Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Jurisdictional Separations and Referral to the Federal-State Joint Board	)	CC Docket No. 80-286
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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The Commission may soon be in a position to eliminate the Part 36 jurisdictional separations process. That should indeed be the goal, as it would benefit consumers. The Commission has a long history of ending rate regulation of competitive services, and it should continue to do so. Similarly, the Commission should move toward ending separations as competition continues to grow. In the meantime, the Commission should promote the development of competition by forbearing from separations in jurisdictions under incentive regulation, extending the current separations freeze and preventing states from imposing any new or different cost allocation requirements. The Commission should also allow rate-of-return companies the opportunity to reduce the extent to which the allocation of costs among categories is an administrative burden. Specifically, the Commission should:

1. Affirm that the national policy goal is to replace rate regulation with competition, and recognize that the need for jurisdictional separations is eroding rapidly;
2. Extend the freeze on jurisdictional separations indefinitely where it is still useful;
3. Grant BellSouth's forbearance petition and extend similar forbearance from cost assignment rules, including jurisdictional separations, to other companies that do not rely on separations;
4. Preempt any and all state actions that are contrary to the separations freeze and/or forbearance from jurisdictional separations;
5. Grant rate-of-return carriers a new one-time opportunity to elect to freeze category relationships; and
6. Allow rate-of-return carriers now and in the future to freeze or unfreeze category relationships for the purpose of harmonizing their treatment of category relationships across all study areas within the company.

I. THE COMMISSION SHOULD NOT MAKE MAJOR CHANGES TO JURISDICTIONAL SEPARATIONS AT THIS TIME

It is helpful to begin a discussion of jurisdictional separations by remembering what it is, and why it exists. The Commission recently wrote that:

> Jurisdictional separations is the process by which incumbent LECs apportion regulated costs between the intrastate and interstate jurisdictions. Historically, one of the primary purposes of the separations process has been to prevent incumbent LECs from recovering the same costs in both the interstate and intrastate jurisdictions.[1]

From this definition, one can clearly see that jurisdictional separations principally concerns only *regulated* (as in rate regulated) costs. It is also clear that the intended beneficiaries are consumers because the emphasis is on preventing double recovery from customers, and not on ensuring precise relationships between prices and costs for individual services. Competition is eliminating the need for rate regulation, however, which will cause separations to become meaningless as well. Moreover, as the state staff of the Joint Board recognized in the Glide Path papers, the separations process does little to protect consumers.[2] Therefore, changing jurisdictional separations during this transition would only impose needless cost and uncertainty.

Jurisdictional separations must be viewed in the context of the Communications Act as a whole and the overall aim of telecommunications regulation. Congress and the Administration have made competitive, de-regulated telecommunications markets a priority.[3] The Commission is similarly committed, and it has worked admirably to replace regulation with competition. Consistent with these efforts, competition is vibrant and growing rapidly. Intermodal competition, such as voice competition from wireless

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[1] *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 5556 ¶ 2 (2006) (*Separations Freeze Extension Order*).

[2] *Id.*, Appendix A, at 2.

[3] Congress has made this policy choice so the Commission (and the states through the operation of preemption principles) must work to achieve competition and deregulation.

providers, and the development of VoIP have helped eliminate the need for most rate regulation. Indeed, there are few markets, even in rural areas, where competition is not developing rapidly. In light of these changing market forces, the need for jurisdictional separations also is waning.

Where price regulation is removed in both the federal and state jurisdictions and telecommunications services consequently are treated as unregulated services, it would seem that jurisdictional separations would become meaningless because it only applies to costs associated with regulated services—as the saying goes "25% of nothing is still nothing."[4] Accordingly, the Commission should eliminate jurisdictional separations in those jurisdictions that no longer rely on separations. To that end, the Commission should grant the BellSouth forbearance petition and extend forbearance to all places where jurisdictional separations are no longer used or useful. The Commission should also retain the current freeze indefinitely and preempt any inconsistent state actions such that states are not free to impose any jurisdictional cost allocations different from those set by the Commission.

