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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request for Review by Copper Valley Telephone Cooperative, Inc. (SAC 613006) of Decision of Universal Service Administrator	)	WC Docket No. 10-90
	)	USAC Audit ID: HC2016BE030
	)	

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REQUEST FOR REVIEW

COPPER VALLEY TELEPHONE COOPERATIVE, INC.

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Summary

Copper Valley Telephone Cooperative, Inc. ("CVTC") hereby requests *de novo* review of the "Administrator's Decision on High Cost Program Appeal" issued by the Universal Service Administrative Company ("USAC") on March 27, 2019. Specifically, CVTC requests: (a) that its high-cost support for the disbursement period from 2012 through 2016 (the data period from 2010 through 2014) remain calculated and distributed via the generally applicable Part 54, 36 and 32 rules; (b) that Section 36.2(c)(2) of the Rules not be applied to interexchange dark fibers that CVTC was prohibited by Alaska law from using in its local exchange operations and that it leased to its interexchange affiliate Copper Valley Long Distance, Inc. ("CVLD") pursuant to special contracts that were not "sale and lease-back" arrangements in form, intent or operation; and (c) that no recovery of 2012-2016 High Cost Program support for CVTC's Study Area Code 613006 should or will be made (rather than the proposed amount of $1,547,112).

A fair reading of Section 36.2(c)(2) and the *Moultrie Independent Telephone Company* order that interpreted it shows very clearly that the CVTC-CVLD special contracts were not the type of manipulative and self-serving "sale and lease-back" arrangements that Section 36.2(c)(2) was intended to counteract. The subject interexchange dark fibers were never a part of CVTC's operational assets (much less, a substantial part) because CVTC was prohibited by Alaska law from providing interexchange services. CVTC did not lease the dark fibers back from CVLD to use them in CVTC's own operations; rather, CVLD lit and otherwise improved the fibers and used them in its own interexchange business to provide a variety of tariffed services to a significant number of unrelated carrier and business customers in addition to CVTC. CVTC neither made nor negotiated any rental payments for the fibers to CVLD; rather, it paid the same tariffed prices at

which CVLD offered the same services to all of its related and unrelated customers and to the public in general. Finally, CVTC did not "voluntarily" make the special contract arrangements with its affiliate, but rather had no choice due to the Alaska restrictions but to sell or lease the interexchange dark fibers to an entity authorized to provide interexchange services unless it wanted to let them remain unused.

If USAC's position is upheld, it would effectively put the FCC in the position of preempting Alaska's certification and regulation of the intrastate services of Alaskan local exchange carriers and interexchange carriers. CVTC is aware of no past instance where a carrier has been penalized by the Commission for taking actions in compliance with its governing state law -- for example, by forcing a local exchange carrier like CVTC to repay a large and critical amount of federal high cost support because it had complied with the explicit terms and conditions of its basic state Certification of Public Convenience and Necessity or any other applicable state statute or regulation. Rather, the long-established Commission policy of cooperation between the interstate and intrastate jurisdictions has never, to CVTC's knowledge, put regulated entities in the position of choosing between retaining their high cost support or complying with applicable state law.

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Request for Review by Copper Valley Telephone Cooperative, Inc. (SAC 613006) of Decision of Universal Service Administrator	) WC Docket No. 10-90) USAC Audit ID: HC2016BE030)

REQUEST FOR REVIEW

Copper Valley Telephone Cooperative, Inc. ("CVTC"), pursuant to Section 54.719(b) of the Commission's Rules, hereby requests *de novo* review of the attached Administrator's Decision on High Cost Program Appeal, dated March 27, 2019, in Universal Service Administrative Company ("USAC") Audit ID: HC2016BE030 (Exhibit No. 1). USAC therein denied CVTC's appeal of "Audit Finding No. HC2016BE030-F02: 47 C.F.R. §36.2(c)(2) – Incorrect Treatment of Substantial Rent Expense Paid to an Affiliate," wherein the Moss Adams, LLP ("Moss Adams") contract auditors had asserted that CVTC had "incorrectly included expense amounts for the [years 2010 through 2014] in accounts 6123, 6124, 6212 and 6232 for rent expense paid to an affiliate for the use of substantial interexchange plant assets controlled by its affiliate." A copy of the Moss Adams audit report is attached as Exhibit No. 2.

CVTC requests: (a) that its high-cost support for the disbursement period from 2012 through 2016 (the data period from 2010 through 2014) remain calculated and distributed via the generally applicable Part 54, 36 and 32 rules; (b) that Section 36.2(c)(2) of the Rules not be applied to interexchange dark fibers that CVTC was prohibited by Alaska law from using in its local exchange operations and that it leased to its interexchange affiliate Copper Valley Long Distance, Inc. ("CVLD") pursuant to special contracts that were not "sale and lease-back" arrangements in form, intent or operation; and (c) that no recovery of 2012-2016 High Cost Program support for mid-1980s, and was designated as an Eligible Telecommunications Carrier ("ETC") by the Alaska Public Utilities Commission ("Alaska Commission") at or about the time that Section 214(e) of the Communications Act became effective after enactment of the Telecommunications Act of 1996.

