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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners ("NARUC"), respectfully submits these reply comments to respond to the ten other entities[1] that filed initial comments on the Federal Communications Commission's ("FCC" or "Commission") July 18, 2018 *Further Notice of Proposed Rulemaking* ("*FNPRM*") in this docket.[2]

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[1] *See*, the August 27, 2018 (i) ***Comments of Clay County Rural Telephone Cooperative ("Endeavor Communications") in Response to the Notice of Proposed Rulemaking (Endeavor)***; (ii) ***Comments of Pioneer Telephone Cooperative, Inc. (Pioneer)***; (iii) ***Comments of USTelecom (USTelecom)***; (iv) ***Comments of the National Exchange Carrier Association, Inc. (NECA)***; (v) ***Comments of Terral Telephone Company, Inc. (Terrel)***; (vi) ***Comments of ITTA - The Voice of America's Broadband Providers (ITTA)***; (vii) ***Concerned Rural LECs Separations Freeze Comments (Rural LECs)***; (viii) ***Comments of WTA-Advocates for Rural Broadband***; (ix) ***Comments of NTCA – The Rural Broadband Association***; and (x) ***Comments of New Networks Institute & IRREGULATORS (Irregulators)*** and ***Did AT&T, Verizon, CenturyLink & the FCC Intentionally Make the Wired Utility Networks Look Unprofitable – Overcharging America at Least $1/2 Trillion? Did Create America's Digital Divide (Irregulators' addendum)***, all filed *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

[2] *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, ***Further Notice of Proposed Rulemaking***, FCC 18-99, CC Docket No. 80-286, 2018 WL 3495121 (Released July 18, 2018), published at: ***83 Federal Register 35582*** (July 27, 2018).

To recap, the *FNPRM*, sought comment on, among other things, (i) whether the FCC should extend the current freeze of jurisdictional separations category relationships and cost allocation factors for 15 years or a shorter period, (ii) whether to provide rate-of-return carriers who elected to freeze their category relationships in 2001 a time-limited opportunity to opt-out of that freeze, and (iii) whether to modify the scope of the existing referral.

NARUC's Initial Comments[3] point out:

[1] that the *FNPRM* seeks several specific changes to the Part 36 separations procedures and 47 U.S.C. § 410(c) does not permit the FCC to revise those procedures without first consulting with the Federal-State Joint Board on Separations ("Separations Joint Board" or "Joint Board") and receiving a recommended decision;[4]

[2] that it is premature for the Commission to assume that the Joint Board cannot reach a recommended decision that addresses the acknowledged dysfunction[5] of the current separations procedures;[6]

[3] that any extension continuing the current factors will impact ratepayers, companies, particularly smaller rural providers, State programs, and the roll out of broadband services;[7] and finally

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3 ***Initial Comments of the National Association of Regulatory Utility Commissioners (NARUC Initial Comments)***, filed August 27, 2018, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

4 *Id.* at pages 9-16.

5 *See, FNPRM* at ¶ 1, conceding that "the jurisdictional separations rules [are] inadequate to accomplish their intended purpose."

6 *NARUC Initial Comments* at pages 16-17. There is no, nor can there be, substantial evidence in the record to support that assumption.

7 *Id.* at pages 17-23.

[4] that, as the *FNPRM's* "category freeze opt-out" proposal demonstrates on its face, practical reforms are both needed and possible via the pending § 410 referral required by law.[8]

NARUC's Initial Comments also make clear that the Joint Board certainly can and has offered a recommended decision on short term freeze extensions based on prior consistent FCC agreements to continue to engage the Board on the issues raised in the *FNPRM,* including comprehensive reform.

The FCC should not modify the existing referral until the deliberative process is concluded. Instead, the Commission should extend the current freeze on an interim basis for no more than two years to engage timely and substantively on separations issues, including the proposed limited-time opportunity for certain carriers to "opt-out" of the 2001 freeze. There is no question that a freeze extension is a change in the Part 36 rules. Prior commissions have recognized that that short extension cannot legally be implemented without consulting with both the federal and State members of the Separations Joint Board to get their recommendations.

