

(c) 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 the average balance of Account 2310 to the categories, as specified in paragraph (b) of this section, based on the relative percentage assignment of the average balance of Account 2310 to these categories during the twelve-month period ending December 31, 2000.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33206, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

§36.142 Categories and apportionment procedures.

(a) *Other Information Origination/Termination Equipment—Category 1.* This category includes the cost of other information origination/termination equipment not assigned to Category 2. The costs of other information origination/termination equipment are allocated pursuant to the factor that is used to allocate subcategory 1.3 Exchange Line C&WF.

(b) *Customer Premises Equipment—Category 2.* This category includes the cost of Customer Premises Equipment that was detariffed pursuant to the Second Computer Inquiry decision. It shall be assigned to the state operations.

(c) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion costs in the categories, as specified in §36.141(b), among the jurisdictions using the relative use measurements or factors, as specified in paragraph (a) of this section, for the twelve-month period ending December 31, 2000. Direct assignment of any category of Information Origination/Termination Equipment to the jurisdictions shall be updated annually.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33206, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

CABLE AND WIRE FACILITIES

§36.151 General.

(a) Cable and Wire Facilities, Account 2410, includes the following types of communications plant in service: Poles and antenna supporting structures, aerial

cable, underground cable, buried cable, submarine cable, deep sea cable, intrabuilding network cable, aerial wire and conduit systems.

(b) For separations purposes, it is necessary to analyze the cable and wire facilities classified in subordinate records in order to determine their assignment to the categories listed in the following paragraphs.

(c) In the separation of the cost of cable and wire facilities among the operations, the first step is the assignment of the facilities to certain categories. The basic method of making this assignment is the identification of the facilities assignable to each category and the determination of the cost of the facilities so identified. Because of variations among companies in the character of the facilities and operating conditions, and in the accounting and engineering records maintained, the detailed methods followed, of necessity, will vary among the companies. The general principles to be followed, however, will be the same for all companies.

(d) The second step is the apportionment of the cost of the facilities in each category among the operations through the application of appropriate factors or by direct assignment.

§36.152 Categories of Cable and Wire Facilities (C&WF).

(a) C&WF are basically divided between exchange and interexchange. Exchange C&WF consists of the following categories:

(1) Exchange Line C&WF *Excluding Wideband*—Category 1—This category includes C&W facilities between local central offices and subscriber premises used for message telephone, private line, local channels, and for circuits between control terminals and radio stations providing very high frequency maritime service or urban or highway mobile service.

(2) *Wideband and* Exchange Trunk C&WF—Category 2—This category includes all wideband, including Exchange Line Wideband and C&WF between local central offices and Wideband facilities. It also includes C&WF between central offices or other switching points used by any common carrier for interlocal trunks wholly within an exchange or metropolitan service area, interlocal trunks with one or both terminals outside a metropolitan service area carrying some exchange traffic, toll connecting trunks, tandem trunks principally carrying exchange traffic, the exchange trunk portion of WATS access lines, the exchange trunk portion of private line local channels, and the exchange trunk portion of circuits between control terminals and radio stations providing very high frequency maritime service or urban or highway mobile service.

(3) The procedures for apportioning the cost of exchange cable and wire facilities among the operations are set forth in §§36.154 and 36.155.

(b) Interexchange C&WF—Category 3—This category includes the C&WF used for message toll and toll private line services. It includes cable and wire facilities carrying intertoll circuits, tributary circuits, the interexchange channel portion of special service circuits, circuits between control terminals and radio stations used for overseas or coastal harbor service, interlocal trunks between offices in the different exchange or metropolitan service areas carrying only message toll traffic and certain tandem trunks which carry principally message toll traffic.

(1) The procedures for apportioning the cost of interexchange cable and wire facilities among the operations are set forth in §36.156.

(c) Host/Remote Message C&WF—Category 4—This category includes the cost of message host/remote location C&WF for which a message circuit switching function is performed at the host central office. It applies to C&WF between host offices and all remote locations. The procedures for apportioning the cost of these facilities among the operations are set forth in §36.157.

(d) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the average balance of Account 2410 to the categories/subcategories, as specified in paragraph (a) through (c) of this section based on the relative percentage assignment of the average balance of Account 2410 to these categories/subcategories during the twelve-month period ending December 31, 2000.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33206, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

§36.153 Assignment of Cable and Wire Facilities (C&WF) to categories.

(a) Cable consists of: Aerial cable, underground cable, buried cable, submarine cable, deep sea cable and intrabuilding network cable. Where an entire cable or aerial wire is assignable to one category, its cost and quantity are, where practicable, directly assigned.

(1) *Cable.* (i) There are two basic methods for assigning the cost of cable to the various categories. Both of them are on the basis of conductor cross section. The methods are as follows:

(A) By section of cable, uniform as to makeup and relative use by categories. From an analysis of cable engineering and assignment records, determine in terms

of equivalent gauge the number of pairs in use or reserved, for each category. The corresponding percentages of use, or reservation, are applied to the cost of the section of cable, i.e., sheath meters times unit cost per meter, to obtain the cost assignable to each category.

(B) By using equivalent pair kilometers, i.e., pair kilometers expressed in terms of equivalent gauge. From an analysis of cable engineering and assignment records, determine the equivalent pair kilometers in use for each category by type of facility, e.g., quadded, paired. The equivalent pair kilometers are then divided by a cable fill factor to obtain the equivalent pair kilometers in plant. The total equivalent pair kilometers in plant assigned to each category is summarized by type of facility, e.g., quadded and paired, and priced at appropriate average unit costs per equivalent pair kilometer in plant. If desired, this study may be made in terms of circuit kilometers rather than physical pair kilometers, with average cost and fill data consistent with the basis of the facilities kilometer count.

(ii) In the assignment of the cost of cable under the two basic methods described in §36.153(a)(1)(i) consideration is given to the following:

(A) Method (A) described in §36.153(a)(1)(i)(A) will probably be found more desirable where there is a relatively small amount of cable of variable make-up and use by categories. Conversely, method (B) described in §36.153(a)(1)(i)(B) will probably be more desirable where there is a large amount of cable of variable make-up and use by categories. However, in some cases a combination of both methods may be desirable.

(B) It will be desirable in some cases to determine the amount assignable to a particular category by deducting from the total the sum of the amounts assigned to all other categories.

(C) For use in the assignment of poles to categories, the equivalent sheath kilometers of aerial cable assigned to each category are determined. For convenience, these quantities are determined in connection with assignment of cable costs.

(D) Where an entire cable is assignable to one category, its costs and quantity are, where practicable, directly assigned.

(iii) For cables especially arranged for high-frequency transmission such as shielded, disc-insulated and coaxial, recognition is given to the additional costs which are charged to the high-frequency complement.

(2) *Cable Loading.* (i) Methods for assigning the cost of loading coils, cases, etc., to categories are comparable with those used in assigning the associated cable

to categories. Loading associated with cable which is directly assigned to a given category is also directly assigned. The remaining loading is assigned to categories in either of the following bases:

(A) By an analysis of the use made of the loading facilities where a loading coil case includes coils assignable to more than one category, e.g., in the case of a single gauge uniformly loaded section, the percentage used in the related cable assignment are applicable, or

(B) By pricing out each category by determining the pair meters of loaded pairs assigned to each category and multiplying by the unit cost per pair meter of loading by type.

(3) *Other Cable Plant.* (i) In view of the small amounts involved, the cost of all protected terminals and gas pressure contactor terminals in the toll cable subaccounts is assigned to the appropriate Interexchange Cable & Wire Facilities categories. The cost of all other terminals in the exchange and toll cable subaccounts is assigned to Exchange Cable and Wire Facilities.

(b) *Aerial Wire.* (1) The cost of wire accounted for as exchange is assigned to the appropriate Exchange Cable & Wire Facilities categories. The cost of wire accounted for as toll, which is used for exchange, is also assigned to the appropriate Exchange Cable & Wire Facilities categories. The cost of the remaining wire accounted for as toll is assigned to the appropriate Interexchange Cable & Wire Facilities categories as described in §36.156. For companies not maintaining exchange and toll subaccounts, it is necessary to review the plant records and identify wire plant by use. The cost of wire used for providing circuits directly assignable to a category is assigned to that category. The cost of wire used for providing circuit facilities jointly used for exchange and interexchange lines is assigned to categories on the basis of the relative number of circuit kilometers involved.

(c) *Poles and Antenna Supporting Structures.* (1) In the assignment of these costs, anchors, guys, crossarms, antenna supporting structure, and right-of-way are included with the poles.

(2) Poles. (i) The cost of poles is assigned to categories based on the ratio of the cost of poles to the total cost of aerial wire and aerial cable.

(d) *Conduit Systems.* (1) The cost of conduit systems is assigned to categories on the basis of the assignment of the cost of underground cable.

[53 FR 17229, May 6, 1987, as amended at 53 FR 33012, Aug. 29, 1988; 58 FR 44905, Aug. 25, 1993]

§36.154 Exchange Line Cable and Wire Facilities (C&WF)—Category 1—apportionment procedures.

(a) *Exchange Line C&WF—Category 1.* The first step in apportioning the cost of exchange line cable and wire facilities among the operations is the determination of an average cost per working loop. This average cost per working loop is determined by dividing the total cost of exchange line cable and wire Category 1 in the study area by the sum of the working loops described in subcategories listed below. The subcategories are:

Subcategory 1.1—State Private Lines and State WATS Lines. This subcategory shall include all private lines and WATS lines carrying exclusively state traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes ten percent or less of the total traffic on the line.

Subcategory 1.2—Interstate private lines and interstate WATS lines. This subcategory shall include all private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.

Subcategory 1.3—Subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services.

(b) The costs assigned to subcategories 1.1 and 1.2 shall be directly assigned to the appropriate jurisdiction.

(c) Effective January 1, 1986, 25 percent of the costs assigned to subcategory 1.3 shall be allocated to the interstate jurisdiction.

(d)-(f) [Reserved]

(g) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Subcategory 1.3 Exchange Line C&WF among the jurisdictions as specified in paragraph (c) of this section. Direct assignment of subcategory Categories 1.1 and 1.2 Exchange Line C&WF to the jurisdictions shall be updated annually as specified in paragraph (b) of this section.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33012, Aug. 29, 1988; 54 FR 31033, July 26, 1989; 66 FR 33206, June 21, 2001; 67 FR 17014, Apr. 9, 2002; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014; 83 FR 63585, Dec. 11, 2018]

§36.155 Wideband and exchange trunk (C&WF)—Category 2—apportionment procedures.

(a) The cost of C&WF applicable to this category shall be directly assigned where feasible. If direct assignment is not feasible, cost shall be apportioned between the state and interstate jurisdictions on the basis of the relative number of minutes of use.

(b) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Category 2 Wideband and exchange trunk C&WF among the jurisdictions using the relative number of minutes of use, as specified in paragraph (a) of this section, for the twelve-month period ending December 31, 2000. Direct assignment of any Category 2 equipment to the jurisdictions shall be updated annually.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33206, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

§36.156 Interexchange Cable and Wire Facilities (C&WF)—Category 3—apportionment procedures.

(a) An average interexchange cable and wire facilities cost per equivalent interexchange telephone circuit kilometer for all circuits in Category 3 is determined and applied to the equivalent interexchange telephone circuit kilometer counts of each of the classes of circuits.

(b) The cost of C&WF applicable to this category shall be directly assigned where feasible. If direct assignment is not feasible, cost shall be apportioned between the state and interstate jurisdiction on the basis of conversation-minute kilometers as applied to toll message circuits, etc.

(c) Effective July 1, 2001, through December 31, 2024, all study areas shall directly assign Category 3 Interexchange Cable and Wire Facilities C&WF where feasible. All study areas shall apportion the non-directly assigned costs in Category 3 equipment to the jurisdictions using the relative use measurements, as specified in paragraph (b) of this section, during the twelve-month period ending December 31, 2000.

[58 FR 44905, Aug. 25, 1993, as amended at 66 FR 33206, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

§36.157 Host/remote message Cable and Wire Facilities (C&WF)—Category 4—apportionment procedures.

(a) *Host/Remote Message C&WF—Category 4.* The cost of host/remote C&WF used for message circuits, i.e., circuits carrying only message traffic, is included in this category.

(1) The cost of host/remote message C&WF excluding WATS closed end access lines for the study area is apportioned on the basis of the relative number of study area minutes-of-use kilometers applicable to such facilities.

(2) The cost of host/remote message C&WF used for WATS closed end access for the study area is directly assigned to the appropriate jurisdiction.

(b) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Category 4 Host/Remote message Cable and Wire Facilities C&WF among the jurisdictions using the relative number of study area minutes-of-use kilometers applicable to such facilities, as specified in paragraph (a)(1) of this section, for the twelve-month period ending December 31, 2000. Direct assignment of any Category 4 equipment to the jurisdictions shall be updated annually.

[52 FR 17229, May 6, 1987, as amended at 58 FR 44905, Aug. 25, 1993; 66 FR 33206, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

AMORTIZABLE ASSETS

§36.161 Tangible assets—Account 2680.

(a) Tangible Assets, Account 2680 includes the costs of property acquired under capital leases and the original cost of leasehold improvements.

(b) The costs of capital leases are apportioned among the operations based on similar plant owned or by analysis.

(c) The cost of leasehold improvements are apportioned among the operations in direct proportion to the costs of the related primary account.

§36.162 Intangible assets—Account 2690.

(a) Intangible Assets, Account 2690 includes the costs of organizing and incorporating the company, franchises, patent rights, and other intangible property having a life of more than one year.

(b) The amount included in this account is apportioned among the operations on the basis of the separation of the cost of Telecommunications Plant In Service, Account 2001, excluding the Intangible Assets, Account 2690.

TELECOMMUNICATIONS PLANT—OTHER

§36.171 Property held for future telecommunications use—Account 2002; Telecommunications plant under construction—Account 2003; and Telecommunications plant adjustment—Account 2005.

The amounts carried in Accounts 2002, 2003, and 2005 are apportioned among the operations on the basis of the apportionment of Account 2001, Telecommunications Plant in Service.

[60 FR 12138, Mar. 6, 1995]

RURAL TELEPHONE BANK STOCK

§36.172 Other noncurrent assets—Account 1410.

(a) The amounts carried in this account shall be separated into subsidiary record categories:

(1) Class B RTB Stock and

(2) All other.

(b) The amounts contained in category (2) all other of §36.172(a)(2), shall be excluded from part 36 jurisdictional separations.

(c) The amounts contained in category (1) Class B RTB stock of §36.172(a)(1), shall be allocated based on the relative separations of Account 2001, Telephone Plant in Service.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33012, Aug. 29, 1988]

MATERIAL AND SUPPLIES AND CASH WORKING CAPITAL

§36.181 Material and supplies—Account 1220.

(a) The amount included in Account 1220 is apportioned among the operations on the basis of the apportionment of the cost of cable and wire facilities in service. Any amounts included in Account 1220 associated with the Customer Premises portion of Account 2310 equipment, shall be excluded from the amounts which are allocated to the interstate operation.

§36.182 Cash working capital.

(a) The amount for cash working capital, if not determined directly for a particular operation, is apportioned among the operations on the basis of total expenses less non-cash expense items.

EQUAL ACCESS EQUIPMENT

§36.191 Equal access equipment.

(a) Equal access investment includes only initial incremental expenditures for hardware and other equipment related directly to the provision of equal access which would not be required to upgrade the capabilities of the office involved absent the provision of equal access. Equal access investment is limited to such expenditures for converting central offices which serve competitive interexchange carriers or where there has been a bona fide request for conversion to equal access.

(b) Equal access investment is first segregated from all other amounts in the primary accounts.

(c) The equal access investment determined in this manner is allocated between the jurisdictions on the basis of relative state and interstate equal access traffic including interstate interLATA equal access traffic, intrastate interLATA equal access traffic, and BOC interstate corridor toll traffic as well as AT&T and OCC intraLATA equal access usage. Local exchange traffic and BOC intraLATA toll traffic is excluded. In the case of independent telephone companies, intrastate toll service provided by the independent local exchange company is excluded in determining intrastate usage, but intrastate toll service provided by long distance carriers affiliated with the local exchange company is included.

(d) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Equal Access Equipment, as specified in paragraph (a) of this section, among the jurisdictions using the relative state and interstate equal access traffic, as specified in paragraph (c) of this section, for the twelve-month period ending December 31, 2000.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33012, Aug. 29, 1988; 66 FR 33206, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

Subpart C—Operating Revenues and Certain Income Accounts

GENERAL

§36.201 Section arrangement.

This subpart is arranged in sections as follows:

Long Distance Message Revenue—Account 5100	36.214
Miscellaneous Revenue—Account 5200	36.215
Uncollectible Revenue—Account 5300	36.216
Certain Income Accounts:	
Other Operating Income and Expenses—Account 7100	36.221
Nonoperating Income and Expenses—Account 7300	36.222
Interest and Related Items—Account 7500	36.223
Extraordinary Items—Account 7600	36.224
Income Effect of Jurisdictional Ratemaking Differences—Account 7910	36.225

[69 FR 12550, Mar. 17, 2004, as amended at 83 FR 63585, Dec. 11, 2018]

§36.202 General.

(a) This section sets forth procedures for the apportionment among the operations of operating revenues and certain income and expense accounts.

(b) Except for the Network Access Revenues, subsidiary record categories are maintained for all revenue accounts in accordance with the requirements of part 32. These subsidiary records identify services for the appropriate jurisdiction and will be used in conjunction with apportionment procedures stated in this manual.

[52 FR 17299, May 6, 1987, as amended at 69 FR 12550, Mar. 17, 2004]

OPERATING REVENUES

§36.211 General.

Operating revenues are included in the following accounts:

Account title	Account No.
Basic Local Service Revenue	5000
Network Access Revenues:	
End User Revenue	5081

Switched Access Revenue	5082
Special Access Revenue	5083
Long Distance Message Revenue	5100
Miscellaneous Revenue	5200
Uncollectible Revenue	5300

[69 FR 12550, Mar. 17, 2004, as amended at 83 FR 63585, Dec. 11, 2018]

§36.212 Basic local services revenue—Account 5000.

(a) Local private line revenues from broadcast program transmission audio services and broadcast program transmission video services are assigned to the interstate operation.

(b) Revenues that are attributable to the origination or termination of interstate FX or CCSA like services shall be assigned to the interstate jurisdiction.

(c) Wideband Message Service revenues from monthly and miscellaneous charges, service connections, move and change charges, are apportioned between state and interstate operations on the basis of the relative number of minutes-of-use in the study area. Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Wideband Message Service revenues among the jurisdictions using the relative number of minutes of use for the twelve-month period ending December 31, 2000.

(d) All other revenues in this account are assigned to the exchange operation based on their subsidiary record categories or on the basis of analysis and studies.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33206, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

§36.213 Network access services revenues.

(a) End User Revenue—Account 5081. Revenues in this account are directly assigned on the basis of analysis and studies.

(b) Switched Access Revenue—Account 5082. Revenues in this account are directly assigned on the basis of analysis and studies.

(c) Special Access Revenue—Account 5083. Revenues in this account are directly assigned on the basis of analysis and studies.

[52 FR 17299, May 6, 1987, as amended at 69 FR 12550, Mar. 17, 2004]

§36.214 Long distance message revenue—Account 5100.

(a) Wideband message service revenues from monthly and miscellaneous charges, service connections, move and change charges, are apportioned between state and interstate operations on the basis of the relative number of minutes-of-use in the study area. Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Wideband Message Service revenues among the jurisdictions using the relative number of minutes of use for the twelve-month period ending December 31, 2000.

(b) Long Distance private line service revenues from broadcast program transmission audio services and broadcast program transmission video services are assigned to the interstate operation.

(c) All other revenues in this account are directly assigned based on their subsidiary record categories or on the basis of analysis and studies.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33206, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36237, June 26, 2014]

§36.215 Miscellaneous revenue—Account 5200.

(a) Directory revenues are assigned to the exchange operation.

(b) Billing and collection revenues are assigned on the basis of services being provided.

(c) All other revenues are apportioned on the basis of analysis.

§36.216 Uncollectible revenue—Account 5300.

The amounts in this account are apportioned among the operations on the basis of analysis during a representative period of the portion of Account 1171, Allowance for doubtful accounts, related to telecommunications billing.

[69 FR 12551, Mar. 17, 2004]

CERTAIN INCOME ACCOUNTS

§36.221 Other operating income and expenses—Account 7100.

(a) Amounts relating to translation in foreign exchange differentials are assigned to the interstate operations.

(b) All other amounts are apportioned based on Telecommunications Plant in Service, Account 2001, if plant related, or on the nature of the item reflected in the

account, if not plant related.

§36.222 Nonoperating income and expenses—Account 7300.

(a) Only allowance for funds used during construction, and charitable, social and community welfare contributions are considered in this account for separations purposes.