During the 2012 through 2016 disbursement period[1] at issue in the subject audit, CVTC received distributions of High Cost Loop Support ("HCLS"), Interstate Common Line Support ("ICLS") and Local Switching Support ("LSS") that were proposed to be revised by the subject audit, plus Connect America Fund – Intercarrier Compensation ("CAF-ICC") and Safety Net Additive Support ("SNA") (2012 only). Subsequently, CVTC elected to receive high-cost support and comply with build-out obligations pursuant to the Alaska Plan during the period from January 1, 2017 through December 31, 2026.

CVTC serves a single Alaska study area (Study Area Code 613006) comprised of six (6) rural local telephone exchanges in south central Alaska. These exchanges include the Valdez exchange (approximately 2,157 access lines), the Glennallen exchange (approximately 1,518 access lines) and four smaller exchanges – Chitina (approximately 51 access lines), McCarthy (approximately 39 access lines), Mentasta (approximately 53 access lines) and Tatitlek (approximately 49 access lines).

STATEMENT OF MATERIAL AND RELEVANT FACTS

The primary relevant facts in this proceeding are: (1) that the Special Contracts between CVTC and its subsidiary Copper Valley Long Distance, Inc. ("CVLD") regarding four dark fiber strands along each of three interexchange routes were not "sale and lease-back transaction[s] involving rental payments" governed by Section 36.2(c)(2) of the Commission's Rules, and

[1] Much of the high-cost support received by CVTC during the 2012-2016 disbursement period was based upon data for the period from 2010 through 2014.

particularly were not "sale and lease-back transactions" contrived for the purpose of increasing high-cost support or generating tax benefits; but rather (2) were required by Alaska law and policies which during the time period at issue mandated strict separation between ILEC local exchange service operations and affiliated interexchange and long distance toll service operations.

Under Alaska statutory law, a "local exchange carrier" is defined as "any carrier certificated to provide local telephone services." AS 42.05.890(1). In contrast, a "long distance carrier" or "long distance telephone company" is defined as "any carrier certificated to provide long distance telephone services" AS.05.890(2), with "long distance telephone service" or "long distance service" being defined as "intrastate, interexchange telephone service." AS 42.05.890(3). The Alaska statute requires separate Certificates of Public Convenience and Necessity ("CPCNs") for different types of public utility services, and limits the nature and extent of such certifications to the authorized areas and scopes of operations described in them. AS 42.05.221(a). The primary purpose and effect of these Alaska statutory definitions and certification requirements during the period preceding and including 2014 was to encourage competition and simplify regulation by separating the provision of local exchange services from the provision of long distance and other interexchange services, particularly when both types of services are provided by affiliated entities.

CVTC was formed in 1961 and received its initial CPCN from the Alaska PUC on or about January 1, 1964. Although CVTC's CPCN (which has been designated as CPCN No. 11 first by the Alaska Public Utilities Commission and then by the successor Regulatory Commission of Alaska) has been amended numerous times over the years to accommodate adjustments to its exchange and service areas, it has expressly stated throughout that it is "authorizing [CVTC] to operate a public utility, as defined by AS 42.05.990(4)(B) for the purpose of furnishing TELECOMMUNICATIONS SERVICE (LOCAL EXCHANGE)." See, for example, CVTC's amended CPCNs dated February 4, 1983, June 23, 1998 and June 17, 1999, which are attached as Exhibit No. 3.

In November 1998, Copper Valley Long Distance, Inc. ("CVLD"), a wholly-owned subsidiary of CVTC, applied for a CPCN to furnish intrastate interexchange telecommunications public utility service within Alaska. By *Order No. 1* in U-98-176, dated March 15, 1999, the Alaska Public Utilities Commission ("Alaska PUC")[2] granted CVLD's application and issued the requested CPCN to CVLD to provide intrastate interexchange service subject to a series of specific conditions primarily designed to separate and restrict certain potential practices and operations of affiliated Alaskan local exchange and interexchange carriers. These conditions included the following requirements relevant to this proceeding: (a) CVLD was required to maintain separate books and records for its intrastate interexchange telephone operations; (b) the assets of CVTC were precluded from being used, directly or indirectly, as collateral for financing the operations of CVLD; (c) CVTC was prohibited from using its assets, employees, or market position for the benefit of CVLD until such time as effective competition existed in the local exchange market of CVTC; (d) CVTC and CVLD were required to be completely separate, with separate employees; and any administrative, financial, legal, accounting, engineering, research, development, or similar services were required to be provided on a strict arm's-length basis, with strictly separated cost accounting; (e) CVTC and CVLD were forbidden to market local exchange services and long distance services as a "bundle"; (f) CVTC and CVLD were prohibited from jointly owning or purchasing any transmission or switching facilities in common with one another; and (g) CVTC and CVLD were not permitted to allow one another to maintain any of the facilities of the other unless the same such arrangement was offered to unaffiliated providers. The Alaska PUC's *Order*

[2] The Alaska PUC was the predecessor of the current Regulatory Commission of Alaska ("Alaska Commission").

and the associated Recommendation of the Alaska PUC staff are attached as CVTC Exhibit A to the Moss Adams Audit Report (Pages 25 through 42 of Exhibit No. 2 of the present petition).

