

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

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**COMMENTS OF  
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER  
ADVOCATES AND  
THE NEW JERSEY DIVISION OF RATE COUNSEL,**

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**I. INTRODUCTION**

In the Notice of Proposed Rulemaking (“NPRM”) released March 29, 2010 in this docket, the Federal Communications Commission (“FCC” or “Commission”) seeks comment once again on extending the current freeze of Part 36 category relationships and jurisdictional cost allocation factors.<sup>1</sup> The jurisdictional separations process “is the process by which incumbent local exchange carriers (LECs) apportion regulated costs between the intrastate and interstate jurisdictions.”<sup>2</sup> The opportunity and timing for comment are virtually identical to that established last year by the FCC’s 2009 NPRM, which, similarly, was released in late March, and concerned the freeze then also scheduled to expire approximately three months later than the NPRM release date. As was the case last year, due to the Commission’s timing there is clearly a limited

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<sup>1</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286 (“80-286”), FCC 10-47, Notice of Proposed Rulemaking (rel. March 29, 2010).

<sup>2</sup> NPRM, ¶ 2.

opportunity to explore options other than the repeated extension of the now nearly decade-old separations freeze.

The National Association of State Utility Consumer Advocates (“NASUCA”) as an organization<sup>3</sup> and the New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency representing New Jersey consumers and as a member of NASUCA,<sup>4</sup> present these brief comments to address the issues raised by the NPRM, which are of significant importance to the ratepayers that NASUCA and Rate Counsel represent, given that current separations are imbalanced to the tune of **\$2-6 billion against those ratepayers.**<sup>5</sup>

NASUCA’s and Rate Counsel’s concerns about the flawed separations process and the FCC’s repeated decisions to extend the separations freeze are unchanged, and, therefore, these comments do not reiterate all the positions and concerns previously described in comments filed previously both separately by NASUCA and Rate Counsel and jointly by NASUCA and Rate Counsel.<sup>6</sup>

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<sup>3</sup> NASUCA is a voluntary association of 45 advocate offices in 42 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

<sup>4</sup> Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. N.J.S.A. §§ 52:27EE-1 *et seq.*

<sup>5</sup> 80-286, Reply Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate, (November 20, 2006) (“NASUCA et al. Reply Comments”) at 48.

<sup>6</sup> Most recently, NASUCA and Rate Counsel each separately filed comments in 2009 regarding the FCC’s proposed extension of the separations freeze.

## II. EXTENSION OF THE SEPARATIONS FREEZE

In 2001, the Commission froze the separations factors at then-current levels.<sup>7</sup> The current NPRM is the fourth seeking comment on extending the jurisdictional separations freeze. The current freeze is due to expire on June 30, 2010.<sup>8</sup> Given the Commission's timing, practically speaking, extending the separations freeze may be a feasible course of action.

Yet on March 5, 2010, the state members of the Federal-State Joint Board on Separations made proposals for interim action on the separations factors, and the Commission has asked for comment on those proposals.<sup>9</sup> NASUCA and Rate Counsel intend to file comments on the state members' proposals, according to the schedule in Public Notice 10J-1.<sup>10</sup> Rather than continue the current frozen factors, the Commission could adopt those proposals prior to the expiration of the freeze.

However, if the FCC extends the separations freeze for another year, such extension should be explicitly found to be an exogenous event that triggers review under both state and federal price cap plans. Under the present flawed, frozen system of allocation, carriers continue to profess negative net income in state proceedings,

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<sup>7</sup> 80-286, Report and Order, 16 FCC Rcd 11382, 11397-88 (2001) ("Separations Freeze Order").

<sup>8</sup> See *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6162 (2009) (*2009 Separations Freeze Extension and Further Notice*) (extending the initial separations freeze scheduled to expire June 30, 2009 for one additional year). See also *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 and Further Notice*) (extending the initial separations freeze scheduled to expire June 30, 2006 for three additional years).

<sup>9</sup> FCC Public Notice FCC 10J-1, "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," released March 30, 2010.