(b) Subsidiary record categories should be maintained for this account that include identification of amounts made to the account for (1) credits representing allowance for funds used during construction and (2) contributions for charitable, social or community welfare purposes, employee activities, membership dues and fees in service clubs, community welfare association and similar organizations.

(c) The portion reflecting allowance for funds used during construction is apportioned on the basis of the cost of Telecommunications Plant Under Construction—Account 2003. The portion reflecting costs for social and community welfare contributions and fees is apportioned on the basis of the apportionment of corporate operations expenses.

[52 FR 17229, May 6, 1987, as amended at 60 FR 12138, Mar. 6, 1995]

§36.223 Interest and related items—Account 7500.

(a) Only interest paid relating to capital leases is considered in this account for separations purposes. Subsidiary Record Categories should be maintained for this account that include details relating to interest expense on capital leases. Such interest expense is apportioned on a basis consistent with the associated capital leases in Account 2680.

§36.224 Extraordinary items—Account 7600.

(a) Amounts in this account of an operating nature are apportioned on a basis consistent with the nature of these items.

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§36.225 Income effect of jurisdictional ratemaking differences—Account 7910.

(a) Amounts in this account are directly assigned to the appropriate jurisdiction.

Subpart D—Operating Expenses and Taxes

GENERAL

§36.301 Section arrangement.

This subpart is arranged in sections as follows:

All Other	36.376.
Category 1—Local Bus. Office Expense	36.377.
Category 2—Customer Services (Revenue Accounting)	36.378.
Message Processing Expense	36.379.
Other Billing and Collecting Expense	36.380.
Carrier Access Charge Billing and Collecting Expense	36.381.
Category 3—All other Customer Service Expense	36.382.
Corporate Operations Expenses:	
General	36.391.
General and Administrative Expenses—Account 6720	36.392.
Operating Taxes—Account 7200	36.411 and 36.412.
Equal Access Expenses	36.421.

[69 FR 12551, Mar. 17, 2004, as amended at 83 FR 63585, Dec. 11, 2018]

§36.302 General.

(a) This section sets forth procedures for the apportionment among the operations of operating expenses and operating taxes.

(b) As covered in §36.2 (c) and (d), the treatment of expenses relating to plant furnished to and obtained from others under rental arrangements is consistent with the treatment of such plant.

(c) In accordance with requirements in part 32 §32.5999 (f) expenses recorded in the expense accounts are segregated in the accounting process among the following subsidiary record categories as appropriate to each account:

Salaries and Wages

Benefits

Rents

Other Expenses

Clearances

(1) Subsidiary Record Categories (SRCs) for Salaries and Wages, Benefits and Other Expenses are applicable to all of the expense accounts except for:

(i) SRCs for access expenses are maintained to identify interstate and state access expense and billing and collection expense for carrier's carrier.

(ii) Depreciation and Amortization Expense SRCs identify the character of the items contained in the account.

(2) SRCs for Rents and Clearance are only applicable to the Plant Specific Operating Expense accounts 6110 thru 6410.

[52 FR 17229, May 6, 1987, as amended at 83 FR 63586, Dec. 11, 2018]

PLANT SPECIFIC OPERATIONS EXPENSES

§36.310 General.

(a) Plant specific operations expenses include the following accounts:

TABLE 1 TO PARAGRAPH (a)

Network Support Expenses	Account 6110.
General Support Expenses	Account 6120.
Central Office Switching Expenses	Account 6210.
Operator System Expenses	Account 6220.
Central Office Transmission Expenses	Account 6230.
Information Origination/Termination Expenses	Account 6310.
Cable and Wire Facilities Expenses	Account 6410.

(b) These accounts are used to record costs related to specific kinds of telecommunications plant and predominantly mirror the telecommunications plant in service detail accounts. Accordingly, these expense accounts will generally be apportioned in the same manner as the related plant accounts.

(c) Except where property obtained from or furnished to other companies is

treated as owned property by the company making the separation, and the related operating rents are excluded from the separation studies as set forth in §36.2 (c) and (d), amounts are apportioned among the operations on bases generally consistent with the treatment prescribed for similar plant costs and consistent with the relative magnitude of the items involved.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33012, Aug. 29, 1988; 69 FR 12551, Mar. 17, 2004; 83 FR 63586, Dec. 11, 2018]

NETWORK SUPPORT/GENERAL SUPPORT EXPENSES

§36.311 Network Support/General Support Expenses—Accounts 6110 and 6120.

(a) Network Support Expenses are expenses associated with motor vehicles, aircraft, special purpose vehicles, garage work equipment, and other work equipment. General Support Expenses are expenses associated with land and buildings, furniture and artworks, office equipment, and general purpose computers.

(b) The expenses in these account are apportioned among the operations on the basis of the separation of account 2110, Land and Support Assets.

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CENTRAL OFFICE EXPENSES

§36.321 Central office expenses—Accounts 6210, 6220, and 6230.

(a) The expenses related to central office equipment are summarized in the following accounts:

TABLE 1 TO PARAGRAPH (a)

Central Office Switching Expense	Account 6210.
Operator Systems Expense	Account 6220.
Central Office Transmission Expense	Account 6230.

(b) The expenses in these accounts are apportioned among the operations on the basis of the separation of the investments in central office equipment—Accounts 2210, 2220 and 2230, combined.

[52 FR 17229, May 6, 1987, as amended at 69 FR 12552, Mar. 17, 2004; 83 FR

63586, Dec. 11, 2018]

INFORMATION ORIGINATION/TERMINATION EXPENSES

§36.331 Information origination/termination expenses—Account 6310.

(a) The expenses in this account are classified as follows:

(1) Other Information Origination/Termination Equipment Expenses; Customer Premises Equipment Expenses

(2) For some companies, these classifications are available from accounting records; for others, they are obtained by means of analyses of plant, accounting or other records for a representative period.

(b) Other Information Origination/Termination Equipment Expenses include all expenses not associated with Customer Premises Equipment expenses. These expenses shall be apportioned between state and interstate operations in accordance with the apportionment of the related investment as per §36.142(a).

(c) Expenses related to Customer Premises Equipment shall be assigned to the state operations.

[52 FR 17229, May 6, 1987, as amended at 53 FR 33012, Aug. 29, 1988]

CABLE AND WIRE FACILITIES EXPENSES

§36.341 Cable and wire facilities expenses—Account 6410.

(a) This account includes the expenses for poles, antenna supporting structures, aerial cable, underground cable, buried cable, submarine cable, deep sea cable, intrabuilding network cable, aerial wire, and conduit systems.

(b) The general method of separating cable and wire facilities expenses amoung the operations is to assign them on the basis of Account 2410—Cable and Wire Facilities.

PLANT NONSPECIFIC OPERATIONS EXPENSES

§36.351 General.

Plant nonspecific operations expenses include the following accounts:

TABLE 1 TO §36.351

Other Property Plant and Equipment Expenses	Account 6510.
Network Operations Expenses	Account 6530.

Access Expenses	Account 6540.
Depreciation and Amortization Expenses	Account 6560.

[83 FR 63586, Dec. 11, 2018]

PLANT EXPENSES—OTHER

§36.352 Other property plant and equipment expenses—Account 6510.

(a) This account is used to record the expenses associated with (1) property held for future telecommunications use and (2) the provisioning of material and supplies.

(b) The expenses in this account are apportioned among the operations based on the separation of Account 2001—Telecommunications Plant in Service.

NETWORK OPERATIONS EXPENSES

§36.353 Network operations expenses—Account 6530.

(a) This account includes the expenses associated with the provisions of power, network administration, testing, plant operations administration, and engineering.

(b) The expenses in this account are apportioned among the operations based on the separations of Account 2210, Central Office Switching, Account 2220 Operator Systems, Account 2230 Central Office Transmission, Account 2310, Information Origination/Termination and Account 2410, Cable and Wire Facilities, Combined.

§36.354 Access expenses—Account 6540.

(a) This account includes access charges paid to exchange carriers for exchange access service. These are directly assigned to the appropriate jurisdiction based on subsidiary record categories or on analysis and study.

DEPRECIATION AND AMORTIZATION EXPENSES

§36.361 Depreciation and amortization expenses—Account 6560.

(a) This account includes the depreciation expenses for telecommunications plant in service and for property held for future telecommunications use. It also includes the amortization expense for tangible and intangible asserts.

(b) Expenses recorded in this account shall be separated on the basis of the separation of the associated primary Plant Accounts or related categories.

CUSTOMER OPERATIONS EXPENSES

§36.371 General.

Customer Operations Expenses are included in the following accounts:

Marketing	Account 6610.
Services	Account 6620.

[69 FR 12552, Mar. 17, 2004, as amended at 83 FR 63587, Dec. 11, 2018]

§36.372 Marketing—Account 6610.

The expenses in this account are apportioned among the operations on the basis of an analysis of current billing for a representative period, excluding current billing on behalf of others and billing in connection with intercompany settlements. Effective July 1, 2001, through December 31, 2024, all study areas shall apportion expenses in this account among the jurisdictions using the analysis during the twelve-month period ending December 31, 2000.

[79 FR 36238, June 26, 2014]

§36.373 Services—Account 6620.

(a) For apportionment purposes, the expenses in this account are first segregated on the basis of an analysis of job functions into the following classifications: Telephone operator services: publishing directory listing; and all other.

(1) Expenses may be apportioned among the operations for groups of exchanges. A group of exchanges may include all exchanges in the study area.

§36.374 Telephone operator services.

(a) Expenses in this classification include costs incurred for operators in call completion service and number services. This includes intercept, quoting rates, directory information, time charges, and all other operator functions performed in the central office, private branch exchange, teletypewriter exchange, and at public telephone stations.

(b) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the Telephone operator expense classification based on the relative percentage assignment of the balance of Account 6620 to this classification during the twelve-month period ending December 31, 2000.

(c) Expenses in this classification are apportioned among the operations on the basis of the relative number of weighted standard work seconds as determined by

analysis and study for a representative period.

(d) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Telephone operator expenses among the jurisdictions using the relative number of weighted standard work seconds, as specified in paragraph (c) of this section, during the twelve-month period ending December 31, 2000.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33207, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36238, June 26, 2014]

§36.375 Published directory listing.

(a) This classification includes expenses for preparing or purchasing, compiling and disseminating directory listings.

(b) Published directory expense is assigned as follows:

(1) Classified directory expense and all expense of soliciting advertising is assigned to the exchange operation.

(2) The expense of alphabetical and street address directories and traffic information records is apportioned among the operations on the basis of the relative number of study area subscriber line minutes-of-use applicable to each operation.

(3) The expense associated with directories and traffic information records prepared for one locality and used in another locality is known as "foreign directories expense." Such expense is assigned to the appropriate operation on the basis of the location of the point where used with respect to the locality for which the directories and records were prepared.

(4) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the classifications, as specified in paragraphs (b)(1) through (3) of this section, based on the relative percentage assignment of the balance of Account 6620 to these classifications during the twelve-month period ending December 31, 2000.

(5) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Published directory listing expenses using the underlying relative use measurements, as specified in paragraphs (b)(1) through (3) of this section, during the twelve-month period ending December 31, 2000. Direct assignment of any Publishing directory listing expense to the jurisdictions shall be updated annually.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33207, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79

FR 36238, June 26, 2014; 83 FR 63587, Dec. 11, 2018]

§36.376 All other.

(a) For apportionment purposes this classification must be divided into three categories:

(1) Category 1—Local Business Office Expense.

(2) Category 2—Customer Services Expense.

(3) Category 3—All Other Customer Services Expense.

§36.377 Category 1—Local business office expense.

(a) The expense in this category for the area under study is first segregated on the basis of an analysis of job functions into the following subcategories: End user service order processing; end user payment and collection; end user billing inquiry; interexchange carrier service order processing; interexchange carrier payment and collection; interexchange carrier billing inquiry; and coin collection and administration. Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in this paragraph (a), based on the relative percentage assignment of the balance of Account 6620 to these categories/subcategories during the twelve-month period ending December 31, 2000.

(1) End-user service order processing includes expenses related to the receipt and processing of end users' orders for service and inquiries concerning service. This subcategory does not include any service order processing expenses for services provided to the interexchange carriers. End user service order processing expenses are first segregated into the following subcategories based on the relative number of actual contacts which are weighted, if appropriate, to reflect differences in the average work time per contact: Local service order processing; presubscription; directory advertising; State private line and special access; interstate private line and special access; other State message toll including WATS; other interstate message toll including WATS.

(i) Local service order processing expense (primarily local telephone service orders) is assigned to the State jurisdiction.

(ii) Presubscription service order processing expense is assigned to the interstate jurisdiction.

(iii) Directory advertising service order processing expense is assigned to the State jurisdiction.

(iv) State private line and special access service order processing expense is assigned to the State jurisdiction.

(v) Interstate private line and special access service order processing expense is assigned to the interstate jurisdiction.

(vi) Other State message toll including WATS service order processing expense is assigned to the State jurisdiction.

(vii) Other Interstate message toll including WATS service order processing expense is assigned to the interstate jurisdiction.

(viii) [Reserved]

(ix) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the categories/subcategories, as specified in paragraphs (a)(1)(i) through (viii) of this section, based on the relative percentage assignment of the balance of Account 6620 to these categories/subcategories during the twelve-month period ending December 31, 2000. Effective July 1, 2001, through December 31, 2024, all study areas shall apportion TWX service order processing expense, as specified in paragraph (a)(1)(viii) of this section among the jurisdictions using relative billed TWX revenues for the twelve-month period ending December 31, 2000. All other subcategories of End-user service order processing expense, as specified in paragraphs (a)(1)(i) through (viii) shall be directly assigned.

(2) End user payment and collection includes expenses incurred in relation to the payment and collection of amounts billed to end users. It also includes commissions paid to payment agencies (which receive payment on customer accounts) and collection agencies. This category does not include any payment or collection expenses for services provided to interexchange carriers. End user payment and collection expenses are first segregated into the following subcategories based on relative total state and interstate billed revenues (excluding revenues billed to interexchange carriers and/or revenues deposited in coin boxes) for services for which end user payment and collection is provided: State private line and special access; interstate private line and special access; State message toll including WATS; interstate message toll including WATS, and interstate subscriber line charge; local, including directory advertising.

(i) State private line and special access payment and collection expense is assigned to the State jurisdiction.

(ii) Interstate private line and special access payment and collection expense is

assigned to the interstate jurisdiction.

(iii) State message toll including WATS payment and collection expense is assigned to the State jurisdiction.

(iv) Interstate message toll including WATS and interstate subscriber line charge payment and collection expense is assigned to the interstate jurisdiction.

(v) Local, including directory advertising payment and collection expense is assigned to the State jurisdiction.

(vi) [Reserved]

(vii) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in paragraphs (a)(2)(i) through (vi) of this section, based on the relative percentage assignment of the balance of Account 6620 to these categories/subcategories during the twelve-month period ending December 31, 2000. All other subcategories of End User payment and collection expense, as specified in paragraphs (a)(2)(i) through (v) of this section, shall be directly assigned.

(3) End user billing inquiry includes expenses related to handling end users' inquiries concerning their bills. This category does not include expenses related to the inquiries of interexchange carriers concerning their bills. End user billing inquiry costs are first segregated into the following subcategories based on the relative number of actual contracts, weighted if appropriate, to reflect differences in the average work time per contact: State private line and special access; interstate private line and special access; State message toll including WATS, interstate message toll including WATS, interstate subscriber line charge; and other.

(i) State private line and special access billing inquiry expense is directly assigned to the State jurisdiction.

(ii) Interstate private line and special access billing inquiry expense is directly assigned to the interstate jurisdiction.

(iii) State message toll including WATS billing inquiry expense is directly assigned to the State jurisdiction.

(iv) Interstate message toll including WATS, and interstate subscriber line charge billing inquiry expense is directly assigned to the interstate jurisdiction.

(v) [Reserved]

(vi) Other billing inquiry expense (primarily related to local bills but also

including directory advertising) is directly assigned to the State jurisdiction.

(vii) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in paragraphs (a)(3)(i) through (vi) of this section, based on the relative percentage assignment of the balance of Account 6620 to these subcategories during the twelve-month period ending December 31, 2000. All other subcategories of End user billing inquiry expense, as specified in paragraphs (a)(2)(i) through (vi) shall be directly assigned.

(4) Interexchange carrier service order processing includes expenses associated with the receipt and processing of interexchange carrier orders for service and inquiries about service. Interexchange carrier service order processing expenses are assigned to the following subcategories based on the relative number of actual contacts which are weighted, if appropriate, to reflect differences in the average work time per contact: State special access and private line; interstate special access and private line; State switched access and message toll including WATS; interstate switched access and message toll including WATS; State billing and collection; and interstate billing and collection.

(i) State special access and private line service order processing expense is directly assigned to the State jurisdiction.

(ii) Interstate special access and private line service order processing expense is directly assigned to the interstate jurisdiction.

(iii) State switched access and message toll including WATS service order processing expense is directly assigned to the State jurisdiction.

(iv) Interstate switched access and message toll including WATS service order processing expense is directly assigned to the interstate jurisdiction.

(v) State billing and collection service order processing expense is directly assigned to the state jurisdiction.

(vi) Interstate billing and collection service order processing expense is directly assigned to the interstate jurisdiction.

(vii) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in paragraphs (a)(4)(i) through (vi) of this section, based on the relative percentage assignment of the balance of Account 6620 to these subcategories during the twelve-month period ending December 31, 2000. All subcategories of Interexchange carrier service order processing expense, as specified in paragraphs (a)(2)(i) through (vi), shall be

directly assigned.

(5) Interexchange carrier payment and collection includes expenses associated with the payment and collection of interexchange carrier billings, including commissions paid to payment and collection agents. Interexchange carrier payment and collection expenses are assigned to the following subcategories based on relative total State and interstate revenues billed to the interexchange carriers: State special access and private line; interstate special access and private line; State switched access and message toll including WATS; interstate switched access and message toll including WATS; State billing and collection; and interstate billing and collection.

(i) State special access and private line payment and collection expense is directly assigned to the State jurisdiction.

(ii) Interstate special access and private line payment and collection expense is directly assigned to the interstate jurisdiction.

(iii) State switched access and message toll including WATS payment and collection expense is directly assigned to the State jurisdiction.

(iv) Interstate switched access and message toll including WATS payment and collection expense is directly assigned to the interstate jurisdiction.

(v) State billing and collection payment and collection expense is directly assigned to the State jurisdiction.

(vi) Interstate billing and collection payment and collection expense is directly assigned to the interstate jurisdiction.

(vii) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in paragraphs (a)(5)(i) through (vi) of this section, based on the relative percentage assignment of the balance of Account 6620 to these subcategories during the twelve-month period ending December 31, 2000. All subcategories of Interexchange carrier payment expense, as specified in paragraphs (a)(2)(i) through (vi) shall be directly assigned.

(6) Interexchange carrier billing inquiry includes expenses related to the handling of interexchange carrier billing inquiries. Interexchange carrier billing inquiry expenses are assigned to the following subcategories based on the relative number of actual contacts, weighted if appropriate, to reflect differences in the average work time per contact: State special access and private line; interstate special access and private line; State switched access and message toll including WATS; interstate switched access and message toll including WATS; State billing

and collection; and interstate billing and collection.

(i) State special access and private line billing inquiry expenses is directly assigned to the State jurisdiction.

(ii) Interstate special access and private line billing inquiry expense is directly assigned to the interstate jurisdiction.

(iii) State switched access and message toll including WATS billing inquiry expense is directly assigned to the State jurisdiction.

(iv) Interstate switched access and message toll including WATS billing inquiry expense is directly assigned to the interstate jurisdiction.

(v) State billing and collection billing inquiry expense is directly assigned to the State jurisdiction.

(vi) Interstate Billing and Collection billing inquiry expense is directly assigned to the interstate jurisdiction.

(vii) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in paragraphs (a)(6)(i) through (vi) of this section, based on the relative percentage assignment of the balance of Account 6620 to these subcategories during the twelve-month period ending December 31, 2000. All subcategories of Interexchange carrier billing inquiry expense, as specified in paragraphs (a)(2)(i) through (vi), shall be directly assigned.

(7) [Reserved]

(b) [Reserved]

[52 FR 17229, May 6, 1987, as amended at 66 FR 33207, June 21, 2001; 71 FR 65746, Nov. 9, 2006; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36238, June 26, 2014; 83 FR 63587, Dec. 11, 2018]

§36.378 Category 2—Customer services (revenue accounting).

(a) The Revenue Accounting proportion of Account 6620 expenses comprise the salaries and other expenses in Account 6620 directly assignable or allocable to the billing of customers and the accounting for revenues, including the supervision of such work.

(b) Revenue Accounting expenses for the study area are separated on the basis of a Job Function analysis into three main classifications: Message processing expense, other billing and collecting expense, and carrier access charge billing and

collecting expense.

