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Federal Communications Commission
Office of the Secretary

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

DOCKET FILE COPY ORIGINAL

Re: Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286.

Dear Ms. Dortch:

The National Exchange Carrier Association, Inc. (NECA) is filing the attached redacted version of its comments on the Petition filed February 26, 2016 by Clay County Rural Telephone Cooperative d/b/a Endeavor Communications (Endeavor).¹ NECA is requesting the information provided in the attachment to this filing be treated as confidential and non-public, and therefore has marked these pages “**REDACTED- FOR PUBLIC INSPECTION.**” For the non-redacted version of these comments, NECA is providing the Commission with a copy of the complete comments marked “**CONFIDENTIAL – NOT FOR PUBLIC INSPECTION.**”

The information provided in this filing is entitled to confidential, non-public treatment under the Freedom of Information Act (FOIA) and related provisions of the Commission’s rules.² The information satisfies the requirement of FOIA Exemption 4 (trade secrets or commercial/ financial information).

NECA submits the following information pursuant to section 0.459 in support of its request for confidential treatment of the data in the attached tables.

¹ Petition for Clarification of Endeavor Communications, CC Docket No. 80-286 (filed Feb. 26, 2016) (*Petition*).

² 47 C.F.R. §§ 0.457 and 0.459; 5 U.S.C. § 552, et. seq. Section 0.457(d)(iii) specifically identifies information submitted in connection with audits, investigations, and examination of records pursuant to 47 U.S.C. 220 as material that has been accepted by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4).

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- Identification of the specific information for which confidential treatment is sought:

NECA seeks confidential treatment for the study area specific information in the attached table, which contains confidential and proprietary information related to Endeavor's cost categorization factors.

- Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission:

This data is submitted in support of comments on a Petition filed February 26, 2016 by Clay County Rural Telephone Cooperative d/b/a Endeavor Communications. Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286.

- Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged:

The information on the table attached to these comments contains sensitive study area specific information.

- Explanation of the degree to which the information concerns a service that is subject to competition:

Rural telephone service has historically lent itself to "cherry picking" by competitors that choose to serve only the low cost areas within a study area.

- Identification of any measures taken by the submitting party to prevent unauthorized disclosure:

The information provided in the attached table includes data that is made available only to NECA representatives on a need to know basis. Any public information is only made available on an aggregate basis.

- Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties:

The calculations in the table are not publicly available.

- Justification of the period during which the submitting party asserts that material should not be available for public disclosure:

NECA requests that all of the data provided in the table be treated as confidential indefinitely. Because of the sensitive nature of the data, it would not be appropriate for public disclosure at any time in the foreseeable future.

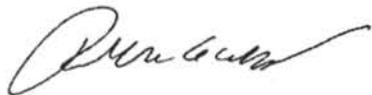
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- Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted:

NECA is providing this data to the Commission to assist it in addressing the Endeavor Petition. However, the Commission should take care to not deprive Endeavor of the opportunity to speak for itself in the event of a FOIA request for access to this data. NECA requests that the Commission notify Endeavor of any FOIA request and allow it a reasonable opportunity to file detailed information supporting continued confidential treatment of its data.

Accordingly, NECA requests confidential treatment of the data provided in the table attached to its comments pursuant to section 0.457 and 0.459 of the Commission's rules.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. M. G. Williams", is written in black ink.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.

By petition filed February 26, 2016,¹ Clay County Rural Telephone Cooperative d/b/a Endeavor Communications (Endeavor) has asked the Wireline Competition Bureau (Bureau) to clarify that rate-of-return regulated local exchange carriers (RLECs) who elected to freeze their category relationships pursuant to the Commission’s *2001 Separations Freeze Order* may subsequently directly assign costs related to the provision of digital subscriber line (DSL) and wideband special access services to new categories of investment introduced subsequent to the inception of the freeze, if that category is ordinarily directly assigned in accordance with the Part 36 rules.²

NECA has no objection to a company “unfreezing” its categorization factors provided a waiver is obtained and the changes are coordinated with appropriate adjustments to tariff rates, where necessary. Further, NECA agrees the Commission’s rules permit companies making new types of investment to add additional categories for such investments and to recalculate new “frozen” categorization factors going forward. NECA believes, however, that Endeavor’s approach to “direct assignment” of investments associated with DSL services, which causes it to

¹ Petition for Clarification of Endeavor Communications, CC Docket No. 80-286 (filed Feb. 26, 2016) (*Petition*).