In fact, competition can be harmed by retaining the jurisdictional separations process where it is no longer needed. As competition has developed, federal and state regulators have studiously avoided applying this burdensome process to competitive providers, which are not rate regulated. Moreover, to the extent questions of regulatory authority have arisen in the competitive context, they have been resolved through means other than cost allocation. Simply put, competitive providers are not required to allocate their costs between federal and state jurisdictions In order to create a competitively neutral marketplace, jurisdictional separations should also be eliminated for incumbent providers whenever practical.

The "Glide Path" papers released by the state members of the Separations Joint Board also recognize that the goal is not to optimize separations going forward, but rather to transition smoothly and efficiently away from separations (at least as currently applied). For example, the authors of the first Glide

[4] 47 C.F.R. § 64.901 *et seq.*

Path paper wrote: "Separations as we have known it, even as frozen, provides little benefit to our constituents."[5] The authors of the second Glide Path paper wrote: "[W]e seek comment on the best transition path or 'glide path' that will take separations from the current regime under the freeze to whatever systems are needed in the new environment … Most broadly, can Separations be abolished altogether?"[6]

The short answer is "yes"; in some places now, and in all places as rate regulation ceases in the face of competition. Therefore, the Commission should work toward eliminating jurisdictional separations, and it should recognize that the public interest is not served by fine-tuning a process that is on its way out. Rather, the only rational approach to transition away from separations is to facilitate competition while minimizing the costs that regulation imposes on the industry (and, ultimately, on consumers). The goal cannot be the perfect allocation of costs between state and federal jurisdictions, which has always been impossible. As noted in the Glide Path papers, it is competition, not separations, that ultimately protects consumers.

Not only are jurisdictional separations of no benefit to consumers during the last days of rate regulation, but the process is increasingly arbitrary and disconnected from any meaningful measure of telecommunications market costs. Indeed, the Commission itself recognized that current separations procedures are becoming even more capricious as the industry moves to broadband and packet-based voice services.[7] Therefore, efforts to optimize the allocation of costs jurisdictionally would simply waste time and resources and cause needless disruption.

The Separations Process is Costly and Useless when Applied to Companies Under Incentive Regulation. Many incumbent local exchange carriers are subject to incentive regulation (*e.g.*, price cap

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[5] *Separations Freeze Extension Order*, Appendix A, at 2.

[6] *Id.*, Appendix B, at 9.

[7] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd. 11382 ¶¶ 1, 12-14 (2001).

regulation) in both the federal and state jurisdictions. Indeed, the substantial majority of access lines fall into this category. Incentive regulation does not correlate to prices and costs. Instead, regulated carriers are given the incentive to reduce their costs because they keep the incremental profits from such efficiency gains. Incentive regulation, therefore, removes the link between jurisdictional separations and consumer prices. Accordingly, altering jurisdictional separations rules will have *no* impact on the majority of consumers.

Market and regulatory developments, such as the move toward bundling and away from metered pricing of non-traffic sensitive network functionalities under regulation (*e.g.*, access charges), increase the disconnect between separations and consumer protection. As the authors of the Glide Path papers described, moving costs from one jurisdiction to another only leads to offsetting changes in federal and state flat-rate charges. The Glide Path papers conclude that "classical separations provided little benefit to end users … [because] customers care little whether the charges on their bills are the result of federal or state action, but ... they do care about the relationship between flat rated and usage-based charges."[8] Regulatory and market developments, have indeed rendered jurisdictional separations obsolete for many carriers in many jurisdictions. The Commission should follow suit and forbear from imposing jurisdictional separations for carriers serving those lines.