(1) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the classifications, as specified in paragraph (b) of this section, based on the relative percentage assignment of the balance of Account 6620 to those classifications during the twelve-month period ending December 31, 2000.

(2) [Reserved]

(c) The term "ticket" denotes either a ticket prepared manually by an operator or the mechanized equivalent of such a ticket processed by the revenue accounting office.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33208, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36239, June 26, 2014]

§36.379 Message processing expense.

(a) This classification includes the salary and machine expense of data processing equipment, including supervision, general accounting administrative and miscellaneous expense associated with the processing of individual toll tickets and local message tickets.

(b) The expense assigned to this classification is divided into the subcategories Toll Ticket Processing Expense and Local Message Processing Expense on the basis of the relative number of messages. Toll Ticket Processing Expense is allocated between the State and interstate jurisdiction on the basis of the relative number of toll messages. Local Message Processing Expense is assigned to the exchange operation.

(1) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the subcategories, as specified in this paragraph (b), based on the relative percentage assignment of the balance of Account 6620 to those subcategories during the twelve-month period ending December 31, 2000.

(2) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Toll Ticketing Processing Expense among the jurisdictions using the relative number of toll messages for the twelve-month period ending December 31, 2000. Local Message Process Expense is assigned to the state jurisdiction.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33208, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36239, June 26, 2014]

§36.380 Other billing and collecting expense.

(a) This classification includes the salary expense, including supervision, general accounting administrative, and miscellaneous expense, associated with the preparation of customer bills other than carrier access charge bills and with other revenue accounting functions not covered in §36.379. Included in this classification are the expenses incurred in the preparation of monthly bills, initial and final bills, the application of service orders to billing records (establishing, changing, or discontinuing customers' accounts), station statistical work, controlling record work and the preparation of revenue reports.

(b) Local exchange carriers that bill or collect from end users on behalf of interexchange carriers shall allocate one third of the expenses assigned this classification to the interstate jurisdiction, and two thirds of the expenses assigned this classification to the state jurisdiction.

(c) Local exchange carriers that do not bill or collect from end users on behalf of interexchange carriers shall allocate five percent of the expenses assigned this classification to the interstate jurisdiction, and ninety-five percent of the expenses assigned this classification to the state jurisdiction.

(d) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the Other billing and collecting expense classification based on the relative percentage assignment of the balance of Account 6620 to those subcategory during the twelve-month period ending December 31, 2000.

(e) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Other billing and collecting expense among the jurisdictions using the allocation factor utilized, pursuant to paragraph (b) or (c) of this section, for the twelve-month period ending December 31, 2000.

[53 FR 33011, Aug. 29, 1988, as amended at 62 FR 15416, Apr. 1, 1997; 66 FR 33208, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36239, June 26, 2014]

§36.381 Carrier access charge billing and collecting expense.

(a) This classification includes the revenue accounting functions associated with the billing and collecting of access charges to interexchange carriers.

(b) Of access charges other than end user common line access charges are assessed for the origination or termination of intrastate services in a particular state, one-half of such expense shall be apportioned to interstate operations. If no such access charges are assessed in a particular state, all such expense shall be

assigned to interstate operations.

(c) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to the Carrier access charge billing and collecting expense classification based on the relative percentage assignment of the balance of Account 6620 to that classification during the twelve-month period ending December 31, 2000.

(d) Effective July 1, 2001, through December 31, 2024, all study areas shall apportion Carrier access charge billing and collecting expense among the jurisdictions using the allocation factor, pursuant to paragraph (b) of this section, for the twelve-month period ending December 31, 2000.

[52 FR 17229, May 6, 1987, as amended at 66 FR 33208, June 21, 2001; 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36239, June 26, 2014]

§36.382 Category 3—All other customer services expense.

(a) Effective July 1, 2001, through December 31, 2024, study areas subject to price cap regulation, pursuant to §61.41 of this chapter, shall assign the balance of Account 6620-Services to this category based on the relative percentage assignment of the balance of Account 6620 to this category during the twelve-month period ending December 31, 2000.

(b) Category 3 is apportioned on the basis of Categories 1 and 2.

[66 FR 33208, June 21, 2001, as amended at 75 FR 30301, June 1, 2010; 76 FR 30841, May 27, 2011; 79 FR 36239, June 26, 2014]

CORPORATE OPERATIONS EXPENSE

§36.391 General.

Corporate Operations Expenses are included in the following account:

General and Administrative	Account 6720.

[69 FR 12552, Mar. 17, 2004]

§36.392 General and administrative—Account 6720.

(a) These expenses are divided into two categories:

(1) Extended Area Services (EAS).

(2) All other.

(b) Extended Area Services (EAS) settlements are directly assigned to the

exchange operation.

(c) The expenses in this account are apportioned among the operations on the basis of the separation of the cost of the combined Big Three Expenses which include the following accounts:

TABLE 1 TO PARAGRAPH (c)

Plant Specific Expenses	
Central Office Switching Expenses	Account 6210.
Operators Systems Expenses	Account 6220.
Central Office Transmission Expenses	Account 6230.
Information Origination/Termination Expenses	Account 6310.
Cable and Wire Facilities Expense	Account 6410.
Plant Non-Specific Expenses	
Network Operations Expenses	Account 6530.
Customer Operations Expenses	
Marketing	Account 6610.
Services	Account 6620.

[52 FR 17229, May 6, 1987, as amended at 69 FR 12552, Mar. 17, 2004; 83 FR 63587, Dec. 11, 2018]

OPERATING TAXES

§36.411 Operating taxes—Account 7200.

This account includes the taxes arising from the operations of the company, *i.e.:*

(a) Operating Investment Tax Credits.

(b) Operating Federal Income Taxes.

(c) Operating State and Local Income Taxes.

(d) Operating Other Taxes.

(e) Provision for Deferred Operating Income Taxes.

[83 FR 63587, Dec. 11, 2018]

§36.412 Apportionment procedures.

(a) For apportionment purposes, the expenses in this account are segregated into two groups as follows: (1) Operating Federal, State and local income taxes and (2) all other operating taxes.

(b) Operating Federal, State and local income taxes are apportioned among the operations on the basis of the approximate net taxable income (positive or negative) applicable to each of the operations. The approximate net taxable income from each of the operations is the summation of the following amounts apportioned to each operation by means of the procedures set forth in this Manual:

(1) Operating revenues,

(2) Less operating expenses,

(3) Less operating taxes except the net income tax being apportioned and except any other tax not treated as a deductible item in the determination of taxable net income for this purpose.

(4) Less operating fixed charges.

(i) The amount of fixed charges attributable to the operations is obtained by subtracting the tax component (positive or negative) attributable to other than the operating fixed charges, i.e., fixed charges on non-operating investments are that proportion of total fixed charges which non-operating net investments are of total operating and non-operating net investments.

(ii) Operating fixed charges including interest on Rural Telephone Bank Stock are apportioned among the operations on the basis of the separation of the cost of telephone plant less appropriate reserves.

(c) Other operating taxes should be directly assigned to the appropriate jurisdiction where possible, e.g., Local Gross Receipts may be directly identified as applicable to one jurisdiction. Where direct assignment is not feasible, these expenses should be apportioned among the operations on the basis of the separation of the cost of Telecommunications Plant in Service—Account 2001.

EQUAL ACCESS EXPENSES

§36.421 Equal access expenses.

(a) Equal access expenses include only initial incremental pre-subscription costs and other initial incremental expenditures related directly to the provision of

equal access, that would not be required to upgrade the capabilities of the office involved absent the provision of equal access. Equal access expenses are limited to such expenditures for converting central offices that serve competitive interexchange carriers or where there has been a bona fide request for conversion to equal access.

(b) Equal access expenses are apportioned between the jurisdictions by first segregating them from all other expenses in the primary accounts and then allocating them on the same basis as equal access investment.

Subpart E—Reserves and Deferrals

§36.501 General.

For separations purposes, reserves and deferrals include the following accounts:

Other Jurisdictional Assets—Net	Account 1500.
Accumulated Depreciation	Account 3100.
Accumulated Depreciation—Property Held for Future Telecommunications Use	Account 3200.
Accumulated Amortization—Capital Leases	Account 3400.
Net Current Deferred Operating Income Taxes	Account 4100.
Net Noncurrent Deferred Operating Income Taxes	Account 4340.
Other Jurisdictional Liabilities and Deferred Credits—Net	Account 4370.

[69 FR 12553, Mar. 17, 2004, as amended at 83 FR 63587, Dec. 11, 2018]

§36.502 Other jurisdictional assets—Net—Account 1500.

(a) Amounts in this account are separated based upon analysis of the specific items involved.

§36.503 Accumulated depreciation—Account 3100.

(a) Amounts recorded in this account shall be separated on the basis of the separation of the associated primary Plant Accounts or related categories, excluding amortizable assets.

§36.504 Accumulated depreciation—Property held for future telecommunications use—Account 3200.

(a) Amounts in this account are apportioned among the operations on the basis of the separation of the costs of the related items carried in Account 2002—Property Held for Future Telecommunications Use.

§36.505 Accumulated amortization—Tangible—Account 3400.

Amounts in these accounts are apportioned among the operations on the basis of the separation of the related accounts.

[52 FR 17229, May 6, 1987, as amended at 83 FR 63587, Dec. 11, 2018]

§36.506 Net current deferred operating income taxes—Account 4100, Net noncurrent deferred operating income taxes—Account 4340.

(a) Amounts in these accounts are maintained by plant account and are apportioned among the operations on the basis of the separations of the related plant accounts.

§36.507 Other jurisdictional liabilities and deferred credits—Net—Account 4370.

(a) Amounts in this account are separated based upon an analysis of the specific items involved.

Subparts F-G [Reserved]

Appendix to Part 36—Glossary

The descriptions of terms in this glossary are broad and have been prepared to assist in understanding the use of such terms in the separation procedures. Terms which are defined in the text of this part are not included in this glossary.

Access Line

A communications facility extending from a customer's premises to a serving central office comprising a subscriber line and, if necessary, a trunk facility, e.g., a WATS access line.

Book Cost

The cost of property as recorded on the books of a company.

Cable Fill Factor

The ratio of cable conductor or cable pair kilometers in use to total cable conductor or cable pair kilometers available in the plant, e.g., the ratio of revenue producing cable pair kilometers in use to total cable pair kilometers in plant.

Category

A grouping of items of property or expense to facilitate the apportionment of their costs among the operations and to which, ordinarily, a common measure of use is applicable.

Central Office

A switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.

Channel

An electrical path suitable for the transmission of communications between two or more points, ordinarily between two or more stations or between channel terminations in Telecommunication Company central offices. A channel may be furnished by wire, fiberoptics, radio or a combination thereof.

Circuit

A fully operative communications path established in the normal circuit layout and currently used for message, WATS access, or private line services.

Circuit Kilometers

The route kilometers or revenue producing circuits in service, determined by measuring the length in terms of kilometers, of the actual path followed by the transmission medium.

Common Channel Network Signaling

Channels between switching offices used to transmit signaling information independent of the subscribers' communication paths or transmission channels.

Complement (of cable)

A group of conductors of the same general type (e.g., quadded, paired) within a single cable sheath.

Complex

All groups of operator positions, wherever located, associated with the same

call distribution and/or stored program control unit.

Concentration Equipment

Central office equipment whose function is to concentrate traffic from subscriber lines onto a lesser number of circuits between the remotely located concentration equipment and the serving central office concentration equipment. This concentration equipment is connected to the serving central office line equipment.

Connection—Minute

The product of (a) the number of messages and, (b) the average minutes of connection per message.

Conversation—Minute

The product of (a) the number of messages and, (b) the average minutes of conversation per message.

Conversation—Minute—Kilometers

The product of (a) the number of messages, (b) the average minutes of conversation per message and (c) the average route kilometers of circuits involved.

Cost

The cost of property owned by the Telephone Company whose property is to be apportioned among the operations. This term applies either to property costs recorded on the books of the company or property costs determined by other evaluation methods.

Current Billing

The combined amount of charges billed, excluding arrears.

Customer Dialed Charge Traffic

Traffic which is both (a) handled to completion through pulses generated by the customer and (b) for which either a message unit change, bulk charge or message toll charge is except for that traffic recorded by means of message registers.

Customer Premises Equipment

Items of telecommunications terminal equipment in Accounts 2310 referred to as CPE in §64.702 of the Federal Communication Commission's Rules adopted in the *Second Computer Inquiry* such as telephone instruments, data sets, dialers and other supplemental equipment, and PBX's which are provided by common carriers

and located on customer premises and inventory included in these accounts to be used for such purposes. Excluded from this classification are similar items of equipment located on telephone company premises and used by the company in the normal course of business as well as over voltage protection equipment, customer premises wiring, coin operated public or pay telephones, multiplexing equipment to deliver multiple channels to the customer, mobile radio equipment and transmit earth stations.

Customer Premises Wire

The segment of wiring from the customer's side of the protector to the customer premises equipment.

DSA Board

A local dial office switchboard at which are handled assistance calls, intercepted calls and calls from miscellaneous lines and trunks. It may also be employed for handling certain toll calls.

DSB Board

A switchboard of a dial system for completing incoming calls received from manual offices.

Data Processing Equipment

Office equipment such as that using punched cards, punched tape, magnetic or other comparable storage media as an operating vehicle for recording and processing information. Includes machines for transcribing raw data into punched cards, etc., but does not include such items as key-operated, manually or electrically driven adding, calculating, bookkeeping or billing machines, typewriters or similar equipment.

Dial Switching Equipment

Switching equipment actuated by electrical impulses generated by a dial or key pulsing arrangement.

Equal Access Costs

Include only initial incremental presubscription costs and initial incremental expenditures for hardware and software related directly to the provision of equal access which would not be required to upgrade the switching capabilities of the office involved absent the provisions of equal access.

Equivalent Gauge

A standard cross section of cable conductors for use in equating the metallic

content of cable conductors of all gauge to a common base.

Equivalent Kilometers of 104 Wire

The basic units employed in the allocation of pole lines costs for determining the relative use made of poles by aerial cables and by aerial wire conductors of various sizes. This unit reflects the relative loads of such cable and wire carried on poles.

Equivalent Pair Kilometers

The product of sheath Kilometers and the number of equivalent gauge pairs of conductors in a cable.

Equivalent Sheath Kilometers

The product of (a) the length of a section of cable in kilometers (sheath kilometers) and (b) the ratio of the metallic content applicable to a particular group of conductors in the cable (e.g., conductors assigned to a category) to the metallic content of all conductors in the cable.

Exchange Transmission Plant

This is a combination of (a) exchange cable and wire facilities (b) exchange central office circuit equipment, including associated land and buildings and (c) information origination/termination equipment which forms a complete channel.

Holding Time

The time in which an item of telephone plant is in actual use either by a customer or an operator. For example, on a completed telephone call, holding time includes conversation time as well as other time in use. At local dial offices any measured minutes which result from other than customer attempts to place calls (as evidenced by the dialing of at least one digit) are not treated as holding time.

Host Central Office

An electronic analog or digital base switching unit containing the central call processing functions which service the host office and its remote locations.

Information Origination/Termination Equipment

Equipment used to input into or receive output from the telecommunications network.

Interexchange Channel

A circuit which is included in the interexchange transmission equipment.

Interexchange Transmission Equipment

The combination of (a) interexchange cable and wire facilities, (b) interexchange circuit equipment and, (c) associated land and buildings.

Interlocal Trunk

A circuit between two local central office units, either manual or dial. Interlocal trunks may be used for either exchange or toll traffic or both.

Intertoll Circuits

Circuits between toll centers and circuits between a toll center and a tandem system in a different toll center area.

Local Channel

The portion of a private line circuit which is included in the exchange transmission plant. However, common usage of this term usually excludes information origination/termination equipment.

Local Office

A central office serving primarily as a place of termination for subscriber lines and for providing telephone service to the subscribers on these lines.

Loop

A pair of wires, or its equivalent, between a customer's station and the central office from which the station is served.

Message

A completed call, i.e., a communication in which a conversation or exchange of information took place between the calling and called parties.

Message Service or Message Toll Service

Switched service furnished to the general public (as distinguished from private line service). Except as otherwise provided, this includes exchange switched services and all switched services provided by interexchange carriers and completed by a local telephone company's access services, e.g., MTS, WATS, Execunet, open-end FX and CCSA/ONALs.

Message Units

Unit of measurement used for charging for measured message telephone exchange traffic within a specified area.

Metropolitan Service Area

The area around and including a relatively large city and in which

substantially all of the message telephone traffic between the city and the suburban points within the area is classified as exchange in one or both directions.

Minutes-of-Use

A unit of measurement expressed as either holding time or conversation time.

Minutes-of-Use-Kilometers

The product of (a) the number of minutes-of-use and (b) the average route kilometers of circuits involved.

Multi-Center Exchange

An exchange area in which are located two or more local central office buildings or wire centers.

Operations

The term denoting the general classifications of services rendered to the public for which separate tariffs are filed, namely exchange, state toll and interstate toll.

Operator Trunks

A general term, ordinarily applied to trunks between manually operated switchboard positions and local dial central offices in the same wire center.

Private Line Service

A service for communications between specified locations for a continuous period or for regularly recurring periods at stated hours.

Remote Access Line

An access line (e.g., for WATS service) between a subscriber's premises in one toll rate center and a serving central office located in a different toll rate center.

Remote Line Location

A remotely located subscriber line access unit which is normally dependent upon the central processor of the host office for call processing functions.

Remote Trunk Arrangement (RTA)

Arrangement that permits the extension of TSPS functions to remote locations.

Reservation

That amount or quantity of property kept or set apart for a specific use.

Reserved

Kept or set apart for a specific use.

Separations

The process by which telecommunication property costs, revenues, expenses, taxes and reserves are apportioned among the operations.

Service Observing Unit

A unit of work measurement which is used as the common denominator to express the relative time required for handling the various work functions at service observing boards.

Sheath Kilometers

The actual length of cable in route kilometers.

Special Services

All services other than message telephones, e.g., private line services.

Station-to-Station Basis

The term applied to the basis of toll rate making which contemplates that the message toll service charge (telephone) covers the use made of all facilities between the originating station and the terminating station, including the stations, and the services rendered in connection therewith.

Study Area

Study area boundaries shall be frozen as they are on November 15, 1984.

Subscriber Line or Exchange Line

A communication channel between a telephone station or PBX station and the central office which serves it.

Subtributary Office

A class of tributary office which does not have direct access to its toll center, but which is connected to its toll center office by means of circuits which are switched through to the toll center at another tributary office.

Tandem Area

The general areas served by the local offices having direct trunks to or from the tandem office. This area may consist of one or more communities or may include only a portion of a relatively large city.

Tandem Circuit or Trunk

A general classification of circuits or trunks between a tandem central office unit and any other central office or switchboard.

Tandem Connection

A call switched at a tandem office.

Tandem Office

A central office unit used primarily as an intermediate switching point for traffic between local central offices within the tandem area. Where qualified by a modifying expression, or other explanation, this term may be applied to an office employed for both the interconnection of local central offices within the tandem area and for the interconnection of these local offices with other central offices, e.g., long haul tandem office.

Toll Center

An office (or group of offices) within a city which generally handles the originating and incoming toll traffic for that city to or from other toll center areas and which handles through switched traffic. The toll center normally handles the inward toll traffic for its tributary exchanges and, in general, either handles the outward traffic originating at its tributaries or serves as the outlet to interexchange circuits for outward traffic ticketed and timed at its tributaries. Toll centers are listed as such in the Toll Rate and Route Guide.

Toll Center Area

The areas served by a toll center, including the toll center city and the communities served by tributaries of the toll center.

Toll Center Toll Office

A toll office (as contrasted to a local office) in a toll center city.

Toll Circuit

A general term applied to interexchange trunks used primarily for toll traffic.

Toll Connecting Trunk

A general classification of trunks carrying toll traffic and ordinarily extending between a local office and a toll office, except trunks classified as tributary circuits. Examples of toll connecting trunks include toll switching trunks, recording trunks and recording-completing trunks.

Toll Office

A central office used primarily for supervising and switching toll traffic.

Traffic Over First Routes

A term applied to the routing of traffic and denoting routing via principal route for traffic between any two points as distinguished from alternate routes for such traffic.

Operator System

A stored program electronic system associated with one or more toll switching systems which provides centralized traffic service position functions for several local offices at one location.

Tributary Circuit

A circuit between a tributary office and a toll switchboard or intertoll dialing equipment in a toll center city.

Tributary Office

A local office which is located outside the exchange in which a toll center is located, which has a different rate center from its toll center and which usually tickets and times only a part of its originating toll traffic, but which may ticket or time all or none, of such traffic. The toll center handles all outward traffic not ticketed and timed at the tributary and normally switches all inward toll traffic from outside the tributary's toll center to the tributary. Tributary offices are indicated as such in the Toll Rate and Route Guide.