The initial comments either (i) do not address or (ii) actually provide direct record support for the legal and factual concerns raised in *NARUC's Initial Comments*.

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[8] *Id.* at pages 23-24.

DISCUSSION

Section 410(c) does not permit the FCC to revise those procedures without first consulting with the Separations Joint Board.

The *FNPRM* seeks several specific changes to the Part 36 separations procedures. Section 410(c) does not permit the FCC to revise those procedures without first consulting with the Separations Joint Board.[9]

Most of the parties favor an extension of the freeze. But those that address the extension parrot the *FNPRM*'s rationale with little or no amplification. There is no evidence in those comments or in the record that can justify a lengthy freeze. Instead, all the comments provide strong record support for the opposite conclusion: that a Joint Board recommendation on the Part 36 rules is needed soon.

Moreover, like the *FNPRM*, not a single commenter addresses the mandatory consultation requirement in 47 U.S.C. § 410(c).

None offer advice or a rationale for a legal theory that allows the FCC to extend the freeze permanently or for 15 years without the required referral to the Joint Board.

None offer advice or a rationale for the FCC to bypass the § 410(c) referral requirement for the various optional freeze/unfreeze proposals.[10]

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[9] There is some circular reasoning in the suggestion to narrow the scope of the current referral. Any change to the separations rules requires a Joint Board recommended decision. A referral is necessary for those changes. The change in the rule proposed is the limiting factor in any referral. The Act necessarily allows the Joint Board to suggest modifications and/or options in lieu of any proposed change.

[10] *Pioneer* and *Endeavor* both provide arguments for why their requests for waivers should be granted, but neither reference or address the requirements of 47 U.S.C. § 410(c). It is important to note that in the past, separations category freeze waiver requests were always discussed with the State members of the Joint Board before an extension.

For an interim short freeze pending Board deliberations on the optional freeze/unfreeze proposals and other reform issues, the FCC should follow past practice and engage the State members to discuss the appropriate length of a freeze under the "deliberative privilege" created in § 410(c), and act only after meaningful consultation with, and a recommendation from, the Joint Board as anticipated by that section and the 2001 *Separations Freeze Order*.

If the FCC is interested in pursuing either a permanent or lengthy freeze, the Act requires either a separate specific referral or action by the Joint Board on the basis of the existing referral.

As the FNPRM's "category freeze opt-out" proposal demonstrates on its face, practical reforms and a Joint Board Recommended Decision are both needed and possible.

NARUC's Initial Comments at pages 8-9, point out the inconsistencies in the *FNPRM's* approach - which suggests an extended freeze because no progress is possible or needed before specifying the opposite – that change is necessary and that the freeze must be partially truncated at the option of individual carriers for at least frozen category relationships. Specifically those comments indicate that:

[1] the FCC's acknowledgements of (i) the continuing utility of the separations process for the FCC, the USAC, and States, as well as (ii) the impact of recent reforms the FCC concedes "will significantly affect" the analysis of separations, undermines any suggestions that comprehensive reform of Part 36 is not warranted.[11]

[2] the fact that the FCC is proposing to extend the freeze is, on its face, an acknowledgement that the separations process remains both relevant and useful.

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[11] *FNPRM* at ¶¶ 10 – 12 (discussing the declining use of the separations process).

[3] the *FNPRM* proposes reforms to the process that are easily addressed and clearly within the scope of the current referral to the Joint Board.[12]

All comments filed in this proceeding support these three facts, even though nine of the ten comments reflect the same flawed/internally inconsistent approach evidenced on the face of the *FNPRM*.

USTelecom is typical.

First they contend that no changes to the freeze are needed and that it should be extended for fifteen years.

