Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF
ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

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Table of Contents

I. INTRODUCTION AND SUMMARY 1

II. THE COMMISSION SHOULD ELIMINATE THE SEPARATIONS REGIME FOR PRICE CAP CARRIERS 3

A. There is No Practical Reason to Continue to Apply Separations to Price Cap Carriers 3

B. Continued Application of Separations Processes at the State Level Should Not Impede Relief at the Federal Level 5

C. Any Price Cap Carrier Not Yet Subject to Forbearance from the Cost Assignment Rules Should, at Most, be Subject Only to One Condition for Complete Relief from the Separations Requirements 6

III. THE COMMISSION SHOULD ALLOW RATE-OF-RETURN CARRIERS THE OPTION OF UNFREEZING CATEGORIES AND THEN REFREEZING THEM 9

IV. CONCLUSION 11

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ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its comments in response to the Public Notice released by the Federal-State Joint Board on Jurisdictional Separations (Separations Joint Board) seeking to refresh the record in the above-captioned proceeding on issues related to comprehensive permanent separations reform.[1]

I. INTRODUCTION AND SUMMARY

Back in 2001, the Commission noted that the then-current Part 36 separations regime, which had been largely unmodified for several decades, was developed when local telephone service generally was provided through circuit-switched networks operated by companies with monopoly power in the local market, with clear delineation between interstate and intrastate services. The Commission stated further that the telecommunications landscape has changed significantly and the lines between interstate and intrastate services have become increasingly blurred over that time. The Commission noted in particular the growing presence of high-bandwidth technologies and services in the local market, including the Internet, and the increased

[1] *Federal-State Joint Board on Jurisdictional Separations Seeks to Refresh Record on Issues Related to Jurisdictional Separations*, Public Notice, FCC 17J-1 (Sep. Jt. Bd. Apr. 24, 2017).

use of packet-switched technologies which call into question the continued validity of usage-based separations procedures designed for circuit-switched technologies and services.[2]

Even as far back as 2001, the Commission was already looking "towards the eventual reform *or elimination*" of "outdated regulatory mechanisms that are out of step with today's rapidly-evolving telecommunications marketplace."[3] Those observations were appropriate then; 16 years later, in the midst of a widespread industry transition to IP-based services, they are even exponentially more so.[4]

ITTA urges the Commission to now take the long overdue step of eliminating the jurisdictional separations mechanisms as they apply to price cap carriers. There is no practical reason to maintain these requirements for price cap carriers, and the few states that still apply separations processes should not pose an impediment to terminating these requirements at the federal level. Minimal, if any, safeguards should be necessary to effectuate such relief.

The Commission should allow rate-of-return carriers a one-time opportunity to unfreeze their categories with an option to refreeze them. Such flexibility will enable each rate-of-return carrier to assess, based on its own circumstances and investment plans, whether it will be most beneficial to maintain the status quo or update its category relationships, as well as to enjoy certain separations results and minimal compliance burdens or retain the ability to recover costs

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[2] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, 11383, 11390, paras. 1, 12 n.32 (2001) (*2001 Separations Freeze Order*).

[3] *Id.* at 11383, para. 1 (emphasis added).

[4] Similarly, the Commission's observations of eight years ago are even more applicable now: "Many carriers no longer have the necessary employees and systems in place to comply with the old jurisdictional separations process and likely would have to hire or reassign and train employees and redevelop systems for collecting and analyzing the data necessary to perform separations." *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 24 FCC Rcd 6162, 6166, para. 12 (2009).

from new plant investments going forward. Alternative Connect America Cost Model (A-CAM) electing rate-of-return carriers, as well as rate-of-return carriers affiliated with price cap ILECs, to the extent they are on a path towards shedding most vestiges of rate-of-return regulation, should, like price cap carriers, be absolved altogether of separations requirements should the Commission ultimately take that action with respect to price cap carriers.