The Valdez and Glennallen exchanges are CVTC's two largest local telephone exchanges. These two exchanges are adjacent to each other, but the core Alaskan communities of Valdez and Glennallen are located approximately 120 miles apart. In 2005, CVTC completed construction of a 117-mile buried fiber optic facility between its Valdez central office and its Glennallen central office. At the time that the Valdez-to-Glennallen fiber facility was constructed, it was comprised of twenty-four (24) strands of unused and unlit fiber called dark fiber. Eighteen (18) of the strands were set aside for use by CVTC within its Valdez and Glennallen exchanges; that is, all of these eighteen strands started at both the Valdez and the Glennallen central offices but then were severed and branched off before they reached the Valdez-Glennallen exchange boundary and used to provide local exchange services to various areas and customers within each exchange. In other words, each of the eighteen strands was cut and routed so that it provided local exchange services within CVTC's Valdez local exchange and within CVTC's Glennallen local exchange, but did not cross the Valdez-Glennallen exchange boundary or provide any interexchange services. Another two strands of the fiber were reserved by CVTC for its internal use.

CVTC desired to use the remaining four (4) fiber strands to carry traffic across the Valdez-Glennallen exchange boundary back and forth between the Valdez and Glennallen exchanges. However, CVTC's Alaska CPCN was limited to the provision of local exchange telephone services and did not permit it to provide intrastate interexchange telephone services across exchange boundaries. Pursuant to AS 42.05.221(a), a "public utility may not operate and receive compensation for providing a commodity or service without first having obtained from the [Alaska Commission] under this chapter a certificate [*i.e.*, a CPCN] declaring that the public convenience and necessity requires or will require the service." Because CVTC's Alaska CPCN did not permit it to provide intrastate interexchange service, it entered into a Special Contract, dated March 18, 2005, for a Dark Fiber Lease of the four Valdez-Glennallen dark fiber strands to CVLD, because CVLD's Alaska CPCN allowed it to provide intrastate interexchange services.

The CVTC-CVLD Special Contract was filed with the Alaska Commission on March 18, 2005, the same day it was finalized and signed. The Alaska Commission and its staff determined that the four strands of dark fiber crossed the boundary between the Valdez and Glennallen exchanges, and therefore were not a local service covered under CVTC's CPCN for local telephone service. Whereas there was no dispute that lit fiber carrying traffic across exchange boundaries was providing an interexchange service, CVTC and the Commission staff initially disagreed as to whether a lease of dark fiber facilities that crossed exchange boundaries constituted an interexchange service for which an interexchange certificate would be required. Ultimately, on April 28, 2005, the Alaska Commission approved the Special Contract between CVTC and CVLD for a period of two years under File Number TA65-11. In taking this action, the Alaska Commission decided not to fully adjudicate the issue of whether CVTC required an interexchange certificate in order to lease dark fiber that crossed exchange boundaries, but rather "granted a waiver of the certification requirements, to the extent necessary, to allow CVTC to sell interexchange service for the sole purpose of the [Special Contract] even though the utility does not hold an interexchange certificate." The Special Contract was referenced and incorporated into CVTC's Tariff RCA No. 11, and became effective May 2, 2005 (The Special Contract for the Valdez-Glennallen route and the Alaska Commission documents considering and approving it are attached as Exhibit No. 4).

After leasing the four Valdez-Glennallen dark fiber strands from CVTC, CVLD improved them by adding the electronics necessary to light them and to provide interexchange services over them. CVLD has dedicated two (2) of the Valdez-Glennallen fiber strands to the service of a large customer that has no common ownership with CVLD or CVTC and is not otherwise related to them. CVLD has lit and otherwise upgraded and improved the other two (2) fiber strands to provide various voice grade, digital channel and Ethernet interexchange telecommunications services to other carriers including CVTC and to business and residential customers pursuant to the rates, terms and conditions in Part 6 (Sheets 6.1 through 6.69) of CVLD's Tariff RCA No. 555 (originally Tariff APUC No. 555) which is on file with the Alaska Commission.