Trunks

Circuit between switchboards or other switching equipment, as distinguished from circuits which extend between central office switching equipment and information origination/termination equipment.

TSPS Complex

All groups of operator positions, wherever located, associated with the same TSPS stored program control units.

Weighted Standard Work Second

A measurement of traffic operating work which is used to express the relative time required to handle the various kinds of calls or work functions, and which is weighted to reflect appropriate degrees of waiting to serve time.

Wide Area Telephone Service WATS

A toll service offering for customer dial type telecommunications between a given customer station and stations within specified geographic rate areas employing a single access line between the customer location and the serving

central office. Each access line may be arranged for either outward (OUT-WATS) or inward (IN-WATS) service or both.

Wideband Channel

A communication channel of a bandwidth equivalent to twelve or more voice grade channels.

Working Loop

A revenue producing pair of wires, or its equivalent, between a customer's station and the central office from which the station is served.

[71 FR 65747, Nov. 9, 2006]

47 C.F.R. §54.709

§54.709 Computations of required contributions to universal service support mechanisms.

(a) Prior to April 1, 2003, contributions to the universal service support mechanisms shall be based on contributors' end-user telecommunications revenues and on a contribution factor determined quarterly by the Commission. Contributions to the mechanisms beginning April 1, 2003 shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission.

(1) For funding the federal universal service support mechanisms prior to April 1, 2003, the subject revenues will be contributors' interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of prior period actual contributions. Beginning April 1, 2003, the subject revenues will be contributors' projected collected interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of projected contributions.

(2) Prior to April 1, 2003, the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total end-user interstate and international telecommunications revenues, net of prior period actual contributions. Beginning April 1, 2003, the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions. The Commission shall approve the Administrator's quarterly projected costs of the universal service support mechanisms, taking into account demand for support and administrative expenses. The total subject revenues shall be compiled by the Administrator based on information contained in the Telecommunications Reporting Worksheets described in §54.711(a).

(3) Total projected expenses for the federal universal service support mechanisms for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factor and individual contributions. For each quarter, the Administrator must submit its projections of demand for the federal universal service support mechanisms for high-cost areas, low-income consumers, schools and libraries, and rural health care providers, respectively, and the basis for those projections, to the Commission and the Office of the Managing

Director at least sixty (60) calendar days prior to the start of that quarter. For each quarter, the Administrator must submit its projections of administrative expenses for the high-cost mechanism, the low-income mechanism, the schools and libraries mechanism and the rural health care mechanism and the basis for those projections to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. Based on data submitted to the Administrator on the Telecommunications Reporting Worksheets, the Administrator must submit the total contribution base to the Office of the Managing Director at least thirty (30) days before the start of each quarter. The projections of demand and administrative expenses and the contribution factor shall be announced by the Commission in a public notice and shall be made available on the Commission's website. The Commission reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest at any time within the fourteen-day period following release of the Commission's public notice. If the Commission take no action within fourteen (14) days of the date of release of the public notice announcing the projections of demand and administrative expenses, the projections of demand and administrative expenses, and the contribution factor shall be deemed approved by the Commission. Except as provided in §54.706(c), the Administrator shall apply the quarterly contribution factor, once approved by the Commission, to contributor's interstate and international end-user telecommunications revenues to calculate the amount of individual contributions.

(b) If the contributions received by the Administrator in a quarter exceed the amount of universal service support program contributions and administrative costs for that quarter, the excess payments will be carried forward to the following quarter. The contribution factors for the following quarter will take into consideration the projected costs of the support mechanisms for that quarter and the excess contributions carried over from the previous quarter. The Commission may instruct the Administrator to treat excess contributions in a manner other than as prescribed in this paragraph (b). Such instructions may be made in the form of a Commission Order or a public notice released by the Wireline Competition Bureau. Any such public notice will become effective fourteen days after release of the public notice, absent further Commission action.

(c) If the contributions received by the Administrator in a quarter are inadequate to meet the amount of universal service support program payments and administrative costs for that quarter, the Administrator shall request authority from the Commission to borrow funds commercially, with such debt secured by future contributions. Subsequent contribution factors will take into consideration the

projected costs of the support mechanisms and the additional costs associated with borrowing funds.

(d) If a contributor fails to file a Telecommunications Reporting Worksheet by the date on which it is due, the Administrator shall bill that contributor based on whatever relevant data the Administrator has available, including, but not limited to, the number of lines presubscribed to the contributor and data from previous years, taking into consideration any estimated changes in such data.

[62 FR 41305, Aug. 1, 1997, as amended at 62 FR 65038, Dec. 10, 1997; 63 FR 2132, Jan. 13, 1998; 63 FR 43098, Aug. 12, 1998; 63 FR 70576, Dec. 21, 1998; 64 FR 41331, July 30, 1999; 64 FR 60358, Nov. 5, 1999; 66 FR 16151, Mar. 23, 2001; 67 FR 11260, Mar. 13, 2002; 67 FR 13227, Mar. 21, 2002; 67 FR 79533, Dec. 30, 2002; 68 FR 38642, June 30, 2003; 71 FR 38267, July 6, 2006; 76 FR 73876, Nov. 29, 2011]

47 C.F.R. §54.712

§54.712 Contributor recovery of universal service costs from end users.

(a) Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.

(b) [Reserved]

[67 FR 79533, Dec. 30, 2002, as amended at 68 FR 15672, Apr. 1, 2003; 71 FR 38797, July 10, 2006]

STATE REGULATIONS

NEW YORK

16 CRR-NY 641.1

641.1 Annual report required.

Except as provided in section 641.2 herein, every telephone corporation shall file, in accordance with the requirements of section 3.5 of this Title, annually with this commission, at the time and for the period hereinafter provided, an annual report on the form hereinafter prescribed.

16 CRR-NY 641.4

VERMONT

CVR 30-000-3100. REPORTS

3.101 Annual Reports.

Each utility shall file with the Commission one copy of the annual report which it is required to submit to the Department of Public Service. The copy shall be filed with the Commission at the same time the report is submitted to the Department.

ADDENDUM STANDING

AFFIDAVITS IN SUPPORT OF STANDING

AFFIDAVIT OF THOMAS ALLIBONE IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF THOMAS ALLIBONE IN SUPPORT OF STANDING

1. My name is Thomas William Allibone. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My home address is 1062 Embarcation Road, Washington Crossing, Bucks County, Pennsylvania. The Incumbent Local Exchange Carrier serving my residence and area is Verizon Pennsylvania.

4. I currently receive the following communications services:

A. I receive wireline basic local telephone exchange and exchange access service from Verizon Pennsylvania. This company is an incumbent local exchange carrier.

B. The presubscribed telephone toll provider (the IXC that handles all intrastate and interstate outbound non toll-free telephone toll calls) associated with my wireline basic local telephone exchange and exchange access service is also Verizon Long Distance. When I make or receive toll calls using my basic wireline service the IXC is assessed access charges from my LEC, and also pays the access charges to the LEC associated with the other side of the call.

C. I obtain broadband internet service from Verizon Online. This service is provided over fiber. My FiOS service bundle – which includes basic local telephone exchange service and exchange access – is all provided using the same fiber optic plant.

D. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from AT&T Wireless. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting

(SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. Therefore AT&T Wireless pays Verizon Pennsylvania for transmission service, and passes the costs on to me.

E. Each of my communications service providers are required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue they receive from me for assessable communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

F. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Pennsylvania Public Utility Commission regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. In my area, we only have two choices for a bundled service offering – Verizon or Comcast. I do not believe duopoly is actual "competition." My contract with Verizon for fiber-based triple play service has expired. Verizon has repeatedly raised prices and I now pay $40/month more. I am currently planning to switch to Comcast triple play because its prices are marginally lower. But even so it is apparent that Verizon and Comcast do not significantly price compete, and their other terms and conditions of service are quite similar. They would not be able to explicitly or implicitly so coordinate if there were other competitive options.

6. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Thomas William Allibone

SUBSCRIBED AND SWORN TO BEFORE ME this 10 day of May, 2019, to certify which witness my hand and official seal.

[Seal]

Christi Dascher

Notary Public in and for Bucks County, PA

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Christi Dascher, Notary Public
Upper Makefield Twp., Bucks County
My Commission Expires Aug. 16, 2020
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

AFFIDAVIT OF KENNETH A. LEVY IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF KENNETH A. LEVY IN SUPPORT OF STANDING

1. My name is Kenneth Allan Levy. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My home address is 2745 N Van Buren Ave., Tucson, Pima County, AZ 85712. The Incumbent Local Exchange Carrier serving my residence and area is CenturyLink.

4. I currently receive the following communications services:

A. I obtain broadband internet service from CenturyLink. This service is provided over copper, digital subscriber line.

B. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon Wireless. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area.

C. Verizon Wireless is required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue it receives from me for assessable communications services. It passes this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

D. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Arizona Corporation Commission regulates jurisdictionally intrastate communications services, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Kenneth Allan Levy

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of May 2019, to certify which witness my hand and official seal.

[Seal]

Rita Morado
Notary Public
Pima County, Arizona
My Comm. Expires 08-12-2022
Commission No. 552222

Notary Public in and for Pima County, Arizona

AFFIDAVIT OF CHARLES W. SHERWOOD IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF CHARLES W. SHERWOOD, JR IN SUPPORT OF STANDING

1. My name is Charles W. Sherwood, Jr. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My home address is 3561 North Honeylocust Drive,Beverly Hills, Citrus County, FL. The Incumbent Local Exchange Carrier serving my residence and area is CenturyLink.

4. I currently receive the following communications services:

A. I receive basic local telephone exchange and exchange access service from what many call Spectrum/Charter. Although they are often thought to be a "cable company" in this instance they are also a competitive local exchange carrier (CLEC"), although their certification as such from the Florida Public Utilities Commission arises under the name of Bright House Networks, LLC. They use the same name for purposes of their FCC "214" authorizations. The Bright House entity has been assigned Operating Carrier Number ("OCN") 927D and Access Carrier Name Abbreviation ("ACNA") BHS. Bright House has published access tariffs at the state and federal level so as to be in position to recover state and federal price-regulated switched access charges from interexchange carriers that use Bright House facilities to originate or terminate toll calls, including so-called "toll VoIP." Bright House has also executed a series of "interconnection agreements" with all necessary incumbent LECs (including but not limited to AT&T, Verizon, Embarq and Consolidated) that serve in the same Local Access and Transport Area ("LATA"). This is relevant because "local" traffic exchange is also regulated by the state PSC and the FCC, and the terms of "local" traffic exchange are established through interconnection agreements rather than tariff.

B. The presubscribed telephone toll provider (the IXC that handles all intrastate and interstate outbound non toll-free telephone toll calls) associated with my wireline basic local telephone exchange and exchange access service is also Bright House. When I receive a toll calls as part of my service the IXC for the calling party pays access charges to Bright House. When I make a toll call to some area outside the LATA Bright House is assessed access charges to the LEC associated with the other side of the call.

C. I obtain broadband service from Spectrum/Charter. This service is provided over fiber to the home. The distribution plant supporting my broadband service is the same plant used to provide my local telephone service.

D. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Sprint. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area.

E. Each of my communications service providers are required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue they receive from me for assessable communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

F. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Florida Public Service Commission regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. There were several potential suppliers of "wired" voice, video and data services when I moved into my current home. Only Spectrum/Charter could provide "Triple Play" services at the time. CenturyLink could only provide landline service and Comcast could only provide cable TV service. We chose Specturm/Charter so that I could obtain all three services (voice, video and Internet) the same underlying transmission network and receive a unified bill. I would consider whether to instead purchase service from CenturyLink if they offered a Triple Play but despite all the funds they receive through state and federal access charges and Universal Service Support they have not seen fit to deploy high speed facilities in my area.

6. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Charles W. Sherwood, Jr.

NOTARY ON NEXT PAGE

AFFIDAVIT OF CHARLES W. SHERWOOD JR. IN SUPPORT OF STANDING

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of May, 2019, to certify which witness my hand and official seal.

[Seal]

Notary Public in and for Citrus, FLORIDA

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

1. My name is Fred R. Goldstein. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick and Mark Cooper to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My address is PO Box 920362, Needham MA 02492. The Incumbent Local Exchange Carrier serving my residence and area is Verizon.

4. I currently receive the following communications services:

   A. I receive telephone exchange and exchange access service from Comcast, using PacketCable.

   B. I obtain broadband service from Comcast. This service is provided over hybrid fiber coaxial cable. Cable companies, like IXCs and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber based services for "backhaul" and for other purposes.

   C. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. When I make or receive interMTA toll calls using my wireless service the general rules would appear to require that "Verizon the CMRS" be assessed access charges from my LEC (Verizon the ILEC).

D. Each of my communications service providers are required to pay into the federal Universal Service Fund, based on a percentage of the revenue they receive from me for assessable interstate communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

E. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Commonwealth of Massachusetts regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. My consulting practice has largely focused on two sets of clients. One features smaller competitive service providers around the country. I helped many small CLECs get their start in the decade following the Telecommunications Act of 1996. More recently I have largely worked with the Wireless ISP industry. These competitive providers are impacted when incumbent LECs enter markets at below-cost rates, subsidized by their state-utility affiliates via improper separations. The other set of clients has been state and local governments. In that role I have seen how local telephone network, made to seem unprofitable by improper allocations of cost, have been allowed to deteriorate. Especially in rural areas where competition does not exist, subscribers are left with no option except the local wireline ILEC service. The FCC's Freeze on separations has played a role in these and other industry problems which impact me and my clientele:

A. The Federal Communications Commission's principal justification for maintaining the Freeze appears to be that it reduces "burdensome" regulatory filing requirements on the part of Incumbent Local Exchange Carriers, and that it is not relevant to the bulk of subscribers, only to "a small percentage of Americans" who "receive their telecommunications services from providers subject to rate-of-return regulation." But those arguments are disingenuous. The impact of the Freeze extends well beyond those areas.

B. The first excuse, that the separations rules are burdensome, is only notable in context of the what the Commission then states in its Order: "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. More than twenty years later, the Joint Board has not reached agreement on comprehensive separations reform."

C. It is true that the existing Part 36 rules are dated and use terminology and categorization that date back to the analog copper network of the 20th century. But those are, literally, technicalities. Certainly a more modern, simpler set of separations rules could have been drafted over the past 22 years, and especially within the past 15 years. The problem is that over this period traffic patterns have shifted very far from pre-Freeze levels. It is clear that over the 22 years since 1997, essentially no effort has been made to update these rules to track relative jurisdictional use. The Freeze has been the Commission's substitute for reform. While the network has evolved dramatically, and

usage patterns have changed dramatically, the Freeze prevents any meaningful accounting of these changes from being performed.

D. A more important issue is the Freeze impacts far more than rural rate-of-return carriers. While only those carriers are subject to direct separated cost-based FCC regulation of their interstate access rates, the Freeze impacts how states view and thus regulate all Incumbent Local Exchange Carriers, including Price Cap Carriers. Jurisdictional separations, by definition, impact both state and federal jurisdictions, and states are required to use these same metrics to regulate within their intrastate jurisdiction.

E. Exactly how states use separated costs within their own jurisdiction varies from state to state. Retail regulation of ILEC rates has largely been relaxed, but even this varies between states. Some maintain price caps for some basic services, such as residential POTS. Some maintain quality-of-service regulation, such as a requirement that most repairs be performed within a certain time frame, or that routine installations be performed within a certain time. Others retain some form of traditional cost-of-service ratemaking or require reporting using separated costs as a means to ensure rates are reasonably priced.

F. The Commission's own Order notes in paragraph 18 that, "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." Universal service funds exist within many states and are generally applicable to all carriers. Thus separations directly impacts the total charges paid by customers of competitive, as well as incumbent, carriers, even when retail rates are not regulated.

G. Because of the Freeze, the cost of POTS appears to be far higher than it really is. These services are unprofitable because their revenues have plummeted over the past 15 years, while the share of common expenses allocated to them have remained at frozen levels. Thus fewer and fewer lines are expected to cover the same expenses. Because these lines then appear to be unprofitable, ILECs reduce their investment, reduce their maintenance, and often request to discontinue these residual state-regulated services. They then offer unregulated, off-tariff substitutes, either directly or via CLEC affiliates. This back-door deregulation is facilitated by the false losses booked as a result of the Freeze.

H. The putative losses in copper-line POTS have also been used to justify discontinuance of copper-based services, both regulated and the unregulated DSL that piggybacks atop it. And when copper is discontinued, CLECs lose access to unbundled copper loops as well, especially those used for their own DSL-type services, including Ethernet over Copper, a more modern business service than the simple mass-market ADSL formerly promoted by the ILECs. This reduces the competitiveness of the market and in turn allows all remaining providers, typically the ILEC-cable duopoly, to raise their own prices. In the past I consulted for several CLECs using unbundled local loops. As the copper has been retired, or simply deteriorated beyond usability, they have lost

their investments and either pivoted to a different modality, such as wireless, or gone out of business.

I. Policies may also vary between states with regard to intrastate switched access rates. While the Commission has capped intrastate rates at parity with interstate rates, and largely reduced terminating switched access rates to zero or near-zero levels, originating access rates have not yet been reformed. These rates were originally intended to be paid by stand-alone long distance carriers who sold interexchange service to consumers via Equal Access. The IXC paid the LECs on both ends of the call, with the IXC paying the carrier whose customer originated the call as well as the carrier whose customer terminated the call. As local telephone plans began to bundle in long distance again, reverting to the pre-1984 norm, originating access was no longer primarily paid by interexchange carriers. Instead, it remained a punitive rate charged to competitive carriers who were deemed in some way to be providing an "interexchange" service on calls originated by ILEC customers.

J. States can and do allow ILECs to apply intrastate and sometimes interstate access charges these to non-local calls made within a state, where "local" is defined by the ILEC in its tariff or price book. VoIP providers are sometimes exempted and CMRS providers are always exempt from these, while stand-alone IXCs have largely disappeared. Certificated CLECs, however, are not exempt. Thus the primary impact of these rates is to create an impediment to what little CLEC competition still exists. If a Verizon customer in Boston calls a non-local CLEC number in Worcester, Verizon is both the originating and interexchange carrier, so no originating access applies (it would be paying itself), and the terminating access charge to the CLEC has been zeroed out by the same FCC reforms that make robocalling profitable. Originating access, however, does remain on the books, at levels that were not brought down by the past decade's reforms.

K. Because many Interconnection Agreements contain clauses dating back to the dial-in modem era that explicitly classify all calls from ILEC lines to foreign-exchange (FX, also known as Virtual NXX) numbers as subject to intrastate originating access charges, CLECs are not able to provide intraLATA interexchange number portability. This is still the case even though the Commission has opened a Docket on nationwide number portability, a far more complex problem. IntraLATA portability by a CLEC, even between adjacent but not "local to each other" exchanges, is now constructively prohibited even though there are no technical impediments, based on the claim it creates FX service. Competitive carriers, such as cable companies, are thus loath to risk it.

L. This has personally affected me, as I recently moved between two adjacent rate centers which are "local" to each other in the relevant ILEC tariff. My home telephone number provided by Comcast could not be ported to my new location, even though they are served by the same head end, because Comcast, as well as its competitor RCN, implemented a ban on porting numbers across rate center boundaries. That ban is a direct result of the existence of those punitive intrastate originating access tariffs. Their rate level is in part justified by the putatively high costs of Verizon's intrastate service, which is in turn maintained by the Freeze. Under the terms of Verizon's standard interconnection agreement, even calls to wireline foreign exchange numbers within a

local calling area are subject to intrastate originating access. And as a result, I was only able to port the numbers to a mobile carrier, and from there to Google Voice, a VoIP service (deemed jurisdictionally interstate), which forwards the calls to "local" Comcast numbers. This preposterous complexity has preserved the numbers across rate center boundaries but because both sets of numbers, new and old rate centers, are still in service, it has doubled the "attack surface" for robocallers, and thus I receive at least twice as many robocalls as I would have otherwise. My outgoing calls also display the "local" numbers, not the ones I have had for many years and still wish to use.

M. Separations may also impact the way Universal Service Fund monies, at both the state and federal levels, are calculated, collected and disbursed. Federal USF is paid by providers of interstate telecommunications, who are assessed a fee equal to about 20% of their jurisdictional revenues. The provider then passes the fee through to consumers as a line item on the bill. I and every other consumer of interstate telecommunications therefore support the Connect America Fund, which subsidizes broadband service providers in unserved areas and pays providers that offer a discount to eligible low-income beneficiaries. Some states have their own USF, though Massachusetts does not. USF fees and the disbursements, especially to legacy rural ILEC recipients, are impacted by the distorted separations regime. The Freeze Order recognizes the link between separations and USF in paragraphs 18, 43 and 49.