II. THE COMMISSION SHOULD ELIMINATE THE SEPARATIONS REGIME FOR PRICE CAP CARRIERS

A. There is No Practical Reason to Continue to Apply Separations to Price Cap Carriers

As the Commission often describes,[5] jurisdictional separations is the third step in a four-step regulatory process beginning with a carrier's accounting system and leading to the establishment of tariffed rates for an incumbent LEC's (ILEC's) interstate and intrastate regulated services. First, carriers record their costs into various accounts in accordance with Part 32 of the Commission's rules. Second, carriers cost allocate between regulated and nonregulated activities in accordance with Part 64 of the Commission's rules. Third, carriers separate the regulated costs between the interstate and intrastate jurisdictions in accordance with Part 36 of the Commission's rules. Fourth, carriers apportion the interstate regulated costs among the interexchange services and rate elements that form the basis for their exchange access tariffs, in accordance with Part 69 of the Commission's rules.[6]

This regulatory process has been dismantled as far as its application to price cap carriers. Most recently, the Commission allowed price cap carriers to elect to comply with accounting based on generally accepted accounting principles in lieu of the Part 32 Uniform System of

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[5] *See, e.g., Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, FCC 17-55, para. 3 (May 15, 2017) (*2017 Separations Freeze Extension Order*).

[6] *See id.*; 47 CFR pts. 32, 36, 64, 69.

Accounts (USOA).[7] In addition, many price cap carriers have enjoyed – in some cases, for almost a decade – conditional forbearance from the Commission's Cost Assignment Rules, including the cost allocation requirements of Part 64, jurisdictional separations procedures of Part 36, and cost apportionment mechanisms of Part 69, as well as some of the Part 32 requirements.[8]

Not only has this regulatory process as a whole, of which jurisdictional separations is one part, long since not applied to many price cap carriers – including, for almost a decade, the largest price cap carriers, the descendants of the Bell Operating Companies (BOCs);[9] it also was not designed to apply to them. As the Commission has explained, "[t]he Commission adopted the Cost Assignment Rules prior to 1991 when all ILECs were subject to rate-of-return regulation, so that it could set rates targeted to levels that allowed carriers to recover their costs and earn a specific return on their regulated investment."[10] However, after that time, for the larger ILECs, the Commission adopted price cap regulation, a form of incentive regulation.[11] Because price cap regulation "'severs the direct link between regulated costs and prices, a carrier is not able automatically to recoup misallocated non-regulated costs by raising basic service

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[7] *See Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 32 FCC Rcd 1735 (2017) (*Part 32 Order*).

[8] *See Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations et al.*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7648, para. 36 & n.119 (2013) (*2013 USTelecom Forbearance Long Order*); *see also 2017 Separations Freeze Extension Order* at para. 5 n.14.

[9] *See 2017 Separations Freeze Extension Order* at para. 5 n.14.

[10] *2013 USTelecom Forbearance Long Order*, 28 FCC Rcd at 7647, para. 34.

[11] *See id.* Over the past decade, several ILECs also have converted all or some of their operations from rate-of-return regulation to price cap regulation.

rates,' thus reducing incentives to shift non-regulated costs to regulated services."[12] Furthermore, comprehensive reform of the federal universal service fund high-cost program has provided other grounds for rendering the separations process and other Cost Assignment Rules unnecessary as applied to price cap carriers.[13] In sum, there is simply no practical reason to continue to apply the separations regime to price cap carriers.

B. Continued Application of Separations Processes at the State Level Should Not Impede Relief at the Federal Level

The fact that a few states still subject ILECs to separations is not an impediment to relieving price cap carriers of those obligations at the federal level. When the Commission recently absolved price cap carriers of Part 32 requirements, it acknowledged that such action did not preclude a state or regulatory agency from requiring a carrier to maintain the USOA.[14]

Similarly, when the Commission extended the grant of conditional forbearance from the Cost Assignment Rules to all price cap carriers, it did not preempt states' ability to establish intrastate cost allocations for its own purposes.[15] There, the Commission recounted how, in previously granting forbearance to AT&T, it stated its belief that AT&T, "'working cooperatively with the state commissions in its region, can develop methods of separating costs,

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[12] *Id.* at 7649, para. 37 (quoting *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14925-26, para. 133 (2005), *aff'd sub nom. Time Warner Telecom v. FCC,* 507 F.3d 205 (3d Cir. 2007)).

