Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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PETITION FOR DECLARATORY RULING

Moultrie Independent Telephone Company

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In the Matter of	)
	)
Moultrie Independent Telephone Company	)
	)
To: The Commission	

PETITION FOR DECLARATORY RULING

1. Moultrie Independent Telephone Company ("Moultrie"), pursuant to Section 1.2 of the Commission's rules, by its counsel, requests that the Commission review Sections 32.27(a)-(c) and 36.2(a) and (c) of its rules and issue a Declaratory Ruling clarifying a patent ambiguity between the two sections. Moultrie argues that Section 32.27 of the Commission's accounting rules provides carriers with a clear direction to structure transactions with affiliates in such a way that benefits telecommunications carriers and their customers. 47 C.F.R. § 32.27 (1999). Specifically, Section 32.27 requires a carrier to include assets transferred to an affiliate and services provided to a carrier by an affiliate in the carrier's accounts. 47 C.F.R. §§ 32.27 (a)-(c) (1999). Section 32.27 notwithstanding, Sections 36.2(a) and (c) of the FCC's rules requires a carrier to include property transferred to an affiliate and exclude services received by the carrier from the affiliate in the carrier's accounts. 47 C.F.R. § 36.2(a) and (c) (1999). The Commission's separation rule is contrary to its accounting rule; this contradiction must be resolved.

2. The National Exchange Carrier Association ("NECA") and Moultrie disagree on how this contradiction should be resolved. NECA has demanded that Moultrie ignore Section 32.27 and resubmit the 1997 cost study it has already prepared and submitted to NECA.

Furthermore, if Moultrie does not concede to NECA's demand, NECA has threatened to use Moultrie's 1996 cost study in place of any 1997 cost data for Moultrie when calculating its annual cost evaluations.

3. Such action by NECA would ignore the Commission's rules and negate the sound business transactions Moultrie undertook in 1997. The Commission should find that the transactions Moultrie has undertaken with its affiliate should be recorded in Moultrie's accounts and so reflected in Moultrie's 1997 costs studies as submitted to NECA. Moultrie requests that the Commission recognize and clarify the contradiction in its rules and require NECA to accept Moultrie's 1997 cost study as submitted.

4. Moultrie is simultaneously filing with the Commission a Motion for Stay of Section 69.605(a) of the Commission's rules to stay NECA's threat of reverting to Moultrie's 1996 cost study until the Commission has the opportunity to review and rule on the instant petition (the "Petition").

I. Introduction.

5. Moultrie is a rural independent local exchange carrier (ILEC) serving 806 access lines in central Illinois. As required by Section 69.605 of the Commission's rules, Moultrie submitted a 1997 cost study (the "1997 Study")[1] to NECA for NECA's purpose of developing the pooled carrier common line rate for telecommunications carriers. 47 C.F.R. §69.605 (1999). NECA returned the 1997 Study to Moultrie claiming that the study was not prepared in accordance with the Commission's rules. Specifically, NECA asserts that certain affiliate transactions

[1] *See* Moultrie Independent Telephone Company, NECA Final Cost Study 1997, submitted to NECA on Dec. 3, 1998.

Moultrie undertook in 1997 violated the Commission's Part 36 separation rules. NECA informed Moultrie that it must prepare a revised cost study,[2] or NECA will penalize Moultrie by using the 1996 cost study previously submitted by Moultrie (the "1996 Study").[3] This unwarranted penalty would have a severe economic impact on Moultrie and the community it serves. The use of 1996 costs on Moultrie's 1997 activities would decrease the tax and Universal Service Fund ("USF") benefits that Moultrie would otherwise recognize and pass on to consumers. Moultrie stands to lose an estimated $400,000 if NECA carries out its threat. That money could be used by Moultrie to continue to maintain affordable telecommunications to its rural central Illinois customers.

6. Moultrie submits that the 1997 Study was prepared in accordance with the Commission's rules and that it is valid thereunder. Moultrie believes there is a patent ambiguity between the Commission's separation rules and its accounting rules. Moultrie prepared the 1997 Study using its best judgement in the face of the ambiguity engendered by the rules.