² *Id.*

recalculate and change certain of its categorization factors from year-to-year, runs directly contrary to the Commission's Part 36 rules and the intent of the Commission's *2001 Separations Freeze Order*. By adding a new category of costs after the Freeze Order and thereafter continuing to recalculate its Circuit Equipment category relationships each subsequent year, Endeavor has modified its "frozen" categorization factors on an ongoing basis without Commission waiver. NECA has accordingly required Endeavor to make corrective adjustments to its data submissions in accordance with established procedures. If Endeavor wishes to assign costs in this manner going forward, it should be required to seek a waiver of the freeze, as several similarly-situated companies have done. NECA would be pleased to accommodate prospective reallocations pursuant to such a waiver coincident with the effective date of any necessary access rate adjustments.

I. BACKGROUND

Section 36.1 of the Commission's rules generally describes the separations process as follows:

The first step is the assignment of the cost of the plant to categories. The basis for making this assignment is the identification of the plant assignable to each category and the determination of the cost of the plant so identified. The second step is the apportionment of the cost of the plant in each category among the operations by direct assignment where possible, and all remaining costs are assigned by the application of appropriate use factors.³

For most companies conducting separations studies on an annual basis, changes in plant investment over time can be expected to cause percentage changes in the "mix" of plant assigned to particular categories from year-to-year. These categorization percentages or factors (along with direct assignment and allocation use factors applied to categorized plant) are used in

³ 47 C.F.R. § 36.1.

separations studies to determine state and interstate costs and ultimately, rates in each jurisdiction.

The Commission's *2001 Separations Freeze Order* required RLECs to freeze their allocation use factors, and gave these companies the option of freezing their category relationships as well.⁴ The freeze was intended to "provide stability and regulatory certainty for incumbent LECs by minimizing any impacts not contemplated by the Commission's Part 36 rules, such as growth in local competition and new technologies."⁵ A company with "frozen" categorization can be expected to have changes in investment levels as well, but would normally be expected to use the same percentage factors developed in its base year 2000 cost study, as specified in section 36.3(b) of the Commission's rules.

The Commission initially intended the freeze to be in effect for a five-year period beginning July 1, 2001, or "until the Commission completed comprehensive separations reform, whichever came first."⁶ Subsequent orders extending the freeze for varying periods were issued in 2006, 2009, 2010, 2011, 2012 and 2014, leading in some cases to separations results that do not optimally reflect current investment patterns.⁷ The Commission has, however, made clear

⁴ *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd. 11382 (2001) (*2001 Separations Freeze Order*).

⁵ *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*, CC Docket No. 80-286, Order, 27 FCC Rcd. 6357 (2012) ¶ 4 (*Eastex Telephone Order*), citing *2001 Separations Freeze Order* ¶ 12.

⁶ *Id.* ¶ 5, citing *2001 Separations Freeze Order* ¶ 9.

⁷ See *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd. 5516 (2006); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 24 FCC Rcd. 6162 (2009); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 25 FCC Rcd. 6046 (2010); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd. 7133 (2011); *Jurisdictional*

that companies who elected to freeze their category relationships in 2001 could obtain waivers of the freeze upon a showing of good cause. Waivers of the freeze were granted to Gila River Telecommunications, Inc. in 2010,⁸ and Eastex Telephone Cooperative, Inc. in 2012.⁹ Subsequently, two additional companies filed petitions seeking waiver of the categorization freeze.¹⁰ Both of these petitions remain pending.

Like many RLECs, Endeavor began offering DSL service at some point after the Commission's separations freeze took effect. Endeavor "unfroze" its categorization factors and began directly assigning its Circuit Equipment investments in DSL.¹¹ Non-Circuit Equipment investments continued to be categorized based on previous frozen factors established in 2001.¹² Endeavor then continued to apply this methodology for identifying and directly assigning Circuit Equipment investment to categories in each of its annual cost studies through 2014.¹³

Separations Reform and Referral to the Federal-State Joint Board, CC Docket No. 80-286, Report and Order, 27 FCC Rcd. 5593 (2012); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 29 FCC Rcd. 6470 (2014) (*2014 Separations Freeze Extension Order*).

⁸ See *Petition by Gila River Telecommunications, Inc. Pursuant to 47 C.F.R Sections 36.3, 36.123 – 126, 36.152 -157, and 36.372 -382 for Commission Approval to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286, Order, 25 FCC Rcd. 17459 (2010).

⁹ See *Eastex Telephone Order*.