[13] *Id.* at 7650, para. 40 & n.132 (transitioning distribution of high-cost support to mechanisms based on a combination of a forward-looking cost model and competitive bidding "eliminate[s] the need for cost-based data and calculations to determine universal service support").

[14] *See Part 32 Order*, 32 FCC Rcd at 1741, para. 16 n.51.

[15] *See 2013 USTelecom Forbearance Long Order*, 28 FCC Rcd at 7653, para. 49.

satisfying any remaining need states have for jurisdictional separations information.'"[16] The Commission then reported that "AT&T confirmed that this arrangement has worked since 2008," with AT&T cooperating with the handful of state commissions that had requested information.[17] Thus, the Commission expressed its expectation that, "similar to the precedent set with AT&T, price cap carriers will work with state commissions so that they will be able to obtain intrastate revenue data and all cost accounting information from the carriers needed for state regulatory purposes."[18] Likewise, for any of the few states that still subject ILECs to separations, the Commission should be able to rely upon a comparable harmonious process with any price cap carrier relieved of federal separations requirements.[19]

C. Any Price Cap Carrier Not Yet Subject to Forbearance from the Cost Assignment Rules Should, at Most, be Subject Only to One Condition for Complete Relief from the Separations Requirements

For the few price cap carriers that have not yet met the conditions for forbearance from the Commission's Cost Assignment Rules, all that should be required, if anything, for complete relief from the jurisdictional separations requirements is an annual certification that they have complied with Section 254(k) of the Communications Act of 1934, as amended,[20] and will maintain and provide any requested cost accounting information necessary to prove such

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[16] *Id.* at 7653-54, para. 49 (quoting *Petition of AT&T Inc. for Forbearance under 57 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, Memorandum Opinion and Order, 23 FCC Rcd 7302, 7316-17, para. 25 (2008)).

[17] *Id.* at 7654, para. 49 & n.156.

[18] *Id.* at 7653, para. 49 n.154.

[19] In the unlikely event that any disputes arise, the Commission should clarify that the separations categories and factors as frozen in 2001 for price cap carriers represent the default position.

[20] 47 U.S.C. § 254(k). Section 254(k) prevents a telecommunications provider from "us[ing] services that are not competitive to subsidize services that are subject to competition." *Id.*

compliance in the event of an administrative action, investigation, or audit.[21] Such a certification was one of the four conditions when the Commission extended the grant of forbearance from the Cost Assignment Rules to all price cap carriers that met the conditions. The other three required all price cap carriers to continue complying with the Part 32 USOA rules, independent price cap carriers to file access imputation plans similar to those previously filed by the BOCs if such carriers plan to provide in-region long distance service without a Section 64.1903[22] separate affiliate, and all price cap carriers to file, and the Wireline Competition Bureau to approve, compliance plans describing in detail how the carriers will meet these conditions.[23]

The Commission recently terminated the Part 32 compliance conditions it had placed on granting forbearance from the Cost Assignment Rules.[24] In light of the intercarrier compensation (ICC) transition[25] being far along at this juncture, the Commission also should no longer require independent price cap carriers to file access imputation plans if such carriers plan to provide in-region long distance service without a Section 64.1903 separate affiliate. When the Commission required such imputation as a condition for forbearance from the Cost Assignment Rules, it expressed concern about independent price cap carriers potentially engaging in anticompetitive discrimination in the provision of access services to unaffiliated entities, so it required such carriers taking advantage of relief from separate affiliate requirements to impute to themselves

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[21] *See 2013 USTelecom Forbearance Long Order*, 28 FCC Rcd at 7652, para. 45.

[22] 47 CFR § 64.1903.

