

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS OF
ITTA – THE VOICE OF AMERICA’S BROADBAND PROVIDERS**

ITTA – The Voice of America’s Broadband Providers (ITTA) hereby submits these comments in response to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned docket.¹ ITTA supports the *FNPRM*’s proposal to allow rate-of-return carriers that elected to freeze their category relationships in 2001 to opt out of that freeze, and supports affording carriers that unfreeze their category relationships the opportunity to refreeze them.

I. DISCUSSION

When the Commission adopted the separations freeze in 2001, it only required rate-of-return carriers to freeze their allocation factors, but gave them the option whether or not to freeze their category relationships.² The Commission reasoned that a one-time option to freeze their categories at the outset would “give each rate-of-return carrier the flexibility to decide, based on its own circumstances and investment plans, whether a freeze of its category relationships will be beneficial.”³ On the one hand, a freeze would provide more certain separations results and be

¹ *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Further Notice of Proposed Rulemaking, FCC 18-99 (July 18, 2018) (*FNPRM*).

² See *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, 11389, para. 11 (2001) (*2001 Separations Freeze Order*).

³ *Id.* at 11394, para. 21.

less burdensome to carriers.⁴ On the other hand, “rate-of-return carriers, whose investment patterns may fluctuate more than those of price cap carriers from year to year, will retain maximum flexibility for recovering costs from new plant investments (upgrades) by not freezing their category relationships.”⁵ There was concern that a categories freeze might harm rate-of-return carriers by limiting their ability to account for changes in investment through the separations process, and also that a mandatory categories freeze would provide disincentives for such carriers to deploy new technologies due to insufficient cost recovery.⁶

With the benefit of 17 years’ worth of hindsight, ITTA believes that the Commission struck the correct balance in adopting the category relationships freeze on an optional basis, for the precise reasons that the Commission espoused. However, one problem transpired in the implementation: the Commission intended the category relationships freeze as an interim, “transitional measure” pending comprehensive separations reform and to last no more than five years. Instead, the category relationships freeze has now lasted some 17 years, and carriers that elected it have been prohibited from withdrawing their elections.⁷ As the *FNPRM* depicts, the

⁴ *See id.* at 11393, 11395, paras. 18, 22. The Commission elaborated that “a freeze will achieve the goal of stability and provide regulatory certainty for carriers by minimizing any cost shift impacts on separations results that might occur as a result of circumstances not contemplated by the Commission’s current Part 36 rules.” *Id.* at 11389, para. 12; *see also Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 32 FCC Rcd 4219, 4226, para. 19 (2017) (*2017 Separations Freeze Extension Order*) (a freeze provides small incumbent local exchange carriers (ILECs) with greater regulatory certainty). Compliance burdens are also substantially reduced insofar as carriers use frozen category relationships and allocation factors for their calculations of separations results and therefore are not required to conduct separations studies for the duration of the freeze. *See Separations Freeze Extension Order*, 32 FCC Rcd at 4221, para. 5; *see also id.* at 4226, para. 19 (the freeze has eliminated the need for ILECs, including small ILECs with 1500 employees or fewer, to complete certain annual studies).

⁵ *2001 Separations Freeze Order*, 16 FCC Rcd at 11393, para. 18.

⁶ *See id.*

⁷ *FNPRM* at 9, para. 23. While the Commission, in the *2001 Separations Freeze Order*, did contemplate that the waiver process would provide a mechanism for relief from the freeze where special circumstances warranted a deviation from it, *see* 16 FCC Rcd at 11407, para. 52, only

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impact of the duration of the category relationships freeze has been that many of the carriers that opted into it have since invested in network upgrades or are considering future upgrades, but they may have been or be unable to recover the costs of those investments, leading to at least some of the service or technology upgrade chilling effects of the freeze whose potential concerned the Commission in 2001.

The *FNPRM* notes that in comments in this proceeding last year, ITTA advocated that the Commission allow rate-of-return carriers the opportunity to unfreeze their category relationships for reasons similar to why it gave such carriers the option whether or not to freeze their category relationships in 2001.⁸ Therefore, it should come as no surprise that ITTA supports the *FNPRM*'s proposal to provide rate-of-return carriers that opted to freeze their category relationships in 2001 a one-time opportunity to opt out of that freeze.⁹ As the *FNPRM* suggests, this makes eminent sense insofar as such carriers would then be able to categorize their costs based on their current circumstances rather than those that existed in 2000.¹⁰ ITTA reiterates that some rate-of-return carriers will embrace the opportunity to more accurately allocate their investment, while others will find reinstating their separations systems unduly burdensome.¹¹ The key lies in the Commission affording such carriers the same flexibility to choose that they enjoyed in 2001.