¹⁰ See *Petition of Pioneer Telephone Cooperative, Inc. for Waiver of 47 C.F.R. Section 36.3, 36.123-126, 36-141, 36.152-157, 36.191 and 36.372-382 To Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286 (filed Mar. 22, 2013); *Petition of Terral Telephone Company, Inc., for Waiver of C.F.R Sections 36.3; 36.123-126, 36-141, 36.152-157, 36.191 and 36.372-382 of the Commission's Rules to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286 (filed Aug. 2, 2012).

¹¹ See *Petition at 2*.

¹² See, e.g., *Appendix A, Cable and Wire Factors*.

¹³ *Id.*

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As Endeavor notes, the Commission recognized the need for adjustments to frozen categorization factors resulting from new types of investment.¹⁴ Companies making new types of investments are expected to calculate new categorization factors for the investment, and then continue using the new frozen factors for the duration of the freeze.¹⁵ However, Endeavor asserts that new investment of a type that is typically directly assigned between the jurisdictions can, under the freeze, continue to be directly assigned to categories even though this approach causes certain of Endeavor's categorization factors to change from year-to-year.

Endeavor notes that changes made in its cost studies each year were not questioned by NECA or USAC in subsequent reviews. In NECA's review of 2014 cost studies, however, a separate company with a pending category freeze waiver request before the Commission was found to have initiated in its 2014 cost study investment re-categorization methods similar to those described by Endeavor. This instance resulted in a material shift of revenue requirement to the interstate Special Access category, which in turn led NECA to conduct a focused examination of all pool participants that had elected to freeze cost categorizations. Of the approximately 50 companies electing the freeze, five additional companies (including Endeavor) were found to have unfrozen their cost categorizations and were continuing to "directly assign" costs in ways that cause their separations category factors to change from year-to-year.¹⁶ All have been required to make corrections to their cost studies in accordance with established procedures.

¹⁴ *Petition* at 4-5.

¹⁵ See *2001 Separations Freeze Order* ¶ 53. ("Rate-of-return carriers who incur new categories of investment during the freeze shall calculate new factors for the investment and then freeze the new factors for the duration of the freeze.")

¹⁶ All five companies utilize the same cost consultant.

II. DISCUSSION

In support of its Petition, Endeavor references language in the Commission's *2001 Separations Freeze Order* on direct assignment of certain costs. There the Commission explained that under the freeze, "[c]ategories or portions of categories that have been directly assigned in the past . . . will continue to be directly assigned to each jurisdiction."¹⁷ Endeavor further references language from the same order regarding treatment of new categories of investment, where the Commission indicated that RLECs who incur new categories of investment during the freeze "shall calculate new factors for the investment and then freeze the new factors for the duration of the freeze."¹⁸

A review of Endeavor's prior cost studies indicates it started assigning investment to a new category of plant COE 4.11 in 2003. Prior to 2003, Endeavor had no investment amounts identified wideband (DSL) in that category of plant. However, Endeavor did not recalculate and re-freeze its categorization factors, as required under section 36.3(b) of the Commission's rules, but instead "direct assigned" that investment and subsequent new investment to the new Circuit Equipment category COE 4.11 while continuing to apply the original frozen factors to Cable and Wire Facilities (CWF) investments. As a result, certain of Endeavor's categorization factors continue to change each year, as displayed in the attached table.¹⁹

Even assuming the investments described in Endeavor's petition have been for a new category of equipment (as opposed to existing types of equipment merely used to provide a new service), NECA does not believe the Commission's freeze rule permits ongoing changes to Endeavor's categorization factors in the manner shown in Appendix A. "Direct assignment" of

¹⁷ *2001 Separations Freeze Order* ¶ 23.

¹⁸ *Petition* at 4, quoting *2001 Separations Freeze Order* ¶ 53.

¹⁹ See Appendix A.

costs to the respective jurisdiction is the second step in the separations process, as clearly indicated in the language of section 36.1, quoted above. For companies with frozen categorization factors, this means direct assignment to the jurisdictions occurs after amounts have been assigned to plant categories by application of the frozen factors.