The Customers of Rate-of-Return Companies Will Not Benefit Meaningfully from Changes to Jurisdictional Separations, but They Can Be Harmed by Such Changes. Rate-of-return LECs do still perform separations, and some continue to perform traffic studies to adjust their separations factors. The resulting cost allocations are used to develop rates, establish the foundation for key intercarrier compensation mechanisms (*i.e.*, access charges) and, importantly, directly or indirectly affect all components of the Commission's high cost universal service funding mechanisms. Any changes to

[8] *Separations Freeze Extension Order*, Appendix B, at 4.

jurisdictional separations, therefore, may have to be accompanied by carefully crafted changes to many other rules and processes by regulators and companies alike to ensure that customers continue to receive high-quality, affordable telecommunications services in high-cost areas. In sum, it is risky to alter jurisdictional separations for rate-of-return companies.

The risk of changing jurisdictional separations for rate-of-return companies is not accompanied by any meaningful benefit for end-user customers, whom regulators are charged to protect. Even for a rate-of-return company, the link between cost allocation and any particular rate consumers might pay is increasingly tenuous in a world of flat-rated packages. More fundamentally, the market is producing benefits for consumers today by creating a wide range of new services and choices, provided over new or upgraded networks. To the extent any change to separations might actually affect rates, it would introduce uncertainty into this process, and might actively penalize innovation and investment in the new services. For these reasons, change to the separations process offers little or no prospect for any consumer benefit, and the very real possibility of consumer harm. Accordingly, the public interest would not be served by disruptive and costly changes to jurisdictional separations.

The Commission Should Permanently Freeze Jurisdictional Separations Until the Process Is Eliminated. Extending the existing cost allocation freeze indefinitely is necessary to ensure that the evolving transition away from jurisdictional separations is as seamless as possible. The reality is that any allocation of costs for carriers between regulatory jurisdictions will be arbitrary. The system is indeed broken, but it is broken beyond repair and any attempt to fix it will only make matters worse in the short-term and prove unnecessary in the long-term. The better course is to extend the freeze indefinitely and allow competition to render it wholly irrelevant.

The Commission Must, In Any Event, Avoid Premature Changes To Jurisdictional Separations, Which Could Frustrate Intercarrier Compensation And Universal Service Reforms. Even if the Commission

were to decide that changes to jurisdictional separations might make sense—which they do not—now is *not* the time to make any such changes. The Commission is working toward comprehensive reform of both intercarrier compensation and universal service contributions and support mechanisms. Carriers, regulators, and stakeholders must be able to evaluate the proposed changes to universal service (*i.e.*, contributions reform and the Joint Board request for comment on reverse auctions). Changes to jurisdictional separations, however, would make such evaluation substantially more difficult by adding complexity and, potentially, changing the operation of the various components of the reform plans (even as consumers would remain relatively unaffected). Rather, the Commission should remain focused on its priorities—intercarrier compensation and universal service reform—and not engage in disruptive changes to jurisdictional separations. In addition, the Commission should ensure that its decision is not undermined by inconsistent state action. Therefore, the Commission should also preempt any state rules or decisions that impose new or different jurisdictional cost allocations.

II. THE COMMISSION SHOULD GRANT BELLSOUTH'S PETITION FOR FORBEARANCE FROM COST ASSIGNMENT RULES, INCLUDING SEPARATIONS, FOR CARRIERS WITH INCENTIVE REGUATION IN BOTH THE STATE AND FEDERAL JURISDICTIONS

BellSouth has filed a petition seeking forbearance pursuant to Section 10 from the FCC's cost assignment rules, including jurisdictional separations rules. This petition has great merit, not just for BellSouth, but for all carriers that like BellSouth are subject to incentive regulation in both the federal and state jurisdictions. The detailed cost assignment process, up to and including the separations process, has no impact on these carriers' rates, and it offers no benefits to consumers in those regions, like the BellSouth region, where there is no rate-of-return regulation. In fact, the cost assignment and separations process harms competition because it is a regulatory burden (and a costly one at that) that only applies to carriers such as BellSouth, and not to their competitors. Therefore, the Commission can best serve consumers, competition, and the public interest by granting BellSouth's petition and removing unnecessary

and irrelevant cost assignment and separations record keeping. The Commission should also extend the same forbearance, on its own motion, to all other carriers subject to incentive regulation in both the federal and state jurisdictions.

