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

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

PETITION FOR RECONSIDERATION

Pursuant to section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") rules,[1] the Coalition for Equity in Switching Support[2] ("Petitioner" or "Coalition") hereby submit this Petition for Reconsideration of the Commission's *Report and Order* recently adopted in the above-captioned proceeding.[3]

I. INTRODUCTION AND SUMMARY

Petitioner seeks reconsideration of the modifications made to section 36.125(j) of the Commission's rules that govern the provision of Local Switching Support ("LSS") to small incumbent local exchange carriers ("LECs").[4] A rule very similar to the one adopted in the recent order was in effect between 2001 and 2006 and was interpreted in a

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[1] 47 C.F.R. § 1.429.

[2] The Coalition's members currently include Bixby Telephone Company; Chequamegon Communications Cooperative, Inc.; Cross Telephone Company; Farmers Telephone Cooperative, Inc.; Granite State Telephone, Inc.; Hargray Telephone Company, Inc.; Ketchikan Public Utilities; Northeast Florida Telephone Company; Randolph Telephone Membership Corporation; Roanoke and Botetourt Telephone Company; Star Telephone Membership Corporation; Telephone Service Company of Ohio; Vermont Telephone Company, Inc.; Waitsfield and Champlain Valley Telecom; and Warwick Valley Telephone Company.

[3] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, FCC 09-44 (rel. May 15, 2009) ("*2009 Separations Freeze Extension*" or "*2009 Order*").

[4] 47 C.F.R. § 36.125(j).

way that penalized small incumbent LECs whose access lines increased and then decreased and, as a result, unfairly and unjustifiably caused carriers with exactly the same number of access lines to be assigned substantially different Dial Equipment Minute ("DEM") weighting factors that determine LSS assistance. The Commission's order not only fails to offer any rational basis for reinstituting this discriminatory rule, but also ignores the unanimous record compiled in response to the Notice of Proposed Rulemaking that urged the Commission to ensure that such discrimination did not occur while the freeze extension was in effect. The Commission, therefore, should promptly reconsider and revise section 36.125(j) to require that LSS payments to eligible carriers must be based on a carrier's actual access line count during the applicable period.[5]

II. BACKGROUND

A. Prior Proceedings

LSS assistance is calculated by applying a DEM weighting factor to an incumbent LEC's local switching costs. The factor is determined on the basis of whether an eligible carrier's access lines in the relevant study area are less than 10,000, between 10,001 and 20,000, or between 20,001 and 50,000. Incumbent LECs with more than 50,000 access lines in a study area do not receive LSS assistance. Under this program, a carrier with a lower number of access lines typically is assigned a higher DEM weighting factor, meaning that a larger percentage of the carrier's costs are recovered from the interstate

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[5] As a matter of fairness, the Commission should extend the same assistance relief to the period beginning on July 1, 2006 by concluding, as the Coalition has suggested, that the original version of section 26.125(j) expired by its own terms on June 30, 2006. *See* Petition for Clarification, CC Docket Nos. 80-286, 96-45 (filed Jan. 8, 2009). At a minimum, in reconsidering its May 2009 decision, the Commission should make clear that the new rule applies to any reporting period that has not yet finally closed (*i.e.*, calendar years 2008 and 2009).

jurisdiction through a higher level of federal local switching support. Thus, an eligible carrier with fewer than 10,000 access lines is assigned a DEM weighting factor of 3.0, whereas a carrier serving 20,001 to 50,000 access lines is assigned a factor of 2.0.

In the original *2001 Separations Order*, the Commission generally froze all factors used to allocate costs between the interstate and intrastate jurisdictions for a period of five years.[6] The Commission, however, made one exception – it provided that the DEM weighting factor used to calculate a carrier's LSS would be reduced if a carrier's access line count increased above one of the three thresholds during the five-year period the freeze was scheduled to be in effect.[7]

The Commission's adoption of this exception to the overall freeze was prudent in light of the fact that incumbent LEC access lines had been increasing steadily for decades. By not freezing the DEM