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two such waivers have been granted, and two other waiver requests have remained pending for five years or more. *See FNPRM* at 6, para. 15 & n.38. This undoubtedly has had a disincentive effect on carriers that would benefit from an unfreezing of their category relationships from seeking relief to do so.

⁸ *See FNPRM* at 9, para. 24 (citing ITTA Comments, CC Docket No. 80-286, at 9-10 (May 24, 2017) (ITTA May 24, 2017 Comments)); *see also supra* at 1-2.

⁹ *See id.* at para. 23.

¹⁰ *See id.*

¹¹ *See id.* at para. 24 (citing ITTA May 24, 2017 Comments at 10).

To illustrate why such flexibility remains important, consider the example of special access (i.e. business data services) rates.¹² As the *FNPRM* describes, rate-of-return carriers that elected model-based (A-CAM) universal service high-cost support now only have business data services costs that are subject to the separations freeze.¹³ Therefore, “it does not make sense, nor is it equitable to require A-CAM electing companies to continue to keep their frozen categories rather than allow those companies to set Special Access rates that accurately reflect their costs.”¹⁴ Conversely, 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, but not be able to realize any benefit because it would not be able to actually sell business data services at double current rates.¹⁵ But that would be a business decision that the Commission should accord such carriers the flexibility to make based on their particular circumstances.¹⁶

¹² *See id.* at 10, para. 26 (seeking comment on how the pricing of services, particularly business data services, would be affected if carriers are allowed to update their network cost assignments to more accurately reflect the services they provide today, and on whether carriers would seek to better align their rates for specific services with the underlying costs of those services).

¹³ *See id.* at 5, para. 11.

¹⁴ *See* Comments of the United States Telecom Association, CC Docket No. 80-286, at 4 (Apr. 17, 2017).

¹⁵ While ITTA proffers this example for illustrative purposes, as ITTA has urged in response to the Notice of Proposed Rulemaking proposing that the Commission allow model-based rate-of-return carriers to move to incentive-based regulation of their provision of business data services, the Commission should forbear from application of its cost assignment rules, including its separations rules, consistent with the forbearance it granted to price cap carriers. *See* Comments of ITTA and USTelecom, WC Docket No. 17-144, at 11-13 (June 18, 2018); *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, Notice of Proposed Rulemaking, FCC 18-46 (Apr. 18, 2018).

¹⁶ In this regard, ITTA opposes the Commission *requiring* all rate-of-return carriers currently operating under the category relationships freeze to unfreeze their category relationships. *See FNPRM* at 11, para. 34 (seeking comment on whether the Commission should require, rather than allow, carriers to unfreeze their category relationships). As the Commission noted in the *2017 Separations Freeze Extension Order*, the freeze has eliminated the need for ILECs, including small ILECs with 1500 employees or fewer, to complete certain annual studies. *See*

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The *FNPRM* further seeks comment on whether the Commission should allow carriers presently subject to the category relationships freeze that opt to unfreeze their category relationships to refreeze those relationships at some later date.¹⁷ ITTA supports the Commission affording such carriers the option to refreeze their categories following their opportunity to unfreeze them. For the same reasons discussed above that an optional freeze made sense in 2001, likewise the opportunity to refreeze category relationships would bestow upon carriers the ability to calibrate their category relationships based on current circumstances, but also provide for more certain separations results and relief from burdensome cost studies should those attributes outweigh any benefits of remaining unfrozen. As ITTA suggested previously, the Commission could permit carriers to refreeze their category relationships six months or so after the period for optional unfreezing of categories concludes.¹⁸

In addition, ITTA supports granting rate-of-return carriers that did not freeze their categories in 2001 the opportunity to freeze them at this juncture should they choose to do so.¹⁹ The same rationale that militates towards allowing carriers to refreeze their categories after unfreezing them applies here. Specifically, an optional category relationships freeze was a good

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2017 Separations Freeze Extension Order, 32 FCC Rcd at 4226, para. 19. Some ILECs, including small ILECs, may seek to keep their category relationships frozen in order to continue to forego such studies, and/or for other reasons. So long as the Commission provides rate-of-return carriers the flexibility of a one-time option whether or not to unfreeze their category relationships, the Commission need not adopt any carve outs specifically applicable to small ILECs. *See FNPRM* at 12, para. 40 (seeking comment on whether the Commission should apply any rules it adopts differently to small entities).