6. As explained above, the Freeze Order does inflict several concrete injuries in fact on me and all other consumers of intrastate and interstate communications services. If the Commission is required to revisit the issue because of a remand on review it will be forced to finally confront the serious harms inflicted by currently "frozen" jurisdictional allocations. The FCC and the states will be required to stop kicking this 22 year old can down the road several years, only to kick it again for an even longer period once the deadline approaches. The ultimate result will be allocation methods that more fairly represent relative use. This will benefit consumers, the carriers and the entire economy because it will lead to more rational regulatory treatment.

7. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick and Mark Cooper for a further explication on why I and the other petitioners have standing.

Fred R. Goldstein

SUBSCRIBED AND SWORN TO BEFORE ME this 17th day of May, 2019, to certify which witness my hand and official seal.

JOSEPH VALENTIN
Notary Public
Massachusetts
My Commission Expires
Apr 11, 2025

Notary Public in and for

Joseph Valentin

AFFIDAVIT OF MARK COOPER IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF MARK COOPER IN SUPPORT OF STANDING

1. My name is Mark Neal Cooper. I am one of the named Petitioners in the above captioned proceeding.My home address is 504 Highgate Terrace, Silver Spring Maryland.

2. I provide basic facts in this Affidavit but also express certain opinions that underlie the questions this Affidavit is presented to resolve. I consider myself an expert by training and education for purposes of Fed. R. Ev. 702. I have written several books and articles in this field, and accepted as an expert qualified to express opinions bearing on similar topics in both federal and state courts. My bio is attached hereto.

3. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

4. The Incumbent Local Exchange Carrier serving my residence and area is Verizon.

5. I currently receive the following communications services:

   A. I receive wireline basic local telephone exchange and exchange access service from Verizon. This company is an incumbent local exchange carrier.

   B. The presubscribed telephone toll provider (the IXC that handles all intrastate and interstate outbound non toll-free telephone toll calls) associated with my wireline basic local telephone exchange and exchange access service is also Verizon. When I make or receive toll calls using my basic wireline service the general rules would appear to require that “Verizon the IXC” be assessed access charges from my LEC (Verizon the ILEC). They would also require that my IXC also pay access charges to the LEC associated with the other side of the call. I question, however, whether “Verizon the IXC” is in fact paying the same access charges to “Verizon the ILEC” that “Verizon the LEC”

would impose on calls to and from my local line if I presubscribed to a different IXC. There is some evidence that given their familial relationship Verizon the IXC and Verizon the ILEC have implemented different and potentially discriminatory prices in comparison to what unaffiliated IXCs are charged. This may be the case for both switched and special access (Business Data Service) and in both the intrastate and interstate jurisdictions.To the extent Verizon the IXC uses fiber-based services that are not classified as BDS I believe Verizon the ILEC and Verizon the IXC are engaging in similar discriminatory and anti-competitive behavior. The Affidavit of Bruce Kushnick provides more detail on these points.

C. I obtain broadband service from Comcast. This service is provided over hybrid fiber coaxial cable. The underlying transmission is obtained from Comcast and sometimes Verizon the ILEC and my broadband provider pays fees to Verizon the ILEC to use this line. Cable companies, like IXCs and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber-based services for "backhaul" and for other purposes.

D. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. When I make or receive interMTA toll calls using my wireless service the general rules would appear to require that "Verizon the CMRS" be assessed access charges from my LEC (Verizon the ILEC). They would also require that my CMRS provider also pay access charges to the LEC associated with the other side of the interMTA toll call. I question, however, whether "Verizon the CMRS" is in fact paying the same access charges to "Verizon the ILEC" that "Verizon the LEC" would impose on calls to and from my wireless service if I used a different CMRS provider such as Sprint or T-Mobile. There is some evidence that given their familial relationship Verizon the CMRS and Verizon the ILEC have implemented different and potentially discriminatory prices in comparison to what unaffiliated IXCs are charged. This may be the case for both switched and special access (Business Data Service) and in both the intrastate and interstate jurisdictions. To the extent Verizon the CMRS uses fiber-based services that are not classified as BDS I believe Verizon the ILEC and Verizon the CMRS are engaging in similar discriminatory and anti-competitive behavior. The Affidavit of Bruce Kushnick provides more detail on these points.

E. Each of my communications service providers are required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue they receive from me for assessable communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

F. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Maryland Public Service Commission regulates the

jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

6. As part of my business I have prepared testimony and research and made presentation of the results in and visited for personal reasons every state in the United States except New Mexico and Alaska.[1]In the course of conducting that business I have consumed local telecommunications services, the price of which has been distorted by the cost accounting practices at issue in this proceeding. While I cannot identify every individual transaction that constitutes this harm, there is no doubt that I have engaged in these transactions hundreds, if not thousands of times, and I continue to do so. Moreover, to the extent that my clients are harmed by the accounting practices at issue, they must pass that injury (recover the costs) in some fashion, which undoubtedly harms me indirectly.

7. There is a second and extremely important way the accounting practices at issue harm me. They allow incumbent communications companies to distort or undermine competition, and this has denied me the benefit of a much more competitive environment at home and throughout the United States. These practices have directly contributed tohigher prices and fewer choices than would otherwise obtain. To appreciate this important harm to consumers we must step back and view the overall distortion and harm that has resulted from these practices in general and how they are dealt with in the Freeze Order in particular.This requires an appreciation of the central issues in this case and proceeding.

A. Two defining aspects of communications networksare that a large proportion of total costs are fixed in nature and many costs – both fixed and variable – are common and joint. Fixed costs are those that stay relatively constant without regard to demand or consumption of the asset that gives rise to them. Fixed costs are also often "common" to several different services and used to jointly provide both intrastate and interstate services. There are also "joint" costs – those that relate to activities used by both the intrastate and interstate jurisdictions. There are some costs that are both joint and common, there are some that are common but not joint and some that are joint but not common. The classic example of a fixed cost that is fixed but also joint and common is the local loop. Most loop costs do not vary with usage, but loops support many different intrastate and interstate services. There are also variable or usage related costs (costs that vary depending on volume) and they too can be common or joint. An example would be a central office switch, which supports several intrastate services and several interstate services. Some central office costs are fixed and some are variable but most are joint and common.

B. It has long been recognized that competition is socially beneficial largely because it drives prices for goods and services toward cost.[2] Economic regulation was deemed

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[1] Attachment A presents my resume, which documents the extensive geographic scope of my testimony and analysis, much of which requires travel to the location being analyzed.

[2] Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations,"* Edwin Cannan (Ed.) (University of Chicago Press, 1976), Book 1, Chapter VII. "When the price of any commodity is neither more nor less than what is sufficient to pay the rent of the land, the wages of the labour, and the profits of the stock [of] bringing it to

necessary because some markets are not competitive. Thus, regulation was instituted to act as a substitute for competition. This is well-recognized in the scholarly literature and some regulatory statutes expressly so state. The FCC's "cost accounting" rules (Part 32), the "separations" rules (Part 36) and then ultimately the rules that assign costs to individual jurisdictional services (Parts 51, 61, 64 and 69) are important because a principal measure of whether a rate is fair, just and reasonable is the extent to which the price of the service recovers the costs incurred to provide that service and thus matches as closely as possible what would obtain in a fully competitive marketplace. One therefore cannot persuasively claim that a rate is "reasonable" where there is a significant mismatch between the cost incurred to provide a service and the revenue from that service, unless there has been an express public policy determination that the service should substantially subsidize other services or activity, or be subsidized by some other service or activity.

C. The FCC generally believes that it can rely on market forces as a short-cut mechanism and substitute for traditional cost of service ratemaking. It has increasingly eschewed cost of service ratemaking in favor of alternative regulation techniques such as price caps, forbearance and outright deregulation based on the view that competition will sufficiently constrain prices. But these "light regulation" tools only work if there is some correlation between costs and rates at the onset of the relaxed regulatory measures and the product actually succeeds in reasonably matching up with what would obtain in a competitive market. The Freeze Order so recognized in ¶¶30-31 by allowing some "rate of return" ILECs to "unfreeze" and "update" their "category relationships." Paragraph 30 states, in pertinent part 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." A translation into plain English is that the FCC is fully aware that the long-standing "freeze" to separations has led to the situation where costs that are clearly jurisdictionally *interstate* have been stranded on the intrastate side, and even on the interstate side costs properly attributable to business data services are being recovered from other interstate services. In other words, intrastate ratepayers are subsidizing interstate services and some interstate services are cross-subsidizing other interstate services, including BDS. Paragraph 43 "agree[s] 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" and "share[s] NARUC's and the Irregulators' concern that those rules necessarily misallocate network costs." Some of the comments in the proceeding below prove this is so. The ITTA's August 27, 2018 comments contended on page 4 that "it is plausible that a rate-of-return carrier that elected to freeze its categories in 2001 would see business data services rates more than double what they are today if it now was to unfreeze its categories." WTA's August 27, 2018 filing asserted on page 6 that "unfreezing of 2001 category relationships will result in a shifting of costs in most affected study areas from intrastate to interstate, and from

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market, accruing to their natural rates… the commodity is then sold precisely for what it is worth, or for what it really costs the person who brings it to market (62)"

common line to special access." What these carriers are clearly saying is that the longstanding "freeze" to separations has led to a huge cost misalignment between jurisdictions and among various services.

D. What the Freeze Order fails to recognize is that the same cost misalignment it agreed exists for rate of return carriers also exists for price cap carriers. This disconnect has affected interstate services but is even more impactful and prejudicial to intrastate ratepayers. Freeze Order ¶28 baldly asserts that "the separations rules are irrelevant to price cap carriers" but this is legally and factually incorrect, at least insofar as intrastate costs and rates are concerned. The Kushnick affidavit so demonstrates.

E. 47 U.S.C. §§201 and 201 require that rates for interstate telecommunications services be just, reasonable and nondiscriminatory. The "interstate" portion of services that rely on a local loop and FCC-regulated special access – now known as Business Data Services or "BDS" – have always been regulated utility services under Title II of the Act. They are still regulated utility services, and still subject to §§201 and 202. The FCC merely replaced the then-applicable *ex ante* cost-based reasonableness mechanisms with new *ex post* mechanisms to review for reasonableness, and decided that §§201 and 202 "do not explicitly require rates to correspond to costs – only that such rates be just and reasonable and not unreasonably discriminatory." *See*, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459, 3565, 3567, ¶¶260-261, 265 (2017). The Commission recognized that "when considering whether rates are just and reasonable" costs remain "a factor." 32 FCC Rcd at 3567 n. 651. So, to this day, and despite its deregulatory zeal, even the FCC acknowledges that costs remain an important factor towards assessing reasonableness, even though they are no longer the primary ratemaking tool in the interstate jurisdiction. In the forbearance context the Commission has admitted that "We cannot rule out all 'possible future need for cost data' even under price capregulation. And there are several instances in which we have a specific need for some data related to costs for price cap carriers in order to ensure just and reasonable rates, protect consumers and serve the public interest." *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c)from Enforcement of Certain Legacy Telecommunications Regulations*, 28 FCC Rcd 7627, 7650, ¶38 (2013), *pet. for rev. denied sub nom. Verizon v. FCC,* 770 F.3d 961 (D.C. Cir. 2014).

F. One of the specific "needs" the FCC recognized in the various forbearance orders mentioned in Freeze Order note 45 was a way to ensure compliance with 47 U.S.C. §254(k), which prohibits a telecommunications carrier from using services that are not competitive to subsidize services that are subject to competition. In each of its sequential "cost rules" forbearance orders for AT&T, Verizon and Qwest and then all price cap ILECs the FCC required the benefiting ILECs to certify they were in compliance with §254(k). As the FCC observes in the last sentence of note 45 it terminated this and other conditions in 2017. *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, 32 FCC Rcd 1735, 1748-49, ¶44. Basically, the Commission decided it does not in fact "need" cost information after all, even though separated costs are still "necessary" to administer the purposes listed in Freeze Order ¶18. The FCC is purposefully blinding itself, thus obstructing enforcement of the duties Congress delegated it to perform.

G. The Commission accomplishes this by way of a sub-delegation of its just and reasonableness oversight to the silent hand of competition, even where there is in fact no such competition or at least not enough competitive pressure to provide a sufficient incentive for the dominant ILECs to adjust and maintain prices that would obtain in a competitive market, *e.g.*, rates that trend toward marginal cost and result in a market price that equals marginal cost (MC) that in turn is the same as average total cost (ATC), since in the long-term, all costs including fixed or capital costs must be recovered, but they will earn only a normal rate of profit.[3] I noted above that a significant portion of communications network costs are fixed, joint and common. This means it is very difficult to obtain a scenario where prices do ever equal both MR and ATC. That is why industries with high fixed costs are often a "natural monopoly": only one firm (or sometimes two) can achieve the scale where the MR/ATC intersection occurs. This, in turn, explains why the communications industry has high barriers to entry for facilities-based local transmission, and those that try to enter often fail because they never reach the necessary scale.

H. The problem is therefore that without cost information it is simply impossible to identify and cure the very subsidization and competitive distortions the FCC *admits are endemic to the current separations regime* in the Freeze Order. And, even more important, while it may or may not be the case that federal regulators will want and use cost information the FCC has effectively prevented the states from using proper cost data to set intrastate rates even where the state law requires some reference to cost. The states have to obey and apply FCC-prescribed separations outcomes, but for price cap carriers that have received forbearance they cannot obtain the information they must have to do that very thing. For the rate of return carriers that choose to not "unfreeze" the states are stuck with the admitted costs that should and would be assigned to the interstate jurisdiction if separations better reflected relative use. In sum, intrastate ratepayers and in particular those receiving basic local exchange service from incumbent LECs are being forced to subsidize interstate rates and services and other nonregulated activities and there is nothing they can do about it for at least another 6 years.

I. Rates that do not at least roughly approximate costs can do great harm. In economic terms, unjust rates and cross subsidies create inefficiency (reducing total social welfare) and inequity (unjustly transferring wealth between classes of consumers, between consumers and producers and between groups of producers).

J. The 1996 Act reflected a hope and expectation the communications sector could rely more on competition and less on regulation, so it allowed the FCC to forebear from regulation where competition rendered regulation no longer necessary in the public interest. Deregulation was supposed to come after the competition arrived. Unfortunately, it never did, not with sufficient force to ensure rates would be just and reasonable. The in-

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[3] Id., notes that "The … price, therefore, which leaves him this profit, is not always the lowest at which a dealer may sometimes sell his goods,; it is the lowest at which he is likely to sell them for any considerable time (63)." Smith describes fluctuation over short periods and also the long-term trend noting that "the market price of every particular commodity is in this manner continually gravitating… toward the natural price (67)."

region market share of the companies that inherited their network from the monopoly period is still above 50%, almost a quarter of a century after the Act.[4]

K. When companies incur costs to supply competitive services but recover them from local services and in particular basic local telephone service, they do harm in a number of ways.

i) They make it appear that local services are losing money and rate increases are necessary. This makes basic (plain old) telephone service more costly than it should be. (This also is an independent violation of Section 254(k) of the Act).

ii) When incumbent companies provide other competitive services, such as enhanced/information service, they fail to recover the costs associated with those services through the price they charge for those service. These shifts provide artificial profits or a cushion that allows price squeeze against competitors that do not enjoy familial relationship with an incumbent that has local operations. They can also abuse the familial tie as a mechanism to charge non-integrated competitors more than they charge themselves for the competitive service. Regulators at the state and federal level have always been aware of these concerns and implemented long-standing affiliate transactions and cost-accounting rules to identify and prevent this abuse. The FCC is well down the road toward complete abandonment of these tools. Its failure to repair the broken separations process allowed it to rationalize this course because the dumping of costs on the states minimized the impact. But even worse, the same delay has effectively prevented any state that might want to retain these tools from using them to mitigate the harm on the intrastate side even though the burden has fallen on intrastate far more than on interstate.

iii) By not fixing and not constantly reviewing cost allocations, as the FCC has done in the allocation of costs between the federal and state jurisdiction and within the federal jurisdiction in setting price caps, the FCC has created an immense opportunity to earn excess profits, an opportunity that the communications network owners have exploited aggressively.

L. Since the subscriber line charge was fixed, the misallocated costs had to be recovered from plain old telephone (POTS) users. POTS charges are higher than they should be and suppress demand for lower income consumers, which reduces universal service. Moreover, this is likely to be true of all states, regardless of the current

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[4] The effects and harms of the misallocation and over recovery of costs discussed in the remainder of my affidavit have been demonstrated in an academic paper, a presentation to a state bar association, and in joint comments to the FCC as noted by Bruce Kushnick. See my attached resume. "Business Data Services after the 1996 Act: Structure, Conduct, Performance in the Core of the Digital Communications Network The Failure of Potential Competition to Prevent Abuse of Market Power," Telecommunications Policy Research Conference, September, 2016.Overcharged And Underserved: How A Tight Oligopoly On Steroids Undermines Competition And Harms Consumers In Digital Communications Markets, Pennsylvania Utility Law Conference, Pennsylvania Bar Institute, June 1, 2017.

regulatory status of POTS. Since the misallocation occurred before state deregulation, the error was baked into the basic rates that provided the launch pad for deregulation (i.e. price caps started too high and/or the lack of competition allow incumbents to recover all those costs).

M. By misallocating costs and recovering them from the wrong people – not the cost causers – the allocation that the FCC seeks to freeze for another six years wreaks havoc on competition. The most effective first step in dealing with these problems is to cut them off at the source. Without the misallocation and over recovery of costs, the tasks of pursuing the goals of the Communications Act – universal services, just and reasonable rates, increased reliance on competition – will be much easier.

N. Petitioners hope to convince the court on the merits that the Freeze Order is illegal and there must be a timely and more realistic, 21st century separation of costs between the intrastate and interstate jurisdictions. The result would move costs from intrastate to interstate, and then ultimately costs should, would or perhaps might be reallocated between interstate services to better match how these higher interstate costs are incurred to provide each service. Then serious inquiry can be made at the state and federal level whether some of costs that are presently recovered from basic services are more properly attributed to competitive services or affiliated concerns.

O. Predicting how that will come out in the end is difficult, but one thing is certain: **any** separation reform will be far better and more favorable to consumers and competitors than is the case under the current "frozen" regime.

i) The true rate to which basic local service and legacy copper plant will be revealed. Basic ratepayers may yet actually receive some benefit from the immense amounts they were forced to fund for fiber that either did not get deployed or actually used to provide services to the residential mass market.

ii) States that still regulate local rates will be able to lower them to more just, reasonable and cost-based levels.

iii) States that have shifted to some form of price cap will be in position have to adjust the caps in recognition of the dramatic reduction in costs.

iv) States that have deregulated will be under immense pressure to lower rates so that consumers enjoy at least part of the benefit of correcting the misallocation error.

v) At the federal level, the FCC will finally be confronted with the problem it created. The companies will want to raise interstate rates to cover the costs that have been illegally relegated to the intrastate jurisdiction. In the proceeding that follows reallocation of jurisdictional costs, the FCC will be forced to comply with the 1996 Act.

vi) Timing is important, and a six-year delay will be fatal. Ratepayers will soon be called upon to fund another round of network upgrades to support

wireless 5G. The required investment will rival or exceed the amounts dedicated to recent upgrades to digital and fiber plant. The FCC may be content with doubling down on the past misallocations and abuses, but the states are likely to disagree. From a ratepayer perspective a course correction after six years will be much more difficult, if not impossible.

8. I have been harmed, the other Petitioners have been harmed, intrastate ratepayers have been harmed, interstate ratepayers have been harmed and competition has been harmed. The Freeze Order continues and exacerbates the harm. An order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action will redress the harm by requiring separations reform sooner than would otherwise occur.

9. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick and Fred Goldstein for a further explication on why I and the other petitioners have standing.

Mark Neal Cooper

SUBSCRIBED AND SWORN TO BEFORE ME this 18 day of May, 2019, to certify which witness my hand and official seal.