By letter dated November 20, 2007, the Alaska Commission approved the extension of the original Special Contract for the lease of the four Valdez-Glennallen dark fiber strands beyond its initial two-year term via automatic renewals on a year-to-year basis. (This letter is attached as Exhibit No. 5.) At this time, the Special Contract for the Valdez-Glennallen route remains in effect.

In 2007 and 2008, CVTC constructed a second fiber optic route that extends for approximately thirty-four (34) miles between existing fiber facilities at approximately Mile 82 of the Richardson Highway within CVTC's Glennallen exchange, along the Edgerton Highway to its Chitina central office (the "Glennallen-Chitna route"). Like the Valdez-Glennallen route, the Glennallen-Chitina facility consists of twenty-four (24) fiber strands. CVTC reserves twenty (20) of these fiber strands for internal use or cuts and branches them off within its Glennallen and Chitina exchanges to provide local exchange telephone services. It leases the remaining four (4) strands of dark fiber that extend the full length of the route and cross the border between the

Glennallen and Chitina exchanges to CVLD pursuant to a Special Contract, dated January 22, 2009. A copy of this Special Contract is attached as Exhibit No. 6.

In 2008, CVTC constructed a third fiber optic route that extends for approximately one hundred (100) miles from its Glennallen central office to its Mentasta central office and then through the Mentasta exchange to the boundary of the Mentasta exchange and Alaska Power & Telephone's Tok exchange (the "Glennallen-Mentasta route"). Like the Valdez-Glennallen and Glennallen-Chitina routes, the Glennallen-Mentasta facility consists of twenty-four (24) fiber strands. CVTC reserves twenty (20) of these fiber strands for internal use or cuts and branches them off within its Glennallen and Mentasta exchanges to provide local exchange telephone services. It leases the remaining four (4) strands of dark fiber that extend the full length of the route and cross the border between the Glennallen and Mentasta exchanges to CVLD pursuant to a Special Contract, dated November 21, 2009. A copy of this Special Contract is attached as Exhibit No. 7.

At the time that the special contracts for the Glennallen-Chitina and Glennallen-Mentasta fiber routes went into effect in 2009, CVTC was no longer required to obtain specific review and approval of such contracts from the Alaska Commission.

After leasing the four dark fiber strands along the Glennallen-Chitina and Glennallen-Mentasta routes from CVTC, CVLD improved them by adding the electronics necessary to light them and to provide interexchange services over them. CVLD has used all four (4) of the upgraded and lit fiber strands along each route to develop, market and provide various voice grade, digital channel and Ethernet interexchange telecommunications services to other carriers including CVTC and to business and residential customers. All of these services (including those purchased by

CVTC) are offered, ordered, furnished and paid for pursuant to the rates, terms and conditions in Part 6 (Sheets 6.1 through 6.69) of CVLD's Tariff RCA No. 555.

During the five years subject to the audit, CVTC's investment in the dark fibers leased to CVLD along the Valdez-Glennallen, Glennallen-Chitina and Glennallen-Mentasta routes constituted only small fractions of its total cable and wire ("C&W") investment and of its total plant in service ("TPIS"). These investment percentages were as follows:

Year	Dark Fiber Investment	Total C&W Investment	% of C&W Investment	TPIS	% of TPIS
2010	$2,789,910	$65,504,262	4.26%	$89,577,920	3.11%
2011	3,535,397	66,864,938	5.29%	87,315,750	4.05%
2012	3,535,139	67,675,584	5.22%	88,300,249	4.00%
2013	3,404,690	68,744,054	4.95%	89,776,485	3.79%
2014	3,404,788	70,346,518	4.84%	89,211,596	3.82%

CVTC is one of the multiple carrier and business customers that purchase the tariffed telecommunications services that are provided by CVLD over the leased interexchange dark fiber strands that CVLD has lit and otherwise improved in order to offer interexchange services to the public. During the 2014 year under audit, CVLD derived only $455,341.29 (8.98%) of its $5,071,865.62 of private line service revenues from CVTC. During the other years mentioned in Finding No. HC2016BE030-F02, there is a clear pattern of CVTC's purchase of interexchange telecommunications services from CVLD over the leased fiber strands becoming a smaller and smaller portion of CVLD's business. Specifically: (a) in 2010, only $724,514.05 (30.46%) of CVLD's $2,378,791.97 in private line service revenues came from CVTC; (b) in 2011, only $862,514.88 (24.01%) of CVLD's $3,592,265.85 in private line service revenues came from CVTC; (c) in 2012, only $858,360.08 (19.43%) of CVLD's $4,416,825.74 in private line service revenues came from CVTC; and (d) in 2013: only $894,188.21 (18.99%) of CVLD's $4,708,950.82 in private line service revenues came from CVTC.