¹⁷ *See FNPRM* at 11, 12, paras. 33, 37.

¹⁸ *See ITTA* May 24, 2017 Comments at 10 n.38. To the extent the *FNPRM* seeks comment on requiring carriers with frozen categories to notify the Commission at least four months prior to the July 1, 2019 tariff effective date of their decisions to opt out of the category relationships freeze, *see FNPRM* at 11, para. 32, this would then provide such carriers an additional two months to assess whether to refreeze their category relationships.

¹⁹ *See FNPRM* at 12, para. 36 (seeking comment on whether to allow carriers not currently subject to the category relationships freeze to elect to freeze their categories).

approach in 2001, but 17 years have elapsed since then. There is no reason that carriers that made a decision then whether or not to opt in to what was characterized as a “transitional measure” should continue to be locked into that decision at this juncture. Similarly, in light of the *FNPRM*’s proposal to extend the separations freeze for 15 years, signaling that comprehensive separations reform may not be forthcoming until at least 2033, ITTA supports allowing carriers to change their elections on a periodic basis.²⁰ ITTA suggests that this process of an optional unfreezing followed by an optional refreezing occur every five years. Not only was that the maximum contemplated duration of the original category relationships freeze, it also balances affording carriers flexibility with administrative simplicity of the Commission not having to conduct this process too often.

ITTA also concurs that “the interest of simplicity” should guide other aspects of implementation of an optional unfreezing of category relationships.²¹ For instance, for that reason, ITTA supports the *FNPRM*’s proposal to allow carriers a single opportunity to unfreeze their frozen category relationships at this juncture.²² Furthermore, ITTA supports the dates certain for such unfreezing contemplated by the *FNPRM*, specifically, that conforming changes to tariffs would become effective on July 1, 2019, and carriers would need to notify the Commission by March 1, 2019 of their decisions to opt out of the category relationships freeze.²³

Finally, ITTA opposes any requirement that a carrier that opts out of the category relationships freeze recalculate its base period revenue (BPR) using unfrozen category relationships and file a revised interstate switched access revenue requirement with the

²⁰ *See id.* at para. 37.

²¹ *Id.* at 11, para. 32.

²² *See id.*

²³ *See id.* The Commission should ensure that an order in this proceeding is effective within sufficient time, for instance by December 31, 2018, to enable carriers to make informed choices whether to opt out of the category relationships freeze.

Commission.²⁴ For one thing, such a measure would run counter to the implementation simplicity principle that ITTA (and the *FNPRM*) otherwise espouses.²⁵ Additionally, while ITTA appreciates the Commission's concerns about the potential for carriers to double-recover their costs after unfreezing their category relationships,²⁶ requiring a BPR recalculation would reduce interstate switched access cost recovery at the same time carriers more appropriately recover their investment attributable to categories other than interstate switched access. To the extent that this measure may therefore neutralize any advantage of unfreezing cost categories, it likewise would, ironically, present the same problem that the Commission ascribed to a mandatory categories freeze: namely, that when combined with the burdens associated with recalculating the BPR and revising the interstate switched access revenue requirement, as well as efforts to revise tariffs to account for unfrozen categories, it would end up as a disincentive for carriers to deploy new technologies, in this case due to flat cost recovery combined with the logistical hassles of going through this rigmarole without any cost recovery advantage in the end.

II. CONCLUSION

ITTA wholeheartedly endorses the *FNPRM*'s proposal to afford rate-of-return carriers that previously elected to freeze their category relationships a one-time opportunity in the near-term to opt out of that freeze. The same principles of flexibility that made the 2001 decision to give carriers the option whether or not to freeze their category relationships a good approach not only support that proposal, they also militate towards the Commission allowing carriers that seize the opportunity to opt out of the categories freeze to subsequently refreeze their category

²⁴ *See id.* at para. 30.

²⁵ *See id.* (proposing that carriers use 2011 cost study data to recalculate their BPRs). "While some carriers may have the necessary data to perform the study, others may not. For those that do not, we invite parties to propose an alternative means of estimating the BPR adjustment that should be made." *Id.*

²⁶ *See id.* at 10-11, paras. 28-29.

relationships, allowing carriers that did not previously opt to freeze their category relationships to now do so, and allowing carriers to change their elections on a periodic basis.

Respectfully submitted,

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August 27, 2018