7. The Commission must address the contradiction in its rules before Moultrie is penalized by having to abide by a rvised cost study as demanded by NECA, and also by the consequential economic harm and distortion of Moultrie's rates such a penalty would produce. Accordingly, Moultrie requests the Commission review Sections 32.27 and 36.2 of its rules and issue a clarification of how these rules should be interpreted in light of each other and the evidence presented by Moultrie in this Petition.

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[2] *See attached* Letter from Roberta L. Alvir, NECA, to Larry Van Ruler, ITC; Steve Bowers, Moultrie; and John Boehm, NECA dated March 12, 1999.

[3] *See* Moultrie Independent Telephone Company, NECA Final Cost Study 1996, submitted to NECA on Sept. 16, 1997.

II. Moultrie Has Standing to Petition the Commission for a Declaratory Ruling.

8. The Commission may issue a declaratory ruling to terminate a controversy or remove uncertainty with respect to its rules. *See*, 47 C.F.R. § 1.2 (1999) and 5 U.S.C. § 554(e) (1999). There is clearly a controversy in this matter as NECA and Moultrie disagree as to how affiliate transactions should be accounted for in Moultrie's 1997 Study and the controversy arises from the uncertainty created by the Commission's rules. Sections 32.27 and 36.2 of the Commission's rules are contradictory and force carriers to make an educated guess as to how to apply affiliate transactions in their cost studies. The Commission has consistently evaluated and clarified its rules where there are perceived inconsistencies in numerous amendments and revisions to its rules. *See e.g.*, 1998 Biennial Regulatory Review--Review of International Common Carrier Regulations, Report and Order, 1999 FCC LEXIS 1167, (Int'l Bur., March 18, 1999) (FCC clarifies unnecessary or confusing rules and simplifies existing procedures.) Additionally, the Commission requests that carriers who disagree with NECA's interpretations of its rules petition the Commission for a declaratory ruling.[4] Pursuant to the FCC's rules and policies, Moultrie seeks a declaratory ruling to clarify Sections 32.27 and 36.2 of the Commission's rules.

III. The Commission's Rules are Inconsistent.

9. NECA contends that Moultrie has violated Section 36.2 of the Commission's separation rules by including certain affiliate transactions in its cost study. However, Moultrie included the transactions in its regulated accounts in compliance with Section 32.27 of the Commission's accounting rules.

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[4] *Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes*, 10 FCC Rcd 6243 at para. 44 (1995).

10. Section 36.2(c)(2) requires carriers to include property transferred to affiliates and related expenses in the carriers' account and exclude from the accounts rent paid to affiliates for use of the transferred property. 47 C.F.R. § 36.2(c)(2) (1997). Section 32.27 requires a carrier to include assets transferred to an affiliate and services provided to the carrier by affiliates in the carrier's accounts. 47 C.F.R. §§ 32.27 (a)-(c) (1997).

11. Moultrie has sought to follow the Commission's accounting rules, which appear to contradict the Commission's separation rules. During 1997, the time period reflected in the 1997 Study, Moultrie transferred ownership of certain of its telecommunications facilities to an affiliate. The affiliate subsequently rented the facilities back to Moultrie at cost, without realizing any profit. These transactions allowed Moultrie to include the lease costs in its 1997 Study, while excluding the property assets.

12. Moultrie structured the transfer to optimize its recovery under the USF and to maximize tax benefits. In determining the USF disbursement to carriers, a carrier's common line investment is divided by total plant investment from data provided by the carrier to NECA. The total plant investment includes common line investment plus other assets and investments. By transferring the property assets to its affiliate, Moultrie was able to decrease the denominator in the USF ratio by eliminating the value of the property assets. Moultrie included the rental costs of these transactions in its operating expenses. These transactions both optimized the amount Moultrie would receive from the USF and provided tax benefits to Moultrie so that Moultrie could offer better services and lower prices to its rural consumers.