Granting BellSouth's petition would not run afoul of *Smith v. Illinois Bell Tel Co., 282U.S.133 (1930)* as the Commission and the states can still allocate jurisdictional responsibilities as necessary, including determining the scope of the respective jurisdictions in the context of hearing any rate complaint that might arise (which will not be often given the extent of competition). Finally, as BellSouth and other parties demonstrated persuasively, the few objections raised to the forbearance petition are without merit and, apparently, based on mistaken assumptions. In particular, the Commission will still receive all of the cost data it receives today pursuant to Part 32.

III. THE COMMISSION SHOULD GIVE RATE-OF-RETURN CARRIERS A ONE-TIME ELECTION TO CHOOSE WHETHER OR NOT TO FREEZE THEIR SEPARATIONS FACTORS

When the Commission froze the cost allocation factors in the *Separations Freeze Order*, it also froze the allocation of costs to categories within the jurisdictions for price-cap carriers. The Commission allowed rate-of-return carriers the option of freezing such category relationships as well, but it did not make this mandatory because rate-of-return carriers were reasonably concerned that a freeze on category relationships at that time could have resulted in significant cost misallocations going forward as they deployed new digital technologies.

Over the past five years, many rate-of-return carriers have made substantial technological upgrades and find themselves in a different position than they were in 2001. Moreover, the technological and market changes over the past five years often have led to substantial business changes for rate-of-return carriers and, in a number of cases, changes of ownership and consolidation. The public interest would best be served, therefore, by allowing rate-of-return carriers the opportunity to reconsider whether

they should freeze their category cost relationships. This is particularly true where companies find themselves with some properties subject to the category freeze and others that are not frozen (which has happened in the course of changes of control). A number of these carriers would either (1) benefit from having only one approach (frozen or not) company-wide; and/or (2) benefit from freezing their category relationships. In addition to granting rate-of-return carriers a one-time opportunity to choose whether or not to freeze their category relationships, as was done in 2001, the Commission should make clear that going forward, carriers will be able to make a one-time election regarding the separations freeze when they undergo a change of control (this could be accomplished by rule or clear guidance on the availability of waivers). This will allow companies and their customers to avoid the administrative cost of maintaining both separations methodologies.

IV. THERE IS NO NEED FOR ADDITIONAL DATA

The Commission should not issue the data request proposed last year by the State Members of the Joint Board. First, it does not make sense to conduct detailed analysis of current separations at this time because separations reform is unlikely to add value and is premature. Further changes to jurisdictional separations are unwise and, indeed, the Commission should forbear from separations for most access lines. There is no need, therefore, for additional data regarding the accuracy of this obsolete regulatory accounting process.

Second, the data request would be burdensome because carriers have largely discontinued the practice of performing traditional separations studies since the separations freeze was imposed in 2001.[9] This data request is focused on questions about the impact of the Internet, competition, unbundled network elements, and the growth in local minutes during the interim freeze. Moreover, the Commission already

[9] *See, e.g.*, Letter dated January 20, 2006 from Robin Tuttle, USTelecom, to Marlene H. Dortch, Federal Communications Commission, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, White Paper, at 1-2.

has much of the requested data, and it should not require carriers to repackage it. The burden of production far outweighs any net benefit.

V. CONCLUSION

The Commission should extend the jurisdictional separations freeze indefinitely; forbear from jurisdictional separations where the ILEC is subject to incentive regulation, or no rate regulation at all, in both the federal and state jurisdictions; grant rate-of-return carriers a new one-time election to freeze category relationships; and permit rate-of-return carriers to freeze or unfreeze category relationships to harmonize their treatment across all study areas within the company.

Respectfully submitted,

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