[Seal]

Notary Public in and for Minaxi Patel

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MINAXI PATEL
NOTARY PUBLIC STATE OF MARYLAND
MONTGOMERY COUNTY
MY COMMISSION EXPIRES FEBRUARY 13, 2020

ATTACHMENT "A" TO AFFIDAVIT OF MARK COOPER IN SUPPORT OF STANDING

(COOPER BIO)

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EDUCATION:

Yale University, Ph.D., 1979, Sociology

University of Maryland, M.A., 1973, Sociology

City College of New York, B.A., 1968, English

PROFESSIONAL EXPERIENCE:

President, Citizens Research, 1983 - present

Research Director, Consumer Federation of America, 1983-present

Senior Fellow for Economic Analysis, Institute for Energy and the Environment, Vermont Law School 2009-present

Associated Fellow, Columbia Institute on Tele-Information, 2003-2016

Fellow, DonaldMcGannon Communications Research Center, Fordham University, 2005-2015

Fellow, Silicon Flatirons, University of Colorado, 2009-2014

Fellow, Stanford Center on Internet and Society, 2000-2010

Principle Investigator, Consumer Energy Council of America, Electricity Forum, 1985-1994

Director of Energy, Consumer Federation of America, 1984-1986

Director of Research, Consumer Energy Council of America, 1980-1983

Consultant, Office of Policy Planning and Evaluation, Food and Nutrition Service, United States Department of Agriculture, 1981-1984

Consultant, Advanced Technology, Inc., 1981

Technical Manager, Economic Analysis and Social Experimentation Division, Applied Management Sciences, 1979

Research Associate, American Research Center in Egypt, 1976-1977

Research Fellow, American University in Cairo, 1976

Staff Associate, Checchi and Company, Washington, D.C., 1974-1976

Consultant, Division of Architectural Research, National Bureau of Standards, 1974

Consultant, Voice of America, 1974

Research Assistant, University of Maryland, 1972-1974

TEACHING EXPERIENCE:

Lecturer, Washington College of Law, American University, Spring, 1984 - 1986, Seminar in Public Utility Regulation

Guest Lecturer, University of Maryland, 1981-82, Energy and the Consumer, American University, 1982, Energy Policy Analysis

Assistant Professor, Northeastern University, Department of Sociology, 1978-1979, Sociology of Business and Industry, Political Economy of Underdevelopment, Introductory Sociology, Contemporary Sociological Theory; College of Business Administration, 1979, Business and Society

Assistant Instructor, Yale University, Department of Sociology, 1977, Class, Status and Power

Teaching Assistant, Yale University, Department of Sociology, 1975-1976, Methods of Sociological Research, The Individual and Society

Instructor, University of Maryland, Department of Sociology, 1974, Social Change and Modernization, Ethnic Minorities

Instructor, U.S. Army Interrogator/Linguist Training School, Fort Hood, Texas, 1970-1971

PROFESSIONAL ACTIVITIES:

Member, Advisory Committee on Appliance Efficiency Standards, U.S. Department of Energy, 1996 - 1998

Member, Energy Conservation Advisory Panel, Office of Technology Assessment, 1990-1991

Fellow, Council on Economic Regulation, 1989-1990

Member, Increased Competition in the Electric Power Industry Advisory Panel, Office of Technology Assessment, 1989

Participant, National Regulatory Conference, The Duty to Serve in a Changing Regulatory Environment, William and Mary, May 26, 1988

Member, Subcommittee on Finance, Tennessee Valley Authority Advisory Panel of the Southern States Energy Board, 1986-1987

Member, Electric Utility Generation Technology Advisory Panel, Office of Technology Assessment, 1984 - 1985

Member, Natural Gas Availability Advisor Panel, Office of Technology Assessment, 1983-1984

Participant, Workshop on Energy and the Consumer, University of Virginia, November 1983

Participant, Workshop on Unconventional Natural Gas, Office of Technology Assessment, July 1983

Participant, Seminar on Alaskan Oil Exports, Congressional Research Service, June 1983

Member, Thermal Insulation Subcommittee, National Institute of Building Sciences, 1981-1982

Round Table Discussion Leader, The Energy Situation: An Open Field For Sociological Analysis, 51st Annual Meeting of the Eastern Sociological Society, New York, March, 1981

Member, Building Energy Performance Standards Project Committee, Implementation Regulations Subcommittee, National Institute of Building Sciences, 1980-1981

Participant, Summer Study on Energy Efficient Buildings, American Council for an Energy Efficient Economy, August 1980

Member, University Committee on International Student Policy, Northeastern University, 1978-1979

Chairman, Session on Dissent and Societal Reaction, 45th Annual Meeting of the Eastern Sociological Society, April, 1975

Member, Papers Committee, 45th Annual Meeting of the Eastern Sociological Society, 1975

Student Representative, Programs, Curricula and Courses Committee, Division of Behavioral and Social Sciences, University of Maryland, 1973-1974

President, Graduate Student Organization, Department of Sociology, University of Maryland, 1973-1974

HONORS AND AWARDS:

Ester Peterson Award for Consumer Service, 2010

American Sociological Association, Travel Grant, Uppsala, Sweden, 1978

Fulbright-Hayes Doctoral Research Abroad Fellowship, Egypt, 1976-1977

Council on West European Studies Fellowship, University of Grenoble, France, 1975

Yale University Fellowship, 1974-1978

Alpha Kappa Delta, Sociological Honorary Society, 1973

Phi Delta Kappa, International Honorary Society, 1973

Graduate Student Paper Award, District of Columbia Sociological Society, 1973

Science Fiction Short Story Award, University of Maryland, 1973

Maxwell D. Taylor Award for Academic Excellence, Arabic, United States Defense Language Institute, 1971

Theodore Goodman Memorial Award for Creative Writing, City College of New York, 1968

New York State Regents Scholarship, 1963-1968

National Merit Scholarship, Honorable Mention, 1963

PUBLICATIONS:

ENERGY

Books and Chapters

The Political Economy of Electricity: Progressive Capitalism and the Struggle to Build a Sustainable Power Sector (Praeger, 2017)

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The Consumer and Energy Impacts of Oil Exports, April 1983

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A Decade of Despair: Rising Energy Prices and the Living Standards of Lower Income Americans, September 1982

The Impact of Rising Energy Prices on the Delivery of Public Service by Local Governments, August 1982

The Impact of Rising Energy Prices on the Low Income Population of the Nation, the South, and the Gulf Coast Region, July, 1982

A Comprehensive Analysis of the Impact of a Crude Oil Import Fee: Dismantling a Trojan Horse, April 1982

The Past as Prologue II: The Macroeconomic Impacts of Rising Energy prices, A Comparison of Crude Oil Decontrol and Natural Gas Deregulation, March, 1982

The Past as Prologue I: The Underestimation of Price Increases in the Decontrol Debate, A Comparison of Oil and Natural Gas, February 1982

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Books and Chapters

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"Broadband in America: A Policy of Neglect is not Benign," in Enrico Ferro, Yogesh K. Dwivedi, J. Ramon Gil-Garcia, and Michael D. Williams, Eds., *Overcoming Digital Divides: Constructing an Equitable and Competitive Information Society,"*IGI Global Press, 2009.

"Political Action and Internet Organization:An Internet-Based Engagement Model," in Todd Davies and Seeta Pena Gangaharian, Eds., *Online Deliberation: Design, Research and Practice,* CSLI press.

"When Counting Counts: Marrying Advocacy and Academics in the Media Ownership Research Wars at the FCC," forthcoming in Lynn M. Harter, Mohan J. Dutta, and Courtney Cole, Eds., *Communicating for Social Impact: Engaging Communication Theory, Research, and Pedagogy***,** Hampton Press.

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Open Architecture as Communications Policy (Stanford Law School, Center for Internet and Society: 2004)

Media Ownership and Democracy in the Digital Information Age: Promoting Diversity with First Amendment Principles and Rigorous Market Structure Analysis (Stanford Law School, Center for Internet and Society: 2003)

Cable Mergers and Monopolies: Market Power In Digital Media and Communications Networks (Washington, D.C.: Economic Policy Institute, 2002)

"When Law and Social Science Go Hand in Glove: Usage and Importance of Local and National News Sources, Critical Questions and Answers for Media Market Analysis,"forthcoming in, Philip Napoli, Ed. *Media Diversity and Localism: Meaning and Metrics, (*Lawrence Erlbaum, 2007)

"The Importance of Open Networks in Sustaining the Digital Revolution," in Thomas M. Lenard and Randolph J. May (Eds.) *Net Neutrality or Net Neutering*(New York, Springer, 2006)

"Reclaiming The First Amendment: Legal, Factual And Analytic Support For Limits On Media Ownership," Robert McChesney and Benn Scott (Eds), *The Future of Media* (Seven Stories Press, 2005)

"Building A Progressive Media And Communications Sector," Elliot Cohen (Ed.), News Incorporated: Corporate Media Ownership And Its Threat To Democracy (Prometheus Books, 2005)

"Hyper-Commercialism In The Media: The Threat To Journalism And Democratic Discourse," Snyder-Gasher-Compton-(Eds), *Converging Media, Diverging Politics: A Political Economy Of News In The United States And Canada*(Lexington Books, 2005)

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AFFIDAVIT OF BRUCE A. KUSHNICK IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

v.

Federal Communications Commission and United States of America,
Respondents

AFFIDAVIT OF BRUCE ALLAN KUSHNICK IN SUPPORT OF STANDING

1. My name is Bruce Allen Kushnick. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Fred Goldstein and Mark Cooper to explain why the basic facts I present below demonstrate that I and the other Petitioners have each suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My address is 185 Marine Ave, Apt 4E, Brooklyn, New York.

4. The Incumbent Local Exchange Carrier serving my residence and area is Verizon New York, the state telecommunications public utility which my family (and I used) since 1951 through May, 2012 at this address. In 2012, this service was also used for dial-up internet, which also included my email service through a New York based Internet Service Provider, Bway.net, which I had been using since 1997.

5. From 1951 through 2012 the residence used AT&T for long distance service.

6. I currently receive the following communications services:

   A. I receive telephone exchange and exchange access service from Spectrum, sometimes called Charter Spectrum, which is a trade name of Charter Communications. The service relies on “packet cable.” The local exchange part is provided though Charter Fiberlink CCO, LLC and/or Time Warner Cable Information Services (New York) LLC – NY, OCN 532D. These two companies are CLEC affiliates of Charter Spectrum.

   B. I obtain broadband service from Spectrum. This service is provided over hybrid fiber coaxial cable. Cable companies, like IXCs and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber based services for “backhaul” and for other purposes.

C. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Tracfone, which is a "mobile virtual network operator" or "MVNO." Tracfone resells the services of several facilities-based wireless carriers. The company does not typically make any representation in their advertising, web site or their collateral materials who is the actual carrier. I do know that my telephone number is associated with an OCN held by AT&T Mobility and my device usually advises that it is authenticated on AT&T Mobility's network, so it appears that my Tracfone service comes from AT&T Mobility. As part of my Tracfone service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). These services are also supplied via a resale arrangement with AT&T Mobility

7. I have been a telecom analyst for 37 years. In 1985, I was a senior telecom analyst with International Data Corp (IDC) NY office, now IDC/Link. I established New Networks Institute (NNI) as a market research and consulting firm focusing on the new fiber optic networks that were part of the original Information Superhighway plan in 1992. New Networks Institute today acts as the Managing Director of the IRREGULATORS. SEE APPENDIX A: VITA OF BRUCE KUSHNICK.

The IRREGULATORS is an independent consortium of senior telecom experts, analysts, forensic auditors, and lawyers who are former staffers from the FCC, state advocate and Attorneys General Office, as telecom auditors and consultants. Members of the group have been working together, in different configurations, since 1999.[1] SEE APPENDIX B: FILINGS & BIBLIOGRAPHY, NNI, IRREGULATORS 1985-2019. These two consortia are not incorporated. They employ a "brand" I own as a useful moniker for our collaborative efforts in search of rational telecommunications policy.

8. Detailing the Case and How I and the Rest of the Country were Harmed.

Underlying this case is what we contend is one of the largest telecommunications accounting scandals in American history. Basic local consumers have been forced to fund carrier activities costing billions of dollars, but did not receive the corresponding benefits. The funds were spirited away through accounting tricks, including separations, and used for purposes other than provision of basic wireline telephone exchange and exchange access service. The principal beneficiaries were the telephone companies' affiliates or their unregulated activities, for the most part wireless service, telephone toll service, information service and video. The freeze to separations has locked in "category relationships" for cost distribution between jurisdictions that do not resemble the way telephone company plant is used, with the result that the intrastate jurisdiction in general and the "Local" category in particular is forced to support a significantly higher proportion of common costs, including corporate expenses and loop costs, than should be the case under any reasonable method of attributing costs based on relative and actual use. The ultimate result is that regulated captive local wireline local customer revenues cross-subsidize other, more competitive activities and services and especially the telephone companies' less-regulated affiliated or deregulated operations. We contend that the current frozen separations has directly led to unjust, unreasonable and discriminatory rates under 47 U.S.C. §§201 and 202 and a violation of the cross-subsidy prohibition in 47 U.S.C. §254(k).

[1] IRREGULATORS Bios: http://irregulators.org/who-we-are/.

The problem is nationwide in scope, and affects virtually every basic local ratepayer, whether served by a price-cap carrier or a rate of return carrier.

We have repeatedly advised the FCC of this ongoing issue, in several different proceedings, including this one. Our comments and reply comments in the case below expressly pointed them out and provided reams of data and analyses. The FCC agreed with some of our facts and conclusions, but ultimately dismissed all of our concerns and rejected our requests for relief.

9. There are three basic manifestations of the problem.

A. "Frozen" separations assigns a far higher amount of general and corporate expense to intrastate and local than should be the case. The actual relationships have significantly changed, in that there are significantly fewer local loops dedicated to basic service than there were in 2000, but separations still uses the 2000 relationships to assign general and corporate costs. This directly causes a significant mis- and over-allocation of general and corporate expenses to the intrastate and local category.

B. Loop "loss" and "missing loops." Goldstein Affidavit Paragraph 5.G. correctly observes there are many fewer basic local lines in service than were there in 2000 but Local still bears the same proportion of common expenses. This misalignment requires local to bear far more common costs than is appropriate. It leads to higher basic local rates and a higher interstate end user common line ("EUCL") revenue requirement, which is also a rate paid by consumers. It also causes some ILECs' carrier common line ("CCL") rate element to be higher than it should be. When consumers make long-distance calls to certain areas their IXC pays an inflated CCL and this cost is ultimately borne by consumers of toll services. The misallocation also contributes to higher universal service pass-throughs borne by local ratepayers throughout the country.

C. The carriers complain about "line loss" but they do not want to fix the separations consequences of this loss. Although they do often report local line reduced counts, they fail to acknowledge that many of these lines do not actually disappear, but are instead repurposed for things like interstate BDS. We have been able to show that the carriers are not complying with the separations requirement that access lines dedicated to BDS or other interstate services be assigned to the interstate jurisdiction. In 2006, NASUCA, the National Association of State Regulatory Utility Consumer Advocates, detailed that the FCC had not enforced this 'direct assignment' requirement, and that there were already large misallocation of expenses. The FCC never investigated these claims, even though NASUCA repeatedly advised of this problem through comments in 80-286 and related proceedings. In fact, in 2010, NASUCA claimed that the customer overcharging was $2-$6 billion, and that it had repeatedly attempted to get the FCC to deal with these issues to no avail.[2]

D. Affiliate and unregulated activities. Frozen separations also allows the ILECs to use monopoly revenue to support their unregulated or less-regulated affiliates and operations. Verizon the ILEC, for example, extensively supplies network services and

[2] Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, Jurisdictional Separations and Referral to the Federal-State Joint Board, Docket 80-286, April 19th, 2010. http://www.nasuca.org/nwp/wp-content/uploads/2014/01/NASUCA-NJ-SeparationsComments-4-19-10-FINAL.pdf.

facilities to its wireless, IXC, information service and video operations and affiliates, but these operations do not contribute a fair and nondiscriminatory share of the ILEC's direct or common network and operations costs. This has twin effects: consumers pay higher basic rates and competitors that do not enjoy a familial tie to an incumbent suffer competitive disadvantages because they pay higher prices for similar network services and facilities. But even so, none of these services actually pay what they should. Interstate BDS is directly subsidized by intrastate basic local due to current frozen separations rules and outcomes.

10. I will now provide a slightly more detailed summary of these basic facts and issues. I emphasize that our comments in the proceeding below set out a far more detailed analysis, so the Commission is surely aware of the problem. Indeed, Freeze Order ¶43 agrees there is a problem when it states that the Commission "share[s] NARUC's and the Irregulators' concern that those rules necessarily misallocate network costs."

A. The "freeze." The FCC has 'frozen' the cost accounting rules so that all of the different services that use the state-based telecommunications infrastructure will pay the same percentage of expense they did in the year 2000 – 19 years ago. The FCC has extended the freeze 8 times now, and the action below extends it for another 6 years—through 2024.

B. The FCC claims, however, that this is proceeding is only about incumbent phone companies that use the 'rate-of-return' regulatory framework, and not the 'price cap' companies like AT&T, Verizon and CenturyLink, the US major telecommunications utilities. Appendix 1 to the FCC's decision,[3] however, amended separations regulations that still expressly apply to price cap carriers and, by extension to state commissions that regulate price cap carriers for intrastate services. The best example is the one quoted in full by the *Freeze Order* on page 22. But many others still do as well. A short and non-exhaustive list includes 47 C.F.R. §§36.3(b), 36.123(a)(5), 36.124(c), 36.125(h), 36.126(b)(6), 36.141(c) and 36.154(g).

C. The FCC claims that many companies received enforcement forbearance from these separation rules, starting in 2008. It is true that price cap carriers have all been granted forbearance for interstate purposes, but that is not the end of the story or a sufficient excuse. States are still bound for intrastate purposes and use intrastate separated data for several purposes, including rate-setting. One would also think that the FCC would analyze and check-in on how price cap carriers have fared since then. More important the Commission should have investigated whether end user customers – both interstate and interstate – actually benefited from forbearance.

D. It turns out they have not. The Commission has not examined even the more limited financial data it required as a condition of forbearance. FCC Chairman Ajit Pai, in an interview with Re/code, was asked about his "weed-whacking" of various rules that

[3] Report And Order And Waiver, Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286, FCC 18-182, Released: December 17, 2018 ("Freeze Order").

"hold back investment."[4] Chairman Pai responded that "the FCC hadn't relied on any of that paperwork in years" and he asked his staff, "When was the last time you looked at these reports?" They said, "Pretty much never."[5]

11. Test case - Verizon NY Financial Information. The IRREGULATORS and New Networks Institute have spent almost a decade documenting what has occurred. Our "test case" involved the Verizon New York annual financial reports that are required by the NY Public Service Commission. These reports are all based on the FCC's cost accounting and separations rules. New York still uses – and must use – separations for intrastate purposes even though Verizon is a "price cap" company and received forbearance from the FCC's separations rules for interstate purposes. The Verizon New York 2017 Annual Report lays out, in vivid, clear, concise detail, the impact of the separations freeze.

A. The most recent is Verizon NY's 2017 Annual Report, published in June 2018.[6] The Verizon New York 2018 Annual Report is supposed to be published on May 23rd, 2019.

B. Our research and reports helped to start an investigation of Verizon NY in 2015 with Communications Workers of America and Public Utility Law Project, PULP. The case was settled in July 2018.[7]

C. The parties were allowed to conduct discovery in the New York proceeding. These materials exposed:

i) The Verizon NY annual report and all of the financials and expenses are based on the FCC cost accounting and separations rules, despite the fact that Verizon obtained forbearance from them for interstate purposes.[8]

ii) The same cost information is also used by the NY Public Service Commission to determine whether rates are reasonable.

iii) Everything from the tax payments and the company's reported intrastate losses, and past local telephone rate increases that were allowed were all based on the FCC's supposedly forborne cost accounting and separations rules.

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[4] The Irregulators do not oppose investment in modern plant; to the contrary. Our problem is that basic local service is allocated much of the cost of new investment as a result of frozen separations but local ratepayers receive very little of the benefit since the investment is largely used for purposes other than basic local service.

[5] Full transcript: FCC Chairman Ajit Pai on Recode Decode, Re/Code Staff, VOX, May 5th, 2017 https://www.vox.com/2017/5/5/15560150/transcript-fcc-chairman-ajit-pai-net-neutrality-merger-recode-decode.

[6] Verizon New York, Inc. Annual Report of Telephone Corporations for the period ending DECEMBER 31, 2017, State of New York Public Service Commission, Published , June 2018 http://irregulators.org/wp-content/uploads/2019/04/VerizonnyAnnualreport2017.pdf.

[7] Case 16-C-0122 –Proceeding on Motion Of The Commission To Consider The Adequacy Of Verizon New York Inc.'s Retail Service Quality Processes and Programs, New York PSC, July 12th, 2018, http://irregulators.org/wp-content/uploads/2018/07/settlementagreementjul17.pdf.