Then they spend the majority of their comments pointing out how wildly out of date the current rules are, how the misallocations have a real impact, and how the FCC must allow carriers to opt to "unfreeze" the "category relationship freeze."[13]

The *Rural LECs* summed up this inherent contradiction in approach best by noting that:

> upon initial review, a 15-year freeze seemed too long, as it fails to provide the Joint Board with sufficient incentive to work toward consensus on a recommendation for comprehensive reform of the existing outdated separations rules.[14]

But, if the FCC is willing to attempt to bypass the Act's requirement for a recommended decision, then:

> [s]o long as the Commission affords these companies ample flexibility to unfreeze their category relationships, then the Concerned Rural I-LECs support the extension of the broader separations freeze for a period of up to 15 years.[15]

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12 *FRNPM* at ¶¶ 23.

13 *USTelecom Comments* at page 3. *Compare,* 47 C.F.R. § 36.3(a). Based on similar facts, some commenters also contend vociferously that carriers with unfrozen category relationships be permitted to freeze them.

14 *Rural LECs Comments* at page 3.

15 *Id.*

Indeed, all but one of the remaining commenters join *USTelecom* and *Rural LECs* in highlighting this one problem (category relationship freezes) that is - without question - within the scope of the existing Joint Board referral.

They all agree this problem should be addressed.

Specifically, they point out accurately that, after 17 years, none of the factors are accurate, the current freeze fails to allocate sufficient costs to the interstate jurisdiction,[16] and the current freeze inhibits the rollout of broadband services. They suggest that one way to temper the impact is to permit one-time, at-will, or periodic opportunities for carriers to either unfreeze or freeze their category relationships.

For example, *USTelecom* says that carriers with frozen category relations must have an opportunity to unfreeze[17] and points out that:

> holding certain carriers hostage to a category relationship freeze election they made 17 years ago is inequitable and unnecessary. . . .[a]s we have repeatedly commented, the passage of 17 years in a rapidly changing industry necessarily means that no carrier's forecast is likely to be currently valid and the net benefits of simplification and stability no longer exist.[18]

Pioneer, in arguing for a waiver of the category relationship freeze, echoes *USTelecom* pointing out that:

> the passage of 17 years in a rapidly changing industry necessarily means that no carrier's 2001 forecast is likely to be currently valid and the net benefits of simplification and stability no longer exist. . . . For all the reasons Pioneer has put forth over the last five years, carriers

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16 *Compare, Irregulators* at 1 ("[I]n 2000, Local Service was 65% of the revenues and paid 65% of the expenses. By 2018, Local Service is 21.6% of the revenue but still pays 45%-68% of the expenses in each category.") *NARUC Initial Comments* at pages 4-5.

17 *USTelecom Comments* at page 1.

18 *Id.* at page 3.

> should no longer be required to operate under rules that addressed the industry as it was foreseeable in 2001.[19]

Similarly, *Endeavor* says that allowing carriers to opt-out of their 2001 freeze will "allow carriers, including *Endeavor*, to categorize their costs based on current circumstances rather than their circumstances in 2000."[20] *Endeavor* goes on to explain that the freeze "as currently applied" to *Endeavor* "eliminates any incentive to move towards more broadband-only services."[21]

The other commenters make similar concessions.[22]

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[19] *Pioneer Comments* at pages 6-7.

[20] *Endeavor Comments* at page 3.

[21] *Id.* at page 4.

[22] *NECA Comments* support both a 15 year extension, and, at page 8, with little explanation, allowing rural local exchange carriers (RLECs) the opportunity to unfreeze category relationships "in any year such changes are permitted to occur." *Terral Comments,* at page 6, point out that with the ability "to unfreeze its category relationships, *Terral* could appropriately allocate its costs to the interstate jurisdiction." It also notes on page 8, that "The freeze on category relationships is . . . in fact, the primary obstacle to *Terral's* deployment of broadband throughout its service area." *WTA Comments* at 1 supports a one-time option for carriers with frozen category relationships to unfreeze them and a one-time option for carriers without frozen category relationships to freeze them. At page 6, WTA acknowledges that "unfreezing of 2001 category relationships will result in a shifting of costs in most affected study areas from intrastate to interstate." The *Rural LECs Comments* explain the problem this way, at pages 3 and 4:

> For most companies this means that their cost separations are now incorrectly skewed to voice services, which results in a significant amount of costs being incorrectly assigned to the intrastate jurisdiction. This is due to the fact that a large portion of network facilities are jointly used in the provision of voice and broadband services and RoR carriers that participate in the National Exchange Carrier Association ("NECA") pools are required by NECA to allocate costs based on customer counts rather than bandwidth. In addition, NECA has interpreted the FCC's 2001 Separations Freeze Order to not allow companies with frozen category relationships to directly assign the growing costs of broadband to the interstate jurisdiction. . . The result is typically a significant allocation of costs to voice services and the intrastate jurisdiction, when actual utilization of the network continues to shift to broadband, which is an interstate service.

These filed comments illustrate clearly that the existing separations process is having unanticipated negative impacts on the federal universal service program, the deployment of broadband in rural areas, State rates and universal service programs, and ratepayers.

These filed comments also indicate that a solution is well within reach.

However, except for the oblique reference in the quoted *Concerned Rural ILEC's* comments, *supra*, like the *FNPRM*, none of the comments acknowledge or address the obvious, *i.e.*, that:

[1] these proposals to modify the Separations Rules to allow one time or periodic freezes of the category relations are squarely within the scope of the existing referral, and that

[2] a recommendation by the Joint Board on this issue, and quite frankly other separations issues as well, is not just probable, but likely in a relatively short time frame.

Indeed, *Terrel* is the only commenter to expend two plus pages[23] on the somewhat specious idea that the current Board cannot reach a recommended decision. *Terrel's* argument is premised on the perceptions of a single member of a Joint Board that currently has a federal vacancy. It is also premised on the idea that Joint Boards can only act if there is a consensus among its federal and State members. But as NARUC pointed out in its initial comments, at 17, while consensus is always preferable, it is not required. The relevant question is not whether all seven members of the Board can find commonality. The question is whether a *majority* of the Board members can agree on a recommended approach. In the past such intra-

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For similar reasons, *ITTA* Comments support, at page 6, a "process of an optional unfreezing followed by an optional refreezing occur every five years." *NTCA Comments* support, at page 6, "a one-time opportunity" for certain RLECs to "unfreeze" their existing categories.

23 *Terrel Comments* at pages 12-14.

board majorities have driven compromise recommendations that were ultimately released for the full Commission's consideration. That is what Congress intended. By definition, both State and federal programs are impacted by the separations process. Congress designed the Separations Joint Board with a majority of State members and bi-partisan FCC representation. The intent was to make sure that the decision-makers most affected by the process had a defined role in changes made to rules that impact both jurisdictions. Logically, at this point, no one can predict if it is impossible to reach a compromise, as since the retirement of Commissioner Clyburn from the agency, the Joint Board is currently lacking a full complement of federal members. Indeed, NARUC respectfully suggests that progress is not just possible, but likely if the agency directs proper resources to further board deliberations.

CONCLUSION

The initial comments clearly demonstrate that the current Separations procedures need to be reformed. They all agree that at least the issue of optional freezing or unfreezing of separations categories should be allowed. They do not and cannot argue that this issue is not within the scope of the existing referral to the Separations Joint Board.

No commenters provide the FCC with any legal rationale to permit it to extend the current freeze permanently or for 15 years.

In these circumstances, the FCC should extend the freeze for no more than two years, but only after consulting with all federal and State members of the Separations Joint Board to recommend such action. The agency should appoint the third FCC Separations Joint Board member as soon as possible and engage the State members on the issues raised in the *FNPRM* and other reform issues. Moreover, it should also, as per § 410(c) refer the "unfreeze" proposals to the Separations Joint Board before taking final action on them in this proceeding.

Respectfully submitted,

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