13. Section 36.2(d) of the Commission's rules allows a carrier to transfer assets to non-affiliates, exclude the assets on the carrier's accounts but include the rental costs incurred when the carrier leases the assets back from the non-affiliate. 47 C.F.R. § 36.2(d) (1999). If Moultrie had transferred its assets to non-affiliates, it would have been able to take advantage of the USF benefits without experiencing any difficulties with its 1997 cost study. However, as will be shown below, it would be impractical, possibly even impossible, for Moultrie to have completed these transactions with a non-affiliate.

14. Moultrie recognizes that costs flow through several processes. First, they are classified under Part 32 of the Commission's rules and then are separated in Part 36.[5] However, where there is a clear ambiguity between its Part 32 and Part 36 of its rules, the Commission should adopt a reasonable interpretation, especially when that interpretation furthers the public interest.

15. As the Commission found in *RAO 21*, serious distortions may occur in the determination of the USF, jurisdictional separations, and investment allocations if carriers do not have a uniform system of accounts.[6] Moultrie requests that the Commission clarify the ambiguity between Section 32.27 and 36.2 of its rules to ensure that carriers have a clear indication of what the rules are intended to accomplish. Moultrie believes the purpose of these rules is to support and foster the provision of affordable telecommunications services, both basic and advanced, to

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[5] See, *Petitions for Reconsideration and Applications of Review of RAO 21*, 8 CR 1250 at para. 18 (1997) (*RAO 21*).

[6] *Id.* at para. 3.

all Americans, including those in rural areas.[7] To this end, Moultrie has developed a strategic business approach that is consistent with Section 32.27 of the Commission's rules.

IV. Moultrie Will Be Irreparably Harmed If NECA Uses Moultrie's 1996 Study in Place of the 1997 Study.

16. When it returned Moultrie's 1997 Study, NECA stated that if a new cost study is not submitted to its satisfaction by the "cost lock" date for determining cost data for 1997, NECA will use the 1996 Study. The "cost lock" date is today, March 29, 1999. Therefore, Moultrie requires immediate relief in its dispute with NECA and respectfully requests that the Commission expeditiously review Sections 36.2 and 32.27 of its rules.

17. NECA's use of the 1996 Study would inaccurately depict the state of Moultrie's investment in its facilities and transactions undertaken in 1997; this would negatively affect Moultrie's profits. If NECA arbitrarily replaces Moultrie's 1997 Study with data from 1996, Moultrie will lose the economic and efficiency benefits gained by the transactions with its affiliate as reflected in the 1997 Study. As stated above, Moultrie stands to lose more than $400,000 if NECA applies Moultrie's 1996 cost information to its 1997 business activities, thereby injuring both Moultrie and its customers as Moultrie would be forced to lower its level of service to maintain affordable rates.

V. The Public Interest Demands That the Commission Resolve this Controversy in Moultrie's Favor.

18. It would be contrary to the public interest for a small carrier, in fact any carrier, to be punished by an inconsistency in the Commission's rules. In this instance, clarification of the Commission's rules is clearly warranted. If NECA is not required to use Moultrie's 1997

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[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Title VII, § 706 (1996).

Study, Moultrie will face a considerable economic loss that would have to be passed on to Moultrie's rural customers.

19. In structuring the affiliate transactions as it has, Moultrie is attempting to be as efficient as possible so that it may provide affordable basic and advanced telecommunications service to consumers that traditionally have received only POTS, if any service at all. Moultrie and its affiliates currently provide several telecommunications services to their customers, including Internet access and cable television, and Moultrie is constantly seeking to improve its business practices so that it is able to offer new, important, and affordable telecommunications services to its customers.

20. However, Moultrie faces many roadblocks in its attempt to bring low cost telecommunication services to its customers. Moultrie has explored different avenues of creating business efficiencies that would bring reasonably priced service to its telephone consumers such as transferring certain of its facilities to a non-affiliated entity from which Moultrie could lease facilities at a reasonable cost. This avenue has ended in a dead-end.

21. There are no local entities that have the economic wherewithal and experience to maintain and invest in the upgrades needed to keep Moultrie's facilities in the excellent condition that Moultrie and its affiliates have attained. In addition, a non-affiliated entity would have to rent the facilities to Moultrie at exorbitant prices in order to maintain them at their present level.