[8] Case 16-C-0122 – Proceeding on Motion of the Commission to Consider the Adequacy of Verizon York Inc.'s Retail Service Quality Processes and Programs, Verizon Response to CWA Discovery Request 3-5 (Oct. 12, 2016), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B4A90C732-0AD7-44FE-A49C-D7C65C9F8762%7D.

iv) Verizon New York is a $5 billion dollar state utility and Local Service generated $1.1 billion in revenues, around 21.6%.

v) In 2000, Verizon New York Local Service was 65% of the revenues and it paid 65% of the expenses. By 2017, Local Service, which is mostly driven by the "intrastate cost" associated with basic copper-based phone lines, was 22% of the revenues. But "Local" was still paying the majority of all of the expenses – including the construction budgets for all of the "interstate" services, such as the fiber optic wires for FiOS or the wires to the cell sites for Verizon Wireless. At the same time, these other services are not paying market prices or properly developed private line/special access/BDS prices. The Verizon wireless affiliate is currently paying a fraction of the costs they impose on the Verizon ILEC for the services they obtain.

vi) Verizon NY Local Service paid $1.8 billion (61%) of total $3 billion in Corporate Operations expense[9] in 2017, but it only had $1.1 billion in revenues. This over-allocation due to accounting mismatches makes Local Service appear unprofitable. The separations freeze based on year 2000 relationships assigned 65% of Corporate operations to Local Service and that never changed. At the same time, Business Data Services and FiOS, received 80% of the revenues in 2017 but were artificially assigned a fraction of this expense.[10] The reason is that use radically changed after 2000 but the category relationships were frozen and could not be adjusted to track what was really going on.

vii) Local Service paid 65% of the Corporate Operations Expense in 2000 because it was 65% of the revenues; in 2017 Local contributed only 21.6% of revenues but was still paying 61% of this Corporate expense.

viii) Verizon Local Service was charged $1.2 billion in construction and Maintenance, (plant and Non-specific Plant) yet the record shows Verizon was spending less than $100 a year for its copper-based networks.

ix) "Interstate" services paid a fraction of the Corporate Operations expenses, and less than Local Service in construction and maintenance. Nonregulated and Access services were profitable.

x) In 2017, Verizon New York reported a total of $2.5 billion in total company losses. It claimed $2.9 billion in losses due to local service, so it apparently obtained $400 million in profits from some other endeavor. These losses allowed Verizon to claim a $943 million tax benefit.

D. Allowing the FCC to extend this freeze for 6 more years, based on actual financial data from a state-based telecommunications utility that has relied on these rules, leads to unjust and unreasonable rates for local customers. As the Goldstein Affidavit explains in Paragraph 5.G. there are many fewer local lines in service than were there in 2000 but Local still bears the same proportion of common expenses. Local rates are assigned

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[9] Corporate Operations includes the cost of lawyers, executive pay, lobbying, and corporate jets, among other things.

[10] SEE: "Local Service, $1.8 Billion for Corporate May 8th, 2019, Medium, https://bit.ly/2YxbwFR.

expenses that belong elsewhere (and in particular interstate BDS) with the result that noncompetitive intrastate Local is being forced to unfairly subsidize interstate services and BDS in particular.

12. Inquiry in other states would yield results similar to those from Verizon New York.

A. New York was useful since it still requires a full annual accounting report from Verizon. We are not so fortunate in some other jurisdictions, including interstate. The FCC erased the paper trail on 2007 by eliminating the publicly available Statistics of Common Carriers. This useful report had been continually published since 1939 but it is no longer available.

B. The Verizon NY results would almost certainly match up with the other states if they were to obtain and use the same type and granular level of data. We do know that the FCC's accounting rules used by all of the state utilities in 2007 based on the last publicly available data. The FCC's ARMIS report for that year showed:

AT&T, Verizon &CenturyLink Corporate Operations Expense, by State, 2007
Source:FCC ARMIS REPORTS

	Total	Local	Access	Local	Access
AT&T-Illinois Bell	$248,908	$193,626	$55,283	78%	22%
AT&T- Kansas	$55,097	$39,030	$16,067	71%	29%
AT&T-Ohio Bell	$180,067	$136,166	$43,901	76%	24%
AT&T-Pacific Bell - California	$743,215	$559,141	$184,074	75%	25%
AT&T-Tennessee	$110,541	$81,025	$29,515	73%	27%
AT&T-Texas	$484,584	$348,590	$135,994	72%	28%
Centurylink-Qwest-Colorado	$131,869	$97,716	$34,153	74%	26%
Centurylink-Qwest-Oregon	$58,678	$41,835	$16,842	71%	29%
Verizon-California GTE	$258,859	$203,080	$55,780	78%	22%
Verizon Florida LLC	$162,990	$122,508	$40,482	75%	25%
Verizon-Maryland	$239,740	$173,268	$66,472	72%	28%
Verizon- Massachusetts	$326,090	$216,948	$109,142	67%	33%
Verizon New Jersey	$425,805	$303,828	$121,977	71%	29%
Verizon New York Telephone	$1,092,744	$740,543	$352,201	68%	32%
Verizon Pennsylvania	$422,168	$303,753	$118,415	72%	28%
Verizon Washington D.C.	$67,115	$43,884	$23,231	65%	35%
Total Percentage				**72%**	**28%**

C. We were able to corroborate that other states would yield similar outcomes through open records or discovery requests in two other Verizon states.

i) In Massachusetts, Verizon MA responses to a discovery request showed that the basic percentages of revenues and expenses aligned with our figures from

New York, including Corporate Operations Expense allocations and claims that Verizon MA was incurring losses on the intrastate side for basic local service.[11]

ii) Verizon New Jersey claimed it was losing over ½ billion annually and attributed the losses to Local Service.[12]

D. The pattern is evident. Reported massive "losses" in the intrastate jurisdiction in general and "Local" in particular are driven from a huge over-allocation of costs that do not properly belong in the local category, or even in the intrastate jurisdiction. This over-allocation is directly caused from current separations results, and it all flows from the long-standing "freeze" and untoward affiliate relations between Verizon the ILEC and its Wireless, IXC and information service operations. Local pays, but others – and especially other less-regulated Verizon affiliated entities and operations – benefit.[13]

13. Although we have repeatedly complained about the problem, including in the proceeding below, the FCC has assiduously avoided any examination of the past, current and prospective impact frozen separations rules have on the intrastate jurisdictions.[14] If they get any information they apparently don't read it so they can then profess ignorance. But the consequences in terms of investments used for broadband and the cross-subsidies occurring between Verizon's local, wireless, toll and information service operations are stark and not truly subject to debate. This misfit between the allocation of expenses and the state financial books has infected everything – especially the state utilities that are using price cap regulations.

14. The Freeze Order contends in several places that separations is "irrelevant" to all price cap carriers and many rate of return carriers. But this contention is belied in ¶18, which notes, in pertinent part, that "[s]tates 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." The Commission is wrong about irrelevance but correct in its ultimate admission separations is still important and used in several states for intrastate purposes.

15. The National Regulatory Research Institute (NRRI) recently issued "State Universal Service Funds 2018: Updating the Numbers April 17, 2019.[15] This report shows that some states require traditional cost-of-service or other separations-based information for ratemaking or as part of the state USF program. For example New Mexico, New York, Oklahoma, and Texas require carriers to submit financial data to show the amount of high cost funding they require. New York carriers eligible to receive funding from the New York State Universal Service Fund (SUSF) must first seek to meet their revenue requirements through increases in their basic

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[11] SUMMARY REPORT: Verizon Massachusetts & Boston: Investigate the Wireless-Wireline Bait-n-Switch, January 2017 https://ecfsapi.fcc.gov/file/1041707743056/VerizonMAreportjan17.pdf.

[12] New Networks Institute OPRA Request with the NJ Board of Public Utilities; Verizon New Jersey Order to Show Cause in Alleged Failure to Comply with Opportunity New Jersey Commitments Docket No. TO12020155 https://www.nj.gov/bpu/pdf/telecopdfs/KucshnickB%20OPRA.pdf.

[13] Ibid.

[14] "WARNING: 30+ FCC Actions in One Year to Slice & Dice States' Rights & Consumer Protections", September, 26, 2018, Medium https://medium.com/@kushnickbruce/warning-30-fcc-actions-in-one-year-to-slice-dice-states-rights-consumer-protections-6fefa5dfaa7a.

[15] State Universal Service Funds 2018: Updating the Numbers, National Regulatory Research Institute, April 17, 2019 http://nrri.org/download/nrri-19-02-state-universal-service-funds-2018-updating-the-numbers/.

residential rates to the $23 per line state benchmark. Once they meet this benchmark, eligible carriers may file a standard rate case to determine the need for supplemental relief from the SUSF. In New Mexico, support is sometimes based on a showing of a "need" for funds to provide universal service.[16]

16. FCC created this mess and is either intentionally or inadvertently hiding the outcome. The FCC is entirely responsible. The problem was created through a series of prior proceedings dealing with cost accounting and separations. Those orders and actions are not subject to collateral attack or reversal in this case. But the FCC was directly confronted with the issues below and could and should have acted to prevent further harm in its disposition below by not extending the freeze and proceeding to secure new separations category relationships that more sensibly track relative use and cost.

17. It is plain that the FCC's preference for "market" outcomes based on assumed competition that does not exist in sufficient quantity or scale to force rational pricing is a complete failure. Further, despite all the forbearance and alternate regulation the price cap carriers are still subject to the Title II just and reasonable standard and they are still bound by the §254(k) prohibition on cross-subsidization. The simple fact is that the current separations outcomes inexorably lead to direct violations of §§201, 202 and 254(k).

18. The "burden" of doing the cost accounting rules is a fiction. Verizon New York is required to file annual accounting reports based on cost allocation and separations rules with the NY Public Service Commission. They do complain, and often request an extension based on burden and available resources.[17] But the burden is not that great; it is simply that Verizon has chosen to assign only 3 people to prepare and file reports in the reporting team, plus a manager for "300 reports annually in NY and other states." Verizon put $1.8 billion of Corporate Operations expenses into Local Service and yet it complains about employing 4 staffers to do these and other reports in other states. The real burden, it appears, is on basic local consumers.

Separations impact every consumer, because the separations rules directly or indirectly drive intrastate and interstate rates and have a material impact on competition. The FCC refuses to fully appreciate that there are still state-based telecommunications utilities and that they have been improperly funding the unregulated services, interstate services and telco affiliates.

Here are just some of the ways I was harmed, but how New York state and all customers overwhelming harms, based on a decade of investigation and telco-supplied evidence.

19. Direct Harms

A. Beginning in at least 2005 I and every other Verizon NY local user was overcharged for intrastate and basic local service.

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[16] Ibid, pp. 33 (Table 5), 35.

[17] Verizon Letter to NY PSC, Matter 10-01709 — "In the Matter of Telecommunication Company Filings of Financial Reports for Verizon New York Inc." January 18th, 2019 http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={FC10A7DE-EB70-41F9-A631-10CFF274CE39}.

B. Starting in 2005, Verizon NY had multiple rate increases based on "massive deployment of fiber optics" and claimed "losses" from basic local service.[18]

C. Verizon New York's basic local service went up 84%. The rate increases were artificial and should never have been assigned to Local Service because the funds were used to support plant and services dedicated to other purposes and endeavors. But these were only the increases for basic service. All other services, including 'calling features' or 'inside wire maintenance' had increases of 50-525%.

D. Using actual phone bills, we found that customers with service from 2005-2017 paid over $2,760.00 extra due directly to the rate increases established in 2005.

E. In 2012, I asked: Why did my current basic service local phone bill go up by more than $62.00 a month through repeated rate increases? I had basic local phone service, with a package of 'add-on' calling features, which included Call Waiting, Call Forwarding and Touchtone Service. I also had a 'legacy' inside wire charge. As an industry expert I knew that the calling package only had an internal cost of a few pennies, since 2000, and the inside wire had little or no operating costs as it had been put in the 1920s, never changed, and was fully depreciated.

F. While it took through 2018 to unravel the answer to these and other questions through the Verizon NY Annual Reports, we now can directly track these harms. They were all attributable to the FCC cost accounting and separations rules that are still used in Verizon New York.

G. I was harmed because the price of local service should have been in steep decline and I could have kept the land line. The overcharging above is only for the extra charged added to the customer bill for basic service when the state issued price increases based on "losses" or "massive deployment of fiber optics.

H. I was harmed because the state tax assessments I had to pay would have been less and state and city services lost tax revenues for economic growth. Verizon New York reported $2.9 billion in loss, but due to profits in other areas Verizon New York was able to claim $2.5 billion in losses for tax purposes. Verizon New York reported losses of over $2 billion (with a few caveats) each of the last 10 years. Their artificial losses reduced their tax contributions, and this required all other state citizens to make up the difference.

I. I was harmed because the other 'taxes, fees, and surcharges' were all increased due to these losses and rate increases. One has only to examine an actual telecommunications bill to see a host of made up fees, or taxes and surcharges that are tied to the retail services purchased by the end user.

J. I was harmed because I pay Universal Service Fund pass-throughs, and the monies go to carriers that still use separations. Thus even though I am in a "price cap" area I am forced to support rate of return carriers throughout the country.

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[18] "Verizon Granted Residential Rate Increase", Number 09054/09-C-0327NY Public Service Commission press release, 6/18/09, https://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/B849A020314983A3852575D900530827/$File/pr09054.pdf.

K. I was harmed by the underlying 'Business Data Services' networks being inflated with profits but these services contributed a fraction of the 'common costs'. These inflated profits are a direct result of the miss-allocation of expenses caused by the FCC separations rules.

L. No competitive alternatives to Verizon. In 2012, the Verizon New York state-based utility local phone service stopped working. I and my family had used the same service since 1966. When I called Verizon customer service (using a pay phone), I was told that I should switch to FiOS, which had recently been installed in my building. When I asked if I could use my then-current Internet Service Provider, a small, independent ISP called Bway.net, I was told no: my only choice was Verizon Online. The so-called replacement of the existing state utility services blocked my ability to use Verizon's competitors for other services like Internet.

M. I was harmed because all cell service providers that are not Verizon pay more than Verizon for the same service. The financial reports discussed above show that Verizon's wireless affiliate pays a fraction of what Sprint does to use the same network services; moreover, the AT&T payments to Verizon New York also appeared to be questionable.[19] Verizon controls the majority of the critical infrastructure, and through cross-subsidies from basic local service it also manipulates and discriminates charges to its wireless affiliate *vis-a-vis* other wireless providers.

N. This is a national problem because these harms flow directly from the FCC accounting and separations rules. From Verizon New Jersey to AT&T California,[20] since 2004, Local rates have gone up by 120+%, largely based on claims of "losses" (calculated using separated costs).

20. **The next generation of the telco strategy - 5G Vaporware.** "5G" is the newest iteration of the telcos' continuing strategy to fleece local ratepayers and obtain undue competitive advantage. Verizon and all the other telcos, including price cap and rate of return carriers, intend to continue and accelerate "investment" in fiber and other high-bandwidth transmission that it will charge to Local but use for something else. This time it is "5G." Small cell 5G will use the same fiber networks that are currently used mostly for unregulated endeavors like FiOS,[21] but even more will be required because the "small cell" architecture requires more transceivers that must have broadband for backhaul. The cycle will repeat and the harms will compound if the freeze continues because the costs Verizon incurs to support its wireless operations will be mostly allocated to "local" under separations rules. Local will be artificially burdened with even more costs, and the accounting will show even higher losses even though local would in fact turn a profit if proper allocations were employed.

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[19] "It's All Interconnected" published by Public Utility Law Project, PULP, 2014.

[20] "Californians Paid Billions Extra: The State Assembly Should Investigate AT&T's Cross-Subsidies", Huffington Post, August 23, 2017, https://www.huffpost.com/entry/californians-paid-billions-extra-the-state-assembly_b_599d26bee4b0b87d38cbe637.

[21] "Part 2: Verizon Wireless Bait & Switch: What Verizon Tells Investors But Has Been Hiding from the Public", October 3rd, 2018, Medium, https://medium.com/@kushnickbruce/part-2-verizon-wireless-bait-switch-what-verizon-tells-investors-but-has-been-hiding-from-the-ba4e25139ade.

21. **End the harm and prevent even more harm.** If these cross-subsidies are ended intrastate and local rates would no longer be required to subsidize other services. Local rates could be reduced, costs would better align with the services that incur those costs, and society would benefit because incentives, risks and returns would begin to match. The only way to do that is by ending the freeze. If the freeze is not ended then local ratepayers will continue to be burdened far beyond what is appropriate and the burden will be even further increased due to new costs to support 5G that will be inappropriately charged to local.

22. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Bruce Allan Kushnick

SUBSCRIBED AND SWORN TO BEFORE ME this 20th day of May, 2019, to certify which, witness my hand and official seal.

MICHAEL SENZ
Notary Public - State of New York
No. 01SE6114952
Qualified in New York County
My Comm. Expires Aug. 30, 2020

[Seal]

Notary Public in and for New York State, County of New York

APPENDIX A

Bruce A. Kushnick, New Networks Institute

VITA

- **Education:**

Mannes School of Music, with Dan Marek, 1979-1980

Harvard University, Graduate School of Psychology, 1977-1978

Massachusetts Institute of Technology, Special Graduate Student in Interdisciplinary Sciences, 1977-1978, (Part of the Division for the Study and Research in Education, now part of the Media Lab.) Worked with Marvin Minsky, MIT AI Labs creating music with artificial intelligence

Master Class in Musical Theatre, (under Lehman Engel) Broadcast Music Inc. (BMI) 1976-1980

School of Contemporary Music 1976-1977

Harvard University Summer School, 1975-1976

Boston Architectural Center, 1975, 1976

Boston University, 1975, Special Graduate Class, School of Music Education

Sergeant School of Nursing, Boston U, 1975

Massachusetts Institute of Technology, 1975, Linguistics & Music Seminars, with Noam Chomsky and Leonard Bernstein.

Brandeis University 1973-1976, Bachelor of Arts, Magna Cum Laude, (Music Composition, Minor in Psychoacoustics.)

Massachusetts Institute of Technology, Research Laboratories in Electronics, (RLE) 1971-1973. Attended classes on acoustics with Amar Bose

Berklee College of Music, 1971-1972

University of Massachusetts, Computer Programming, 1971

Boston Experimental Electronic Projects, 1971

Brooklyn Academy of Music, 1971

Staten Island Community College, 1970-1971

Brooklyn Technical High School, 1966-1970

- **Experience**

Executive Director, Founder, New Networks Institute (NNI), 1992-

Managing Director, IRREGULATORS, 2015-

Chairman, Founding Member, Teletruth 2002-2014 (Dormant)

President, Co-founder, Strategic Telemedia, 1986-1993

Senior Telecom Analyst, Link Resources, a Division of IDC, 1985-1987

Founding member, The Audiotext Group, (now Kelsey/BIA), 1986-1992

Independent Telecom Analyst, National TeleVoice, (NTV) 1982-1986

Recording Artist, CBS/John Hammond Music, 1981-1982

- **Columnist, Broadband & Telecommunication Expert**

Medium, 2018-

Huffington Post, blogger, 2012 -2018

Harvard Nieman Foundation for Journalism's Watchdog Project, 2006-2012

Alternet, with David Rosen, 2010-2014

- **New Networks Institute (NNI)**

New Networks Institute was founded in 1992 to examine how the break-up of AT&T and the creation of the Regional Bell Operating Companies (now AT&T, Verizon, and CenturyLink), impacted America's communications and customers. NNI published a series of books and reports on various related topics. A bibliography is available at http://www.newnetworks.com/biblio.html

- **IRREGULATORS**

Established in 2015. IRREGULATORS is an independent consortium of telecommunications analysts, experts, forensic auditors and lawyers, some of whom held senior positions at the FCC, Consumer advocate and state Attorney General Offices. The IRREGULATORS gather information, present studies and participate in state and federal regulatory proceedings to expand user knowledge and advance consumer interests.

IRREGULATOR Team: http://irregulators.org/who-we-are/

- **Teletruth & New Networks Primary Activities, 2002-2009**

Founded in 2002, Teletruth has been an independent, advocacy group, and working with New Networks, has filed state and federal comments and complaints with the FCC, IRS, SEC, helped to develop class action suits, made Data Quality Act filings at the FCC and performed hundreds of phone audits, recovering millions of dollars for small businesses and consumers.

Class Action suit settlement against Verizon, NJ for inoperative circuits, based on phone data collected through Teletruth audits. October 2006

In 2004 and 2008, Teletruth received grants from the California Consumer Protection Fund to work with UCAN, to study phone, broadband, Internet, wireless charges.

Member, FCC Consumer Advisory Committee (2003-2004).

Class Action suit settlement against Verizon, NJ for missing small business discounts, based on phone data collected through Teletruth audits. July 2004

Proposed Congressional bill — "The Broadband Bill of Rights". 2001-2002 (with Congressmen Nadler)

Created Roundtable for Small Telecom Businesses with Small Business Administration's Office of Advocacy, 2002

Filed the first Data Quality Act complaints with the FCC over phone bill charges, broadband, small business competition, wireless spectrum issues 1994-2010.

- **Books and Major Reports**

New Report Series: "The Digital Divide by Design" 2018-

New Report Series: "Fixing Telecommunications" 2015-2018

$400 Billion Broadband Scandal & Free the Net, 2015

$200 Billion Broadband Scandal, 2005

Dirty, Little, Secret Lives of Phone Bills, 2003

Regional Bell (RBOC) Revenues, Expenditures and Profits, 2002

Bell Executive Compensation, 2002

Bell Write-offs and Foreign Investment Losses 2002

The Unauthorized Bio of the Baby Bells & Info-Scandal, 1998

Inter-NOT: Online Statistics Reality Check, November 1996

Inter-NOT: The Terrible Twos: Online Industry's Learning Curve, February 1997.