[23] *See 2013 USTelecom Forbearance Long Order*, 28 FCC Rcd at 7651-52, paras. 42-46.

[24] *See Part 32 Order*, 32 FCC Rcd at 1748-49, para. 44.

[25] *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *pets. for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

the highest tariffed rate for access.[26] In reality, however, the Commission's feared potential for cost misallocation was centered on rate-of-return carriers.[27] While the Commission nevertheless applied the imputation condition to independent price cap carriers, four years further into the ICC transition to bill and keep, where access charges are at or approaching zero, it is time to also terminate the imputation condition, as well as eliminate Section 64.1903 altogether.[28]

Finally, in light of the Commission already having terminated the Part 32 forbearance condition, and the palpable merits of relieving price cap carriers of imputation conditions, requiring a compliance plan would be overkill. If the Commission feels the need to impose any safeguards in exchange for granting price cap carriers absolute relief from Part 36 requirements, at most it should require a Section 254(k) compliance certification[29] from any price cap carrier that did not previously meet the conditions for forbearance from the Commission's Cost Assignment Rules.[30]

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[26] *See 2013 USTelecom Forbearance Long Order*, 28 FCC Rcd at 7692, para. 146.

[27] *Compare id.* at 7693, para. 148 ("price cap carriers . . . have little if any incentive to engage in cost misallocation") *with id.* at 7694, para. 151 (the Commission's 2011 ICC rules "reduce, but do not eliminate, the incentives for cost misallocation and potential access charge rate increases. We find that it would be unwise to forbear from the separate affiliate requirement for rate-of-return independent ILECs subject to cost regulation. To do so would potentially further increase opportunities for cost misallocation at a time when the Commission has just embarked on a significant transformation of intercarrier compensation and universal service."). To be clear, ITTA does not concur with the Commission's conclusions in 2013 that incentives for cost misallocation warranted continued application of Section 64.1903 to rate-of-return carriers. *See infra* note 28 and accompanying text. Rather, ITTA invokes these conclusions to demonstrate that continuing to impose imputation conditions on independent price cap carriers in exchange for relief from Section 64.1903 requirements would be inordinate.

[28] *See* Comments of CenturyLink, WC Docket No. 16-132 et al., at 10 (Dec. 5, 2016) (in Biennial Review proceeding comments, arguing that Section 64.1903 is irrelevant to price cap carriers and rate-of-return carriers alike in the "current all-distance marketplace").

[29] *See supra* pp. 6-7.

[30] In the *2013 USTelecom Forbearance Long Order*, the Commission noted that notwithstanding the conditional forbearance it granted therein, there might still be instances in which a price cap

(continued…)

III. THE COMMISSION SHOULD ALLOW RATE-OF-RETURN CARRIERS THE OPTION OF UNFREEZING CATEGORIES AND THEN REFREEZING THEM

When the Commission originally 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.[31] 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."[32] On the one hand, a freeze would provide more certain separations results and be less burdensome to carriers.[33] On the other hand, "rate-of-return carriers, whose investment patterns may fluctuate more than those of price cap carriers from year

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carrier seeks relief from the Commission that requires supporting cost data. It provided the example that a separations study would be required if carriers seek additional support under the Total Cost and Earnings Review (TCER) waiver process adopted in the *USF/ICC Transformation Order*. *See 2013 USTelecom Forbearance Long Order*, 28 FCC Rcd at 7654, para. 51 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17996-18002, paras. 924-32). Putting aside that ITTA is not aware of any carrier ever having sought relief pursuant to the TCER waiver process, the mere possibility that a carrier may, through relief it voluntarily seeks, be required to submit a separations study is no reason to deny price cap carriers complete relief from separations requirements, just as it did not present an impediment to the grant of conditional forbearance in 2013. *Cf. Part 32 Order*, 32 FCC Rcd at 1749, para. 44 (continuing to maintain costly Part 32 requirements "on the speculation that at some point, some day, the Commission might do something with them fails any cost-benefit analysis").