Endeavor quotes language found in a background footnote from the Commission's *2014 Separations Freeze Extension Order* which appears to suggest direct assignment of "jurisdictionally pure" services can be performed simultaneously with cost categorization.²⁰ Nothing in the *2014 Separations Freeze Extension Order* suggests, however, that the Commission intended or expected such simultaneous "direct assignments" of costs to override the categorization freeze for RLECs electing this approach. To the contrary, the Commission makes plain in the *Order's* discussion section that, as a result of the extension, "rate-of-return carriers will use the same frozen jurisdictional allocation factors and will (*absent a waiver*) use the same frozen category relationship if they had opted in 2001 to freeze those."²¹ In addition, the language in the *2001 Separations Freeze Order* makes clear that to accommodate a new category of plant that occurred subsequent to the separations freeze, the categorization factors are recalculated, frozen and applied going forward.²²

As previously noted, NECA has no objection to companies electing to unfreeze category relationships pursuant to Commission waiver. NECA also agrees that companies investing in new categories of plant during the freeze are permitted under Commission rules to adjust and re-freeze category relationships, and continue to use such re-frozen categorizations going forward. It appears in this instance, however, that Endeavor (and as noted above, a small number of other

²⁰ *Petition* at 6, quoting *2014 Separations Freeze Extension Order* at n.7.

²¹ *2014 Separations Freeze Extension Order* ¶ 10 (emphasis added).

²² *Supra*, n. 15 and accompanying text.

companies) have applied the concept of “direct assignment” in a manner that causes certain of their categorization factors to change on a yearly basis, in violation of the Commission’s rules and contrary to the intent of the *2001 Separations Freeze Order*.²³

If, however, the Commission agrees that its separations rules permit companies with frozen categorization factors to “direct assign” plant in such a manner as to cause frozen categorization factors to change from year-to-year, it should promptly issue a clarification to that effect as requested by Endeavor. A prompt response along these lines is needed in order for NECA to make corresponding changes in its tariff rates in time for the 2016 Annual Access Tariff Filing.²⁴

III. CONCLUSION

For the reasons stated above, NECA believes that RLECs who elected to “freeze” their category relationships in 2001 must continue to observe the freeze for all accounts, including investments made in new categories of plant. Nothing in the Commissions’ rules governing direct assignment of plant used for jurisdictionally pure services suggests that such direct assignments may be used to change some or all of a company’s frozen categorization factors on a yearly basis, as Endeavor apparently claims. Should the Commission decide otherwise, it should

²³ Endeavor notes neither NECA nor USAC have previously raised questions about its failure to maintain frozen categorization factors. *Petition* at 2-3. But the Commission has made clear that failure to detect violations in prior years does not preclude requiring compliance in later years. See, e.g., *Citizens Utility Company Petition for Waiver of Section 36.154(d) of the Commission’s Rules*, AAD 91-30, Memorandum Opinion and Order, 7 FCC Rcd. 8656 (1992) ¶ 8; *Request for Review of a Decision of the Universal Service Administrative Company by School for Language and Communication Development Glen Cove, New York*, File No. SLD-246025, Order, 17 FCC Rcd. 15166 (2002), citing *Applications of Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service Sanchez Communications, Inc., Hal S. Widsten Classic Media, Inc., Buena Suerte Broadcasting Corp., O-V Communications for Construction Permit for a New FM Station in Oro Valley, Arizona*, Memorandum Opinion and Order, 5 FCC Rcd. 6278 (1990) ¶ 6.

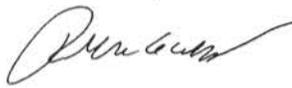
²⁴ Allowing annual modifications of frozen category relationships could have a material effect on individual company access rates and impact other pool members absent such rate changes.

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issue a clarification to that effect promptly so that NECA may make corresponding changes in its tariff rates in the context of the 2016 Annual Access Tariff Filing.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.

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April 7, 2016

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Appendix A: 2000 – 2014 Categorization Factors for Clay County Rural Telephone Cooperative d/b/a Endeavor Communications
Using “Direct Assignment” Method.

	% of Total Acct														
Account 2230 – Circuit Equipment	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<i>Category 4 – Circuit Equipment</i>															
<i>4.1 – Exchange Circuit Equipment</i>															
<i>4.11 – Wideband Exchange Line Circuit Equipment</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>4.12 – Exchange Trunk Circuit Equipment</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>4.13 – Exchange Line Circuit Equipment</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>Category 4.2 – Interexchange Circuit Equipment</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>4.21 – IX circuit equipment furnished to other</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>4.22 – IX circuit equipment used for WDBD s</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>4.23 – All other IX circuit equipment include Special</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>Category 4.3 – Host/Remote Message Circuit Equipment</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
TOTAL	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%

	% of Total Acct														
Account 2410 – Cable & Wire Facilities	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<i>Category 1 – Exchange Line C&WF</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>Category 2 – Wideband and Exchange Trunk C&WF</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>Category 3 – Interexchange C&WF</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
<i>Category 4 – Host/Remote Message C&WF</i>	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
TOTAL	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%