<sup>10</sup> Initial and reply comments regarding the State Members' Interim Proposal are due April 29, 2010 and

although, if costs were allocated efficiently and properly between regulated and unregulated services and between intrastate and interstate jurisdictions, carriers' state earnings likely would differ significantly from those that they represent to state regulators. So that state regulators can ensure that the prices for the services that they regulate are just and reasonable, and so that state regulators can assess accurately the financial ability of carriers (with existing rate levels) to invest sufficiently in the public switched network so as to provide adequate service quality, the FCC should explicitly find that the extension of the separations freeze qualifies as an exogenous event. As set forth in the Commission's rules: "The exogenous cost changes represented by the term 'Z' in the formula detailed in paragraph (b)(1)(i) of this section shall be limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling."<sup>11</sup> In those states with price cap plans, this exogenous event would then trigger review of the implications of the separations freeze on carriers' costs. In addition to treating the continuation of the freeze as an exogenous event, NASUCA and Rate Counsel would request that if the freeze is extended that the Commission find it in the public interest to permit state commissions to file for a waiver of compliance with the separation freeze in setting intrastate rates and such waiver filings would be handled on an expedited basis.

*In the absence of such action by the Commission, NASUCA and Rate Counsel reluctantly – again – recommend that the Commission order yet another extension of the*

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June 1, 2010, respectively.

<sup>11</sup> 47 C.F.R. § 61.45(d).

freeze on jurisdictional separations, with the “new” freeze expiring June 30, 2011, as suggested in the NPRM. Once again, NASUCA and Rate Counsel urge the Commission to commit to this being the last extension and to put forth the effort necessary to reform its jurisdictional separations as discussed in the next section. After more than a decade of regulatory inaction, in an industry that has changed as drastically as the telecommunications industry, the FCC must accomplish the major reforms needed.<sup>12</sup>

### **III. SEPARATIONS REFORM**

Comprehensive reform of jurisdictional separations is necessary and long overdue. The state of the telecommunications marketplace is vastly different than what it was ten years ago, even five years ago. This was illustrated in comments submitted by NASUCA and Rate Counsel, accompanied by detailed affidavits of its experts, in response to the *2006 Separations Freeze Extension and Further Notice*.<sup>13</sup> NASUCA and Rate Counsel will not reiterate the extensive discussion in those comments and affidavits here, but the discussion is no less relevant today that it was in 2006, and perhaps more so. Ratepayers deserve no less than the Commission’s full attention to these issues, which impact billions of dollars in carrier costs and revenues. The Commission must address

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<sup>12</sup> Notably, the recently-issued National Broadband Plan contains extensive discussion of universal service support reform and intercarrier compensation reform, but scarcely a word on separations reform, a key component of the move to a national broadband-enabled network.

<sup>13</sup> See 80-286, Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate; and Affidavits of Susan Baldwin and Dr. Robert Loube (August 22, 2006); *id.*, NASUCA et al. Reply Comments. Among other things, the flawed separations system directly affects consumer advocates’ participation in state proceedings. For example, when regulators investigate intrastate switched access rates, incumbent local exchange carriers typically raise concerns about “revenue recovery.” An improved separations system would yield more accurate data about the cost of basic local exchange service.

these issues and how they affect jurisdictional separations and the Commission's accounting regulations in general, including the allocation of costs and revenues between regulated and non-regulated operations of carriers.

Now is the time for the Commission to move forward with reforming its accounting regulations. Revised accounting should protect ratepayers for the future. It should also attempt to recompense consumers for the longstanding previous misallocations of costs and revenues.

#### **IV. ARMIS**

NASUCA and Rate Counsel are also concerned that regulators' ability to obtain relevant data has been hampered severely by the Commission's granting of forbearance for cost reporting (petitions which NASUCA and Rate Counsel opposed),<sup>14</sup> and therefore, NASUCA and Rate Counsel urge the Commission to re-consider the value of the data that was traditionally available through the FCC's Automated Reporting Management Information System ("ARMIS"). Information asymmetry – where regulated entities uniquely possess relevant cost and revenue data – hampers regulators' ability to ensure that consumers' rates are just and reasonable and to ensure that competition is evolving in an economically efficient manner. The FCC should re-impose ARMIS reporting as a condition for any further extension of the freeze.

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<sup>14</sup>The FCC web site states: "ARMIS filing requirements were reduced significantly for 2008 data by Commission forbearance orders. More information on the impact of the forbearance orders is available on the Significant Changes to ARMIS Reporting Instructions page." <http://fjallfoss.fcc.gov/eafs7/MainMenu.cfm>"

Respectfully submitted,

/s/ David C. Bergmann

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