[31] *See 2001 Separations Freeze Order*, 16 FCC Rcd at 11389, para. 11.

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

[33] *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 2017 Separations Freeze Extension Order* at para. 19 (a freeze provides small 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 2017 Separations Freeze Extension Order* at para. 5; *see also id.* at para. 19 (the freeze has eliminated the need for all ILECs, including small ILECs with 1500 employees or fewer, to complete certain annual studies).

to year, will retain maximum flexibility for recovering costs from new plant investments (upgrades) by not freezing their category relationships."[34] Therefore, 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.[35]

For similar reasons, the Commission should allow rate-of-return carriers the option of a one-time unfreezing of their category relationships. Some rate-of-return carriers will embrace the opportunity to more accurately allocate their investment.[36] Others will find reinstating their separations systems unduly burdensome "'when there is a significant likelihood that there would be no lasting benefit to doing so'" and doing so could, in fact, cause significant disruptions in their regulated rates, cost recovery, and other operating conditions.[37] Likewise, just as the Commission did with the original separations freeze in 2001, it should afford rate-of-return carriers the option to (re)freeze their categories following their opportunity to unfreeze them.[38]

To illustrate why such flexibility remains important, consider the example of Special Access rates. In comments supporting a further 18-month extension of the separations freeze but

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[34] *2001 Separations Freeze Order*, 16 FCC Rcd at 11393, para. 18.

[35] *See id.*

[36] *See, e.g., Petition by Eastex Telephone Cooperative, Inc. Pursuant to 47 C.F.R Sections 36.3, 36.123–126, 36.141, 36.152–157, 36.191, and 36.372–382 for Commission Approval to Unfreeze Part 36 Category Relationships*, Order, 27 FCC Rcd 6357, 6361, para. 12 (WCB 2012).

[37] *2017 Separations Freeze Extension Order* at para. 11 (quoting *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, 5525, para. 23 (2006)).

[38] This could be done six months or so after the period for optional unfreezing of categories concludes. Rate-of-return carriers that did not freeze their categories in 2001 should also be allowed the opportunity to freeze them at this juncture should they choose to do so.

nevertheless advocating that rate-of-return carriers that have elected A-CAM support receive an immediate, one-time opportunity to unfreeze their category relationships,[39] USTelecom observed that the net effect of a rate-of-return carrier receiving support through the A-CAM combined with CAF-ICC transitional support is that A-CAM electing companies only have Special Access service costs that are subject to the separations freeze.[40] 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."[41] Conversely, it is plausible that a rate-of-return carrier that elected to freeze its categories in 2001 would see Special Access 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 Special Access at double the rates.

Finally, as for A-CAM electing rate-of-return carriers, as well as rate-of-return carriers affiliated with price cap ILECs, to the extent they are on a path towards shedding most vestiges of rate-of-return regulation, they, like price cap carriers, should be absolved altogether of separations requirements should the Commission ultimately take that action with respect to price cap carriers.

IV. CONCLUSION

As the Separations Joint Board Chairman recently wrote with respect to the separations rules, "with each passing year, there are fewer people that understand these arcane rules and the

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[39] The Commission denied this request. *See id.* at para. 13.

[40] *See* Comments of the United States Telecom Association, CC Docket No. 80-286, at 3-4 (Apr. 17, 2017).

[41] *Id.* at 4.

substantive usefulness of the rules decreases precipitously."[42] The time has come to jettison these rules as they apply to price cap carriers. For the reasons set forth above, there are no practical reasons or obstacles preventing the Commission from doing so, and the Joint Board should so advise the Commission. Some rate-of-return carriers, however, did not freeze their categories in 2001 and still perform separations studies. And they, or others, may decide that not having frozen categories is more beneficial in light of their particular circumstances and investment plans. The Commission should afford them the flexibility to, if they choose, unfreeze their categories, and then they should have the option to (re)freeze them.

Respectfully submitted,

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[42] *Part 32 Order*, 32 FCC Rcd at 1769, Statement of Commissioner Michael O'Rielly.