Since it constructed the three fiber routes and entered into the special contracts with CVLD during the 2005-2009 period, CVTC has had its accounting practices and reports reviewed during two USAC audits (2008 and 2009), a Commission Office of Inspector General ("OIG") audit (2010), two National Exchange Carrier Association ("NECA") reviews (2008 and 2014), and at least five USAC Payment Quality Assurance reviews (2010, for study period ending December 31, 2008; 2011, for study period ending December 31, 2009; 2013, for study period ending December 31, 2010; 2015, for study period ending December 31, 2012; and 2016, for study period ending December 31, 2013). CVTC's accounting treatment of its special contracts with CVLD was never questioned or challenged during any of these previous audits and reviews.

It is the four strands of non-operational dark fiber leased by CVTC to CVLD along each of the three fiber routes (Valdez-Glennallen, Glennallen-Chitina and Glennallen-Mentasta), and the tariffed rates paid by CVTC in arms' length transactions involving the interexchange telecommunications services provided by CVLD over the leased dark fiber strands that CVLD has lit, improved and tariffed for public use that constitute the subject matter of Finding No. HC2016BE030-F02 and CVTC's present request for Commission review.

LEGAL ARGUMENT

CVTC's legal arguments are intertwined with each other, as well as closely connected with its two main factual assertions. The first is that its "lease an unimproved and non-operational dark fiber facility and then buy some of the tariffed services provided over the improved and operational fiber optic transport facility" arrangement with its interexchange affiliate CVLD was not in form, intent, or operation a "sale-and-lease-back" arrangement of the type subject to Section 36.2(c)(2) of the Rules. The second is that its arrangement with its interexchange affiliate was not voluntary, but rather was required by Alaska state law which prohibited CVTC from providing interexchange services over the interexchange dark fibers. The Commission has never previously, to CVTC's knowledge, penalized a high-cost support recipient by disallowing or reducing its support due to actions that it was required to take in order to comply with state law. Rather, the Commission has a long record of cooperation with state commissions and state law in situations involving dual or shared federal and state jurisdiction.

I

The CVTC-CVLD Special Contracts Are Not a "Sale and Lease-Back" Arrangement Subject to Section 36.2(c)(2) of the Commission's Rules

With virtually no explanation, USAC denied CVTC's appeal of the initial Moss Adams audit report, stating:

> While [CVTC] did not label its transactions with its affiliate as a sales and leaseback arrangement, the agreements were, in fact, a sale and lease back arrangement. Specifically, [CVTC] leased property to an affiliate, and the affiliate sold back services to [CVTC] using the same leased property. [footnote omitted] [CVTC] may not have intended to manipulate its separations or high cost loop support results, but the arrangement with CVLD resulted in [CVTC] receiving High Cost Program support that it was not entitled to under program rules . . . Under FCC rules, [CVTC] may not recover High Cost Program support for the relevant transactions with its affiliate. USAC Administrator's Decision, p. 5.

USAC's peremptory conclusion that the CVTC-CVLD special contracts "were, in fact, a sale and lease-back arrangement" disregarded not only the evidence and reasoning presented by CVTC, but also the changing characterizations of the special contracts by Moss Adams. The contract auditor first claimed that CVTC was paying rents rather than tariffed service charges to CVLD, and that CVTC "did not identify the affiliate transactions as substantial rents and the application of the requirements of 47 C.F.R. §36.2(c)(2)" (Exhibit No. 2, p. 12). After CVTC asserted that it was paying CVLD tariffed charges for publicly offered telecommunications services over facilities that CVLD had significantly improved and that the arrangement had been required by Alaska law and approved by the Alaska Commission, Moss Adams shifted its "reasoning" but not its conclusion, stating: "[r]egardless of whether the affiliate charges incurred by [CVTC] meet the common or technical meaning of rent or lease or whether the arrangement with CVLD qualifies as a sale and lease-back transaction, we don't believe the characterization of the transaction is the fundamental condition for the required application of Part 36.2(c)(2)." (Exhibit No. 2, p. 17). Moss Adams proceeded to rely upon the Commission's statements in *Moultrie Independent Telephone Company*, FCC 01-292, 16 FCC Rcd 18,242 (2001) ("*Moultrie Order*"), regarding the purpose of Section 36.2(c)(2) and other Part 36 Rules, and "concluded" that "[w]e recognize the transaction in [Finding No. HC2016BE030-F02] may not be characterized as a sale and lease-back of interexchange plant [but] we believe the same principles discussed in the *Moultrie Order* apply to [CVTC]" (Exhibit No. 2, p. 19).

The differing characterizations of USAC and Moss Adams both rely upon Section 36.2(c)(2) of the Rules. That provision is very clear and straightforward, and states expressly: "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." The rule speaks specifically and exclusively of "property rented from affiliates" and "rental expenses," and offers no indication that it applies to anything other than arrangements that meet the "common or technical meaning of rent or lease." The Commission has never, to CVTC's knowledge, indicated that Section 36.2(c)(2) applies to anything other than a sale and lease-back transaction, or that any other type of transaction – for example, a purchase of tariffed services offered to the public in general -- can be transformed or contorted into a "rental expense" for purposes of creating the "lease-back" necessary to come within the scope of Section 36.2(c)(2).

