



N A R U C  
National Association of Regulatory Utility Commissioners

November 9, 2018

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**RE: NOTICE OF EX PARTE COMMUNICATION filed *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.**

Dear Ms. Dortch:

In accordance with 47 C.F.R. § 1.1206(b), I am filing this notice of a phone conversation with ***Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety for Commissioner Rosenworcel*** on November 7, 2018.

Among other things, I suggested:

[1] It is illogical on its face to suggest that eliminating a hard deadline that *requires* the FCC to focus on the freeze and associated separations issues that remain important to the states - by pushing out the next potential deadline 15 years – will spur the FCC or the Board to faster action. That simply makes no sense. Historically, the States have always pressed for engagement on the issues with our federal colleagues. Successive FCCs have demonstrated less interest in reform. State member acquiescence in short freeze extensions have required the FCC to focus on freeze issues periodically – because it is *obviously* a change in the separations rules and the statute *requires* engagement to extend it.

[2] It is illogical on its face to suggest that extending the freeze is not changing the FCC rules and at the same time propose specific change to the rules to extend the freeze and also acknowledge if the changes are not made the old separations studies will be required. If a the first five year freeze is a change in the rules that requires a recommended decision, it is impossible to argue that extending the freeze by potentially 15 more years is not also a change - and a very big change - in rules.

[3] It is obvious that any FCC action *sans* a recommended decision does not comply with the plain text of 410(c) – which mandates both a referral and a recommended decision on proposed changes to the separations rules – including extensions of the freeze.

[4] Because of the requirement for a recommended decision, without exception, all prior commissions engaged the majority of the Joint Board (which necessary includes the State members) before extending the freeze as it is unquestionably a change in the Separations rules. Because of the included FCC promises to engage, State members agreed to the first 2006

recommended decision extending the initial freeze. All subsequent *limited* extensions included text either specifically recommended by or agreed with by the State members of the Board. The ever-present looming deadline of a freeze extension has never been used by prior FCCs as an excuse to avoid full Joint Board buy-in on additional limited extensions of the freeze to permit work on reform to continue. Proceeding with an extension of the freeze without engaging the Board – or at least the majority of the board (the State members) does not respect Congress, the Statute or your State colleagues.

***The FCC has recognized what Section 410(c) of the Communications Act requires – changes to the Part 36 rules require as a pre-requisite a recommendation from the Federal State Joint Board on Separations.***

NARUC filed both initial and reply comments<sup>1</sup> on the FCC’s July 18, 2018 *Further Notice of Proposed Rulemaking* (“FNPRM”).<sup>2</sup> Both sets of comments point out that 47 U.S.C. § 410(c) is not ambiguous. It states:

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking . . . to a Federal-State Joint Board.

In February of 2017, to its credit, this Commission acknowledged that if the Part 36 rules “likely would need to be modified,” 47 U.S.C. § 410(c) requires a referral to the Separations Joint Board.<sup>3</sup> The FNPRM proposes modifications to the Part 36 rules. Both the freeze extension (which was initiated based upon just such a recommendation and continued based on similar recommendations) and the proposed changes to category freezes are modifications that require a referral.

***No comment offered a legal rationale for bypassing the statutory requirements nor did the FNPRM articulate a basis for bypassing the statutory mandate.***

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.<sup>4</sup> Both proposals regard “the jurisdictional separation of common carrier property and expenses between

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<sup>1</sup> See, [Initial Comments of the National Association of Regulatory Utility Commissioners](#), filed August 27, 2018, and [Reply Comments of the National Association of Regulatory Utility Commissioners](#), filed September 10, 2018 *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

<sup>2</sup> *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).

<sup>3</sup> *In the Matter of Comprehensive Review of the Part 32 Uniform System of Accounts*, Report and Order, 32 F.C.C. Rcd. 1735, ¶ 46 (2017).

<sup>4</sup> *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).

interstate and intrastate operations.” Indeed, the FCC has acknowledged as much in past orders. The first and second extensions were products of specific Joint Board recommended decisions. In the subsequent temporary freezes proposed, *always relatively short, and always premised on the Joint Board completing reform before expiration of the new freeze*,<sup>5</sup> express support for the freeze extension from the State members (a majority) of the Joint Board became the norm.<sup>6</sup>

***The FCC FNPRM and the record in this proceeding (all the comments filed) indicate that changes to the separations rules are required and necessary in the short term.***

*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.<sup>7</sup>

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<sup>5</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 4219 (2017); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 29 FCC Rcd at 6470 (2014) (Extends the freeze 3 years “while the Joint Board continues its analysis.”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 27 FCC Rcd 5593 (2012) (Extends the freeze two years “while the Joint Board completes its analysis”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd 7133 (2011) (Extends the freeze one year “while the Commission and the Joint Board undertake reform of those rules.”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 25 FCC Rcd 6046 (2010) (Extends the freeze one year while “issues related to interim and comprehensive reform are considered.”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 24 FCC Rcd 6162 (2009); (Extends freeze 1 year “while the Commission and the Joint Board undertake reform of those rules.”) *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, 5523 (2006). (Extends the freeze 3 years “to allow the Commission and Joint Board to complete comprehensive reform.”)

<sup>6</sup> See, *Letter from State Members of the Separations Joint Board to FCC Commissioners*, CC Docket No. 80-286 (filed April 17, 2009), at: <https://ecfsapi.fcc.gov/file/6520213987.pdf> (Supports the extension); *Letter from State Members of the Separations Joint Board to FCC Commissioners*, CC Docket No. 80-286 (filed March 18, 2011), at: <https://ecfsapi.fcc.gov/file/7021034711.pdf>, noting a majority of the joint board supports “the proposal to extend, by one year, the current freeze regarding separations,” and acknowledging FCC’s prior engagement with the board about the extension “well in advance of the release of this notice.”; *Letter from State Members of the Separations Joint Board to FCC Commissioner Rosenworcel, Separations Joint Board Chair*, CC Docket No. 80-286, (filed March 31, 2014), at: <https://ecfsapi.fcc.gov/file/7521096313.pdf>, noting State members support an extension.

<sup>7</sup> *FNPRM* at ¶¶ 10 – 12 (discussing the declining use of the separations process).

[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.

[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.<sup>8</sup>

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.”<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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. And - 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,<sup>12</sup> 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.<sup>13</sup>

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<sup>8</sup> *FRNPM* at ¶¶ 23.

<sup>9</sup> *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.

<sup>10</sup> *Rural LECs Comments* at page 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Comments of USTelecom* at pages 1 and 3; *Comments of Pioneer Telephone Cooperative, Inc. (Pioneer)* at pages 6-7.

<sup>13</sup> *NECA Comments* support, at page 8, allowing rural local exchange carriers 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

The 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. They also indicate that at least a partial 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.

I am providing a copy of this ex parte to Mr. Litman. I have attempted to fairly cover the arguments I presented. If Mr. Litman inform me that this notice fails to cover an additional advocacy point raised during this meeting, I will immediately revise and refile this notice to cover the cited deficit. If you have any questions, please do not hesitate to contact me at 202.898.2207 or [jramsay@naruc.org](mailto:jramsay@naruc.org).

Sincerely,

James Bradford Ramsay  
NARUC General Counsel

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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.

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.