22. The Commission recognizes the benefits a transfer and lease back of assets creates for carriers. 47 C.F.R. § 36.2(d) (1999). However, the Commission does not permit carriers to truly take advantage of these benefits because Section 32.27 requires that carrier to include the transferred assets as well as any services provided to the carrier from the affiliate in the carrier's

accounts. 47 C.F.R. § 32.27. If Moultrie had transferred the facilities to a non-affiliate, NECA would have accepted the 1997 Study without question. As Moultrie shows below, it would be inefficient, conceivably impossible, for Moultrie to have completed these transactions with non-affiliate. In fact, Moultrie did not consider another company to take over its facilities since transfers to affiliates are permitted under the Commission's rules. *See*, 47 C.F.R. § 32.27.

23. Furthermore, transferring Moultrie's facilities to a non-local company was out of the question because a non-local company would likely provide little or no economic benefits to Moultrie's rural community and there would be no guarantee that the non-local company would not draw money out of the community without creating a positive presence there. Rural LECs, such as Moultrie, provide large financial contributions to their communities' tax base and provide jobs to local residents. If the profits of local rural telephone companies are restrained by regulations, the effects will be felt throughout these rural communities as communities' revenue streams are decreased and jobs are slashed.

24. Moultrie is committed to providing affordable telecommunications to rural communities and to improving those communities. The Commission should do everything in its power to achieve these goals. Clarifying Section 36.2 by allowing Moultrie to recognize the cost benefits Section 32.27 provides, would be an important step in helping Moultrie improve its community.

25. It would be inequitable and against the public interest to allow NECA to proceed with its arbitrary interpretation of the Commission's rules and require Moultrie to forfeit the cost benefits it sought to gain through its affiliate transactions. The Commission must allow small rural telephone companies to achieve the cost benefits permitted under the Commission's rules. When

external circumstances and contradictions within the rules themselves make this impossible, the Commission must clarify its rules so that small carriers can provide benefits fo their customers.

VI. Conclusion.

26. Section 32.27 of the Commission's rules is clear; Section 32.27 requires carriers to include assets transferred to an affiliate and services provided to carriers from affiliates in the *carriers'* accounts. 47 C.F.R. §§ 32.27 (a)-(c) (1999). Section 36.2(c) requires carriers to include property transferred to affiliates and exclude services received from affiliates in the carriers accounts. 47 C.F.R. § 36.2(c) (1999). Moultrie requests that the Commission review Sections 32.27(a)-(c) and 36.2(a) and (c) of its rules and clarify the patent ambiguity between these Sections by finding that a carrier may enter into transactions with its affiliates and reflect any cost benefits obtained by these transactions in the carrier's cost study. Any other finding by the Commission would be against the public interest. The Commission should further find that Moultrie's affiliate transactions be properly recorded on Moultrie's 1997 accounts and so reflected in Moultrie's costs studies as submitted to NECA. Moultrie requests that the Commission recognize the contradiction in its rules and require NECA to accept Moultrie's 1997 Study as submitted.

Respectfully submitted,
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March 29, 1999

March 12, 1999

To: Larry VanRuler (ITC) via fax
Steve Bowers (Moultrie) via fax
John Boehm (NECA)
From: Roberta Alvir (NECA)
Subject: Moultrie Telecom. 1997 Cost Study Re-run

Pt. 36.2
"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."

On March 1, 1999 I provided you with documentation (FCC Pt. 36.2) showing that Moultrie's 1997 Cost Study was not prepared in accordance with FCC Rules and Regulations. A revised 1997 Cost Study must be submitted to NECA and POOLED before March cost lock.*

The revised study should :

- REMOVE lease costs
- INCLUDE property and related expenses

* If a Cost Study reflecting compliance with the aforementioned FCC rule is not received before March 25, 1999 - your 1997 settlement amounts will be overridden and will revert back to 1996 amounts.

CERTIFICATE OF SERVICE

I, Tracy L. Trynock, hereby certify that on this 29th day of March, 1999, copies of the foregoing "Petition for Declaratory Ruling" have been served by first-class United States mail, postage pre-paid or by hand delivery upon the following:

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