CVTC agrees with Moss Adams and USAC that the *Moultrie Order* is the primary Commission ruling clarifying the purpose and extent of Section 36.2(c)(2). However, that order made it very clear that Section 36.2(c)(2) applies only to sale and lease-back transactions and associated rental payments. The Commission stated expressly therein that "Section 36.2(c)(2) requires an incumbent LEC, in the case of a substantial sale and lease-back of assets to and from its affiliate, to continue to categorize the assets as an investment, and exclude the lease expenses from its expense categories." *Moultrie Order* at ¶5. It proceeded to emphasize that "the rules in section 36.2(c) governing the treatment of rented property, related expenses, and lease payments between carriers and their affiliates for separations and high-cost loop expense adjustments have been included as fundamental principles in separations procedures since the publication of the first NARUC-FCC Separations Manual in 1947." *Id.* at ¶10.

CVTC is aware of no Commission ruling nor of any general legal principle or precedent that would treat a transaction as governed by Section 36.2(c)(2) when that transaction: (a) clearly does not involve a "sale" of assets by an ILEC to an affiliate and/or the "lease-back" of substantially the same assets by the ILEC from the affiliate; and (b) clearly does not entail the payment of anything resembling "rent" for the leased-back assets by the ILEC to its affiliate. This is the case whether or not some of the transaction's jurisdictional separation or high-cost support effects may be deemed by an auditor to be "similar" to those of a sale and lease-back transaction.

. In fact, the *Moultrie Order*, when read in full, contravenes the efforts of USAC and Moss Adams to extend Section 36.2(c)(2) far beyond the bounds of clear-cut "sale and lease-back" transactions. The order states that "the Part 36 system is premised upon incumbent local exchange carriers owning the majority of their operational assets," and that the exclusion of a substantial amount of such operational assets (called the "foundation blocks" of plant) can skew a company's separations results and high-cost support. *Id.* at ¶11-13. Here, there is no question that CVTC owned during the relevant periods (and still owns) the majority of its operational assets, including the twenty (20) fibers on each of its Valdez-Glennallen, Glennallen-Chitina and Glennallen-Mentasta fiber routes that do not cross exchange boundaries and that it has been using for local exchange services and internal company purposes. However, pursuant to Alaska law prohibiting the provision of interexchange services by entities holding only CPCNs for local exchange service, CVTC could not use for operational purposes the four (4) dark fibers on each route that extended the full length of the route and crossed exchange boundaries because it was a local exchange carrier that was not authorized to provide interexchange services. Hence, the four (4) interexchange dark fibers at issue on each of the three fiber routes were not, and were prohibited from becoming, CVTC's operational assets or any part of the "foundation blocks" of its plant.

In fact, it has been unclear since April, 1994 whether dark fiber is a telecommunications service subject to regulation under Title II of the Communications Act. In *Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994), the court held that the Commission failed to provide sufficient support for concluding that several former Bell companies had offered dark fiber service on a common carrier basis, and remanded the case to the Commission for reconsideration of the basis of its authority to regulate dark fiber service. Almost fourteen years later, the Commission indicated that it had not yet resolved the question of dark fiber service classification. *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, Order on Remand, 23 FCC Rcd 569 (2008). It proceeded to state that it was "unable to conclude at this time, based on this record, that the BOCs are offering dark fiber service on a common carrier basis, or that the Commission should require dark fiber arrangements to be offered on a common carrier basis." *Id.*, at ¶8. Given a lack of evidence demonstrating that dark fiber offerings were or should be common carrier offerings, the Commission vacated prior orders insofar as they subjected BOC dark fiber offerings to common carrier regulation. *Id.* It does not appear that the Commission has subsequently revisited the question of the service classification of dark fiber. CVTC notes that the Commission's *2019 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A)* list "Revenues from the sale or lease of transmission facilities, such as dark fiber or bare transponder capacity, that are not provided as part of a telecommunications service or as a UNE" as non-telecommunications service revenues on Line 418 that should not be included in the universal service or other fund contribution bases. *Instructions*, pp. 33-4.