Telephone Bill Databases, California, 2004, 2008 — Wireless, Wireline, Broadband, Internet.

- **With Probe Research**

"10 Years Since Divestiture: The Future of the Information Age.", consists of 14 volumes, with two computerized databases. 1,900 pages, 875 exhibits. Highlights:

The Information Super-Highway: Get A Grip, 1995

Regional Bell Earnings, Expenditures & Profits, 1994

Telephone Charges in America, 1980-1993, two volumes, computer database

Consumer Attitudes Toward Telephone & Cable Services, two volumes, 1993

New Network Services, 500, 600 and *100, published 1992

- **Computer Databases: (Computer Programmer, Designer)**

Telephone Charges in America, 1980-1992 — All charges, All states.

Consumer Attitudes Toward Telephone & Cable Services, 1000 Consumer Interviews, with Fairfield Research, 1993

Telecom Turf Wars, 1995, 1000 Consumer Interviews, with Fairfield Research.

- **NNI's Research Reports were Marketed by:**

Probe Research, Inc. 1992-1996

Fairfield Research, Inc. 1994-1995

Phillips Business Information, Inc. 1994-1996

- **President, Strategic Telemedia, 1988-1993**

As President of Strategic Telemedia, 1985-1992, (originally National TeleVoice) the primary consulting activities included strategic planning, competitive analysis, and new business opportunities using interactive telecommunications. Selected clients: American Express, AT&T, Citibank, Consumer Union, Donnelly Directory, Nippon, MCI, Ogilvy & Mather, Pacific Bell, BellSouth, Sprint, Weather Channel, Westwood One (NBC and Mutual Radio). Specific projects included:

Acted as principal consultant and creator in the rollout of the first "NII", 3-digit number service, "511" (like "311") in America, with Cox Newspapers, 1992.

Acted as principal consultant to Sprint to create a new division for Telemedia services, including competitive and strategic analysis, product planning and implementation, sales and marketing. 1988-1991 (Estimated revenues were $250 million in 1990.).

Worked with The Weather Channel to implement a series of telephone related services, including 800 and 900 Weather. 900-WEATHER, Recipient of the Golden Phone Award, 1992. Work included product planning, media roll out, selection of vendors, down side risk analysis and co-marketing opportunities. 1991-1992.

Worked with American Express, Checks Division, to develop other lines of business in telecommunications related areas. Project included the exploration of new service offerings, including a telephone calling card, as well as creating an independent telecommunications network. 1990-1991.

Helped create a division for Audiotex and Telemedia services for Westwood One's NBC and Mutual Radio Networks, including vendor selections, financial and program planning, including the creation of a premier telephone sports program. Campaign assistance included Burger King, Levi's Jeans, Yoko Ono.

Worked with Donnelly Directory in the analysis of technology and marketing for the first national Talking Yellow Pages service, 1986.

- **As President of Strategic Telemedia, Co-authored first Published Reports on:**

Automatic Number Identification, (Caller ID) 1986-92

"700, 800, 900: The Intelligent Networks", 1987-1992

Telephone as Media: Telemedia, 1987-91

Automated Service Bureau & Telemarketing Service Agencies -1991

- **Strategic Telemedia's Research Reports were Marketed by:**

The Audiotex Group, 1988-1992

Jupiter Communications, 1987-1990

- **Other Business Activities:**

Invented a '500' Caller Paid network, using the 500 Area Code, 1990. (Rolled out by AT&T.) Example: 500 555-1212.

Telecom Director for "Prime Time to End Hunger", part of Bush Administration's "1,000 Points of Light", 1990.

Created first industry forums for Billing Services involving all RBOCs and IXCs, 1989-90

Founding member of the National Association of Information Services, NAIS (1990) renamed, "Interactive Services Association", (ISA)

Created "Continuous Information Service" for Link Resources 1986-1987

Created first report about emerging voice technology markets. Link Resources, 1985-86

Founding member, The Audiotex Group, 1986, now "The Kelsey Group/BIA"

- **Coined the Terms:**

"Telemedia", "Interactive Voice", "Intelligent 800", "500 Caller-Paid"

Predicted or Influenced:

Predicted companies would incorporate voice technology and add 'press one of this, press two for that" as their phone interface, 1981

Predicted the addition of new technologies to the networks, combined with the divestiture of AT&T, would create an explosion of new networks, as well as new applications, from online services to intelligent 800 services, 1982.

Predicted Caller ID, Calling features and voicemail would become important phone services and new revenues for the phone companies, 1985

Sprint used NNI's data to create the Candice Bergen add "Do you know what you're paying for long distance per minute?" 1992

Predicted flat rate pricing for residential long distance, 1990.

Predicted 900 services would rise… and then fall, 1986…1990

Predicted the Bells would never deploy advanced networks as promised, 1992

- **Press Interviews, 1987-2014, includes the following:**

Featured in the Emmy-nominated "Bill Moyers In America", "The Net at Risk", 2006 Featured in Pulitzer Prize winder David Cay Johnston, "The Fine Print", 2012

New York Times, Business Week, Wall Street Journal, USA Today, Forbes, Washington Post, Chicago Tribune, L.A. Times, Advertising Age, DM News, CNN, Baltimore Sun, Interactive Age, Interactive Week, CNBC, Bloomberg, Inside Washington, Washington Times, Communications Week, Ad Week, Network World, Telecommunications Mag, Outlook on AT&T, Boston Globe, Communications. Daily, Associated Press, Newsbytes, Telephone Week, Philadelphia Inquirer, ISP Planet, Broadband Reports, Computerworld, ABC News-New York, Fox News-New York, Miami Herald, PhillyNews, the Bergen Record, Ars Technica, Forbes, among others.

- **Other Activities:**

"Touchtone", optioned by, Warner Brothers, Wolper Productions., 1995-1999

"Touchtone" a novel, 1994

"Destiny", a novel, 1993

"Kushnick at Carnegie", Original compositions, Weil Recital Hall at Carnegie Hall, 1990

Recording Artist, with No Laughing, CBS/John Hammond Music, 1982

Opera "Ephiphanies" with Richard Kostelanetz, 1982

"Bruce Kushnick, A Retrospective", Carnegie Recital Hall, original compositions, 1980, accompanied by Robert Koff, founding member, Julliard Sting Quartet.

- **Highlights of Speaking Engagements and Events, 1989-93**

Asian Direct Marketing Symposium 93, Keynote Speaker, Telemedia, (May, 1993) Hong Kong

Infotext 93, The Creation of Area Codes *100, 500, and 600, and 3-Digit Dialing (January, 1993)

Press Conference, National Press Bldg. 10 Years Since Divestiture: The Future of the Info Age, (July, 1992)

Audiotex in Scandinavia, 92 Automated Services & Telephone Networks in US, (March, 1992)-Copenhagen

Infotext 92, Buying and Selling an Information Service, (January, 1992)

National Database Conference, Databases and New Telecommunications Options, (December, 1991)

American Telemarketing Association, Using New Telecom Options, Annual Conference, (October, 1991)

World Telemedia, Keynote Address, The Growth of Telemedia, (October 1991)-London

Direct Marketing Association, Database Marketing and Telecom Options, (February, 1991)

Telemedia 90, Tutorial Overview on 800 and 900 Service, (November, 1990)

Information Industry Liaison Committee, Automatic Number Identification Applications, (October, 1990)

Intertainment, Growth of 900 and 800 for Entertainment, (October, 1990)

Retrospective At Carnegie Recital Hall, The Music of Bruce Kushnick, (October, 1990)

Society of Telecom. Consultants, Automatic Number Identification Applications, (May, 1990)

Voice 90, The Telemedia Perspective, (March 1990)

Telecom Publishing, Audiotex Potential, Keynote Address, (February, 1990)

- **Strategic Telemedia Industry Forums**

Forum I First Industry Forum for Long Distance cos. on issues of 900, September, 1989

Forum II Brought together the Long distance carriers and the Regional Bells (RBOC) to discuss Billing and Collections for 900 and enhanced services, March, 1990

Forum III Long Distance co. and RBOCs meet Public Utility Commissioners, June 1990

APPENDIX B
Research, Analysis & Data; State & FCC Filings

- Partial list: 2014-2018
- Reports, Research, Data and Legal & Regulatory Actions, 1998-2015
- FCC Filings and Complaints, 1999-2013
- Data Quality Act Filings, 1994-2011

Reports, research, legal and regulatory Actions, 1985-1999

- The Future of the Information Age, with Probe Research, 1992-1999
- Seminal Research Reports of the Interactive Age, with International Data Corp (IDC)-Link Resources and Strategic Telemedia, 1985-1993

New Networks Institute & the IRREGULATORS filed in over 35 separate FCC proceedings and created "Fixing Telecom" series and the Digital Divide by Design series.

FILINGS RELATED TO 80-286 & The Big Freeze

- FILING: Comments filed in "The Big Freeze" Docket 80-286 and FCC 18-99 - FURTHER NOTICE OF PROPOSED RULEMAKING
- FILED WITH COMMENTS: REPORT 1: Did AT&T, Verizon, CenturyLink & the FCC Intentionally Create the Digital Divide?
- FILED AS REPLY COMMENTS: REPORT 2: Verizon New York 2017 Annual Report: An Analysis of Cross-Subsidies and Customer Overcharging DESCRIPTION: This report, based on the Annual Report shows that there is a utility and that it is hemorrhaging money because of the FCC.
- FILED AS COMMENTS: REPORT 3: Bell Access Line Accounting Manipulation 1984-2018 Description: Verizon, AT&T, CenturyLink, and their association, USTelecom, with the help of the FCC, have manipulated the basic accounting of access lines, and have removed or hidden 80% of all lines, including all Business Data Services, (special access) DSL, competitor lines, FiOS, U-Verse, all of the wires to the cell sites or WiFi hot spots, alarm circuits, and this has been done to reinforce a claim that the utility networks are unprofitable.
- **Report:** Solving Net Neutrality: We Found a Fatal Structural Flaw in Every FCC Proceeding", February 26th, 2018

Partial List of the Proceedings We Filed In:

- ***Net Neutrality Internet Order –****Restoring Internet Freedom WC 17-108*
- ***Section 706 —****Inquiry Concerning Deployment of Advanced Telecom Capability to All Americans in a Reasonable and Timely Fashion, GN 17-199*
- ***Shut off the Copper Proceedings —****Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking – WC Docket No. 17-84*
    - *Technology Transitions, GN Docket No. 13-5;*

  - *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353*
- ***Wireless Replacement of Wired Services*** Wireless Infrastructure NPRM Notice of Proposed Rulemaking–*WT Docket Nos. 17-79 and 15-180*
- ***FCC Cost Accounting Rules*** *Review of Part 32 Uniform System of Accounts Docket 14-130*
  - *Jurisdictional Separations and Referral to the Federal-State Joint Board CC Docket No. 80-286*
- ***Business Data Services (Special Access) –i****n Internet Protocol Environment, Docket No.16-143;*
  - *Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25;*
  - *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services, RM-10593.*
  - *Investigation of Certain Price Cap Local Exchange Carrier Business Data Service Tariff Pricing Plans Environment WC Docket No. 15-247*

The Details

Shut off the Copper Proceeding Filings

- *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking – WC Docket No. 17-84*
- *Technology Transitions, GN Docket No. 13-5;*
- *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353*
- *Also filed in FCC WTB 17-79, GN 17-83, GN 13-5, WC 12-353, CC 80-286*
  - Reply Comment 1 were filed on July 18th, 2017
  - Appendix, The Book of Broken Promises
  - Report 8: Full Report: Verizon New York 2016 Annual Report Analyzed.
  - Report 5: The Hartman Memorandum proves that the FCC's own cost allocation rules created massive financial cross subsidies between and among the state-based wired utilities, and the companies' other lines of business, such as special access, or the wireless service.
  - Report 6:The History & Rules of Setting Phone Rates in America —The FCC's 'Big Freeze' details that the FCC has set basic cost accounting expenses to based on the year 2000 and the FCC has never audited or investigated the impacts for 18 years.

Internet Order

- **The Book of Broken Promises: $400 Billion Broadband Scandal and Free the Net** is an encyclopedic collection of state-based Fiber optic deployments. It has been filing in multiple FCC proceedings in 2017, including *Restoring Internet Freedom WC 17-108*

Internet Order: Verizon's Use of Title II vs FCC of Title II's Harms

- **NNI have filed a Petition for the FCC to investigate** whether Verizon has committed perjury as Verizon has failed to disclose to the FCC, courts or public that their entire financial investments are based on Title II; filed Jan 13th, 2015.
- **Verizon has responded with a letter** denying our claims, filed, Jan 20th, 2015
- **New Networks Institute & Teletruth Response to Verizon,** Feb 23rd, 2015
- **Verizon: Show Us the Money PART I: Verizon's FiOS, Fiber Optic Investments, and Title I.** – Part 1: supplement original Petition for Investigation.
- Letter to the FCC, Comments: Open Internet proceeding. RE: Verizon's Fiber Optic Networks are "Title II" — here's What the FCC Should Do. DOCKET: Open Internet Proceeding, (GN No.14-28)
- Comments First: FCC Open Internet Proceeding **"Title Shopping: Solving Net Neutrality Requires Investigations" , July 14th, 2014**
- Comment Second: Verizon's FiOS Fiber to the Premise (FTTP) Networks are Already Title II in Massachusetts, Maryland, Florida, New Jersey, District of Columbia, Pennsylvania, New York

Section 706 and Related Filings

- Comment1, Comment 2 *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Section 706 Inquiry GN 17-199*
- **NNI: 20 Years of Section 706 and related inquiry filings—**New Networks and our previous iteration, Teletruth and current affiliate IRREGULATORS have filed over 20 times over the last 20 years in Section 706
- http://newnetworks.com/20yearssection706/
- **Part II: Facts Missing from the FCC's Section 706 Broadband Reports**
- **NNI First Section 706 Inquiry,** 1998.

Business Data Services: Consumer Federation of America (CFA) New Networks Institute (NNI) Filings

- *Business Data Services in Internet Protocol Environment*, Docket No.16-143;
- *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25;
- *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593.
- *Investigation of Certain Price Cap Local Exchange Carrier Business Data Service Tariff Pricing Plans Environment WC Docket No. 15-247*

    - Hartman Memorandum letter describing the FCC's distorted cost accounting rules and the harms of the unexamined cross-subsidies. November 4, 2015
    - Report 5: The Hartman Memorandum
    - Report 6:The History & Rules of Setting Phone Rates in America

Joint Press Release: Consumer Federation of America and NNI

- The Manipulation of the Financial Accounting & Special Access

- Fact Sheet Highlights

"BUSINESS DATA SERVICE MARKET PLAGUED BY ILLEGAL COST ALLOCATIONS, OVERCHARGES AND EXCESS PROFITS. Consumer Federation of America and New Networks data show deeply anti-competitive, anti-consumer practices.

- Joint Comments Filed On June 28th, 2016 New Networks Institute and Consumer Federation filed Joint Comments in the FCC's Business Data Services Proceeding
- Consumer Federation Ex Parte Meeting with the FCC, September 12th 2016
- Reply Comments Filed, August 5th, 2016

REPORTS: Fixing Telecom Series

In December, 2015, we released the first two reports in a new series, "Fixing Telecom" a project that started seven years ago. They are based on mostly public, but unexamined, information, the findings impacts all wireline and wireless phone, broadband, Internet and even cable TV/video services in America.

REPORTS:

- Report 1: Executive Summary: Verizon's Manipulated Financial Accounting & the FCC's Big "Freeze"
- Report 2: Full Data Report
- Report 3: SPECIAL REPORT How Municipalities and the States can Fund Fiber Optic Wireline and Wireless Broadband Networks.
- REPORT 4: Data Report Proving Verizon's Wireline Networks Diverted Capex for Wireless Deployments Instead of Wiring Municipalities, and Charged Local Phone Customers for It.
- Report 5: The Hartman Memorandum proves that the FCC's own cost allocation rules created massive financial cross subsidies between and among the state-based wired utilities, and the companies' other lines of business, such as special access, or the wireless service.
- Report 6:The History & Rules of Setting Phone Rates in America —The FCC's 'Big Freeze' details that the FCC has set basic cost accounting expenses to based on the year 2000 and the FCC has never audited or investigated the impacts for 18 years.
- Report 7: SUMMARY REPORT: Verizon Massachusetts & Boston: Investigate the Wireless-Wireline Bait-n-Switch, January 17th, 2017
- Report 8: Full Report: Verizon NY 2016 Annual Report Analyzed, June 2017.

FILINGS:

- Letter to the FCC for an Investigation of Cross Subsidies as detailed in the Hartman Memorandum

On December 16th, 2015, we filed the first reports in 31 separate FCC proceedings.

- FCC Filings: Cover Letter, December 16th, 2015
- FCC List of Proceedings

FCC Comments: Joint Board & FCC Cost Accounting Rules.

We filed comments and refreshed the record in CC 80-186, WC 14-139, CC 80-286, CC 96-45, CC 97-21, WC 05-25, WC 10-90, WC 12-353, GN 13-5, GN 15-191, WC RM-11358

On May 24th, 2017 the IRREGULATORS filed comments with the FCC and the Federal-State Joint Board. They asked:

- Re: Federal-State Joint Board on Jurisdictional Separations Seeks to Refresh Record on Issues Related to Jurisdictional Separations, FCC 17J-1
- Re: Federal-State Joint Board on Separations Seeks Comment on Referral for Recommendations of Rule Changes to Part 36 as a Result of Commission Revisions to Part 32 Accounting Rules, FCC 17J-2

- **On May 15th, 2017** the FCC denied our call for audits of the FCC's accounting rules and granted itself an extension, even though the FCC froze the way expenses were assigned to the different lines of business — but always having 'local service pay the majority of costs.
- **On April 17th, 2017,**the IRREGULATORS filed comments with the FCC calling for the Agency to do audits and investigations of the FCC's "Big Freeze". The FCC's accounting rules were 'frozen' 16 years ago and they have created massive financial cross-subsidies, making local phone customers pay the majority of expenses for all services, from wireless to Broadband Data Services (BDS).

This is important because it documents that the FCC can not create new public policies without accurate financial data,

"We refresh this record, again, with 'Fixing Telecom', a report series done as an independent voice, without corporate or political financing, because sometimes the Public should come first."

- Report 5: The Hartman Memorandum
- Report 6:The History & Rules of Setting Phone Rates in America— The FCC's 'Big Freeze' & Cross Subsidies
- Report1: Executive Summary: Verizon's Manipulated Financial Accounting & the FCC's Big "Freeze"
- Report 2: Full Data Report
- Report 3: SPECIAL REPORT: How Municipalities and the States can Fund Fiber Optic Wireline and Wireless Broadband Networks.
- REPORT 4: Data Report Proving Verizon's Wireline Networks Diverted Capex for Wireless Deployments Instead of Wiring Municipalities, and Charged Local Phone Customers for It.

FILINGS:

Research, Analysis & Data; State & FCC Filings

- Letter to the FCC for an Investigation of Cross Subsidies as detailed in the Hartman Memorandum
- FCC Filings: Cover Letter. On December 16th, 2015, we filed the first reports in 31 separate FCC proceedings
- List of Proceedings: FCC List of FCC Proceedings in which reports were filed
- Joint Filings with Consumer Federation of America in the Special Access, (Business Data Services) proceeding

IRREGULATORS' RESEARCH & ANALYSIS USED IN INVESTIGATION AND SETTLEMENT VERIZON NY, Filed August 8th, 2017

- **COMMENT 1:** Overview and bibliography
- **COMMENT 2:** : Verizon NY in Multi-Billion Dollar Settlement Tangle, Underway in NY State. (Originally published in Huffington Post as summary).
- **COMMENT 3: Full Report:** Follow the Money: Verizon NY 2016 Annual Report Financial Analysis and Implications

Verizon State Based Reports and Analysis

- **2012**"Verizon's State-Based Financial Issues & Tax Losses: The Destruction of America's Telecommunications Utilities" where we called for an investigation of Verizon's financials and the cross-subsidies of its affiliate companies.
- **2013**Verizon Wireless and the Other Verizon Affiliate Companies Are Harming Verizon New York's (The State-based Utility) Customers & the State.
- **2013** Investigation of Verizon Wireline and Wireless Companies Business Relations by the New York State Commission — COMMENTS filed by Common Cause–NY, Consumer Union, CWA and the Fire Island Association culled from data from New Networks Institute research reports.
- **2014**"It's All Interconnected" published by Public Utility Law Project, PULP, with David Bergmann, Esq.
- **Full Report:** Follow the Money: Verizon NY 2016 Annual Report Financial Analysis and Implications
- Note: Current Investigation of Verizon New York's business practices.