Moreover, even if the four dark fibers on each of the three interexchange routes had been CVTC operational assets, they would not have constituted a "substantial" amount of CVTC's cable and wire ("C&W") investment or of its total plant in service ("TPIS") under any reasonable meaning of the term "substantial" (which, to the best of CVTC's knowledge, has never been defined in the context of Section 36.2(c)). As detailed above, during the five years subject to the audit, CVTC's investment in the four interexchange dark fibers along each of the three routes ranged from 4.26% to 5.29% of its total C&W investment, and from 3.11% to 4.05% of its TPIS. Such small percentages are generally not considered to be "substantial" in most Commission measures and criteria.[3]

Reading further, it is clear that the central and decisive factor in the *Moultrie Order's* application of Section 36.2(c)(2) was the Moultrie LEC's admission that it "seeks to maximize its

[3] For example, the Commission has established "safe harbors" to demonstrate "substantial service" in various radio services, including 30% of the population of the licensed area for Broadband Radio Service and Educational Broadband Service licensees (WT Docket No. 03-66) and 50% of the geographic area or of the service area population for 700 MHz licensees (WT Docket No. 99-168).

federal high-cost support subsidy through the transfer of substantial non-loop related assets to an affiliate." (Moultrie Order, ¶14). The FCC emphasized therein that:

> Moultrie appears to have traded with its affiliate the legal ownership of *certain assets that it will still use in its operations, for the sole purpose of generating more favorable universal service subsidies* [emphasis added]. It is well-established that a regulator may choose to ignore transactions between a company and its affiliates that are designed solely to maximize benefits for the company [footnote omitted]. This case presents us with the exact type of separations or high-cost support manipulation, through the use of sales and lease-backs to and from affiliates, which section 36.2(c)(2) of the Commission's rules seeks to prevent. *Id.*

The FCC reiterates in the following paragraph of its *Moultrie Order* that "Section 36.2(c)(2) simply instructs carriers on how to treat sale and lease-back arrangements in the performance of a Part 36 cost study to prevent intentional gaming of their separations or high cost loop support results [footnote omitted]." *Id.* at ¶15.

Here, unlike the ILEC subject to the *Moultrie Order*, CVTC did not "sell" to an affiliate certain motor vehicles, land and buildings, and equipment that it had been using in its regulated local exchange service operations, and then continue to use those same motor vehicles, land and buildings, and equipment in its regulated local exchange service operations by leasing them back from its affiliate at a price and terms determined by it and its affiliate. Rather, CVTC leased to its affiliate CVLD a limited number of unimproved and non-operational dark fibers that CVTC was prohibited by Alaska law and the Alaska Commission from using in its regulated local exchange service operations. CVLD then lit and otherwise upgraded the fibers, and developed and tariffed a variety of services that it offered to other carriers and the public over the fibers and other portions of its interexchange network facilities. CVTC participated with other carriers and customers in purchasing -- on the same terms and conditions and at the same prices -- some of the tariffed services that CVLD offered to the public over the formerly dark fibers that CVLD leased from CVTC.

Furthermore, the Commission made it absolutely clear in the *Moultrie Order* that Section 36.2(c)(2) applies expressly to sale and lease-back transactions with affiliates, and does not extend to different types of transactions that might have similar separations or high-cost support effects when it states:

> Furthermore, we note that Moultrie is free to sell and lease-back its assets at arms' length to a non-affiliated entity, and thus remove the assets from its investment base and include the lease expenses as operational expense, providing that it can find a non-affiliated buyer willing to engage in this transaction. When the transaction is between affiliates and thus not a "competitive" transaction, however, the Commission's rules set up certain safeguards to avoid these transactions being conducted solely for regulatory manipulation. *Id.* at ¶18.

Finally, if any other evidence is needed, CVTC notes that its accounting treatment of its special contracts with CVLD was never questioned or challenged during any of the numerous USAC and OIG audits, NECA reviews and USAC payment quality assurance reviews that were conducted during the 2008-2016 period.

In sum, contrary to USAC's unsupported determination and the shifting Moss Adams characterizations, the Special Contracts between CVTC and CVLD were not sale and lease-back arrangements subject to Section 36.2(c)(2) of the Rules for any and all of the following reasons:

1. There was no lease-back transaction with respect to the subject dark fibers. CVTC leased the dark fibers to CVLD but did not get them back. Rather, CVLD upgraded the fibers by lighting them and developing a number of different telecommunications services that it provided over them to a variety of carrier, business and household customers. CVTC was one of these customers, and purchased some of the services offered by CVLD to the general public over the improved fibers.

2. CVTC made no rental payments – sweetheart or otherwise -- to CVLD with respect to the subject dark fibers. Rather, CVTC paid the same tariffed prices as other customers for the services that it purchased from CVLD over the lit and upgraded former dark fibers. Section 32.27(c) of the Commission's Rules expressly recognizes tariffed prices as a means to ensure that affiliate transactions are not being used for improper purposes, stating that "Services provided between a carrier and its affiliate pursuant to a tariff, including a tariff filed with a state commission, shall be recorded in the appropriate revenue accounts at the tariffed rate."

3. The dark fibers were never a part of CVTC's operational assets, much less a substantial portion thereof. CVTC never lit the interexchange dark fibers to make them operational. In fact, it was prohibited by Alaska law and the Alaska Commission from doing so because they extended across exchange boundaries and CVTC could not offer or provide interexchange services. Even if the dark fibers could be deemed to be "operational" in some manner, they did not constitute a "substantial" portion of CVTC's C&W investment or total plant in service.

4. CVTC did not voluntarily make the Special Contract arrangements with CVLD, nor enter into them with any intent to "game" or otherwise impact its separations results or high-cost support. Rather, it was prohibited by Alaska law from providing interexchange services, and had no option under Alaska law but to lease or sell the interexchange dark fiber strands to a carrier certificated to provide interexchange services, or to allow such strands to remain dark and unused.

II

Punishment of CVTC for Complying With Alaska Law Is Inequitable to CVTC and an Infringement on Alaska's Shared Intrastate Jurisdiction

USAC was equally terse in its response to CVTC's showing that its special contracts with CVLD were required to comply with the provisions and limitations of their respective Certificates of Public Convenience and Necessity ("CPCNs") under Alaska law, and that there was virtually nothing that CVTC could do to "rectify" the situation other than to terminate the special contracts and to preclude CVLD from continuing to provide interexchange services to other carriers and customers (in addition to CVTC) on the formerly dark fiber strands that CVLD had subsequently lit and otherwise upgraded after it had leased them from CVTC.

USAC held that:

> With respect to Copper Valley's arguments related to Alaska law, USAC does not dispute that: (1) Alaska law prohibits carriers from simultaneously providing interexchange and local exchange services, (2) Alaska permitted Copper Valley to lease its dark fiber to its affiliate, or (3) Alaska allowed Copper Valley to purchase interexchange services from its affiliate. However, carriers that receive federal High Cost support must comply with the FCC's Part 36 jurisdictional separations rules. USAC Administrator's Decision, p. 5.

In addition to its showing above that the special contracts were not subject to or in violation of Section 36.2(c)(2), CVTC notes that the Alaska statutory prohibitions that USAC recognizes to be applicable did much more than merely "permit" or "allow" the special contract arrangements to take place. Rather, the Alaska statutes and the Alaska Commission's enforcement practices strictly prevented CVTC from offering or providing interexchange services over the four dark fibers that extended across exchange boundaries on each of the three routes. These prohibitions were in effect from the 2005-2009 period during which the Valdez-Glennallen, Glennallen-Chitina and Glennallen-Mentasta facilities were constructed through the 2010-2014 period subject to the audit. Because CVTC was forbidden by Alaska law from providing interexchange services over the four interexchange dark fibers on each route, its only viable options were to let them remain unused or to sell or lease them to an entity that had obtained an Alaska CPCN for interexchange service. Moreover, as demonstrated by Exhibit No. 4, at the time that CVTC and CVLD entered into the first Special Contract for the Valdez-Glennallen route, they had to go through a substantial Alaska Commission process to request and obtain state approval for the arrangement.

The Commission has long and consistently emphasized that key initiatives like the promotion of universal service entail a federal-state partnership. It has expressly recognized that the "deployment and maintenance of a modern voice and broadband-capable network in rural and high-cost areas across this nation is a massive undertaking, and [that] the continued efforts of the states to help advance that objective is necessary to advance our shared goals." *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16-33, released March 30, 2016, at ¶184.

In fact, the basic interstate/intrastate division of authority and responsibility in the Communications Act of 1934, as amended, that gives the Commission control over interstate and foreign communication services [47 U.S.C. §152(a)] and the states control over intrastate communication service [47 U.S.C. §152(b)] remains a cornerstone of the Act. While the

Commission received increased jurisdiction over commercial mobile services in the Omnibus Budget Reconciliation Act of 1993, and over local exchange telephone competition in the Telecommunications Act of 1996, the continuing authority and rights of the states to require local exchange carriers and intrastate interexchange carriers to apply for and obtain CPCNs in order to operate within their state boundaries has never been questioned. Inherent in the CPCN process are requirements to demonstrate the appropriate legal, financial and technical qualifications of the applicant, as well as obligations upon receipt of certification to comply with applicable state law and with any and all specific conditions attached to the CPCN.

CVTC is aware of no past instance where a carrier has been penalized by the Commission for taking actions in compliance with its governing state law -- for example, forcing an ILEC like CVTC to repay a large and critical amount of federal high cost support because it had complied with the explicit terms and conditions of its basic state CPCN certification or any other applicable state statute or regulation. Rather, the long-established Commission policy of cooperation between the interstate and intrastate jurisdictions has never, to CVTC's knowledge, put regulated entities in the position of choosing between retaining their high cost support or complying with applicable state law.

If USAC's position is upheld, it would effectively put the FCC in the position of preempting Alaska's certification and regulation of the intrastate services of Alaskan local exchange carriers and Alaskan long distance and other interexchange carriers. This would appear to be contrary to Section 221(b) of the Communications Act which limits the jurisdiction of the FCC with respect to charges, classifications, practices, services, facilities or regulations in any case where such matters are subject to regulation by a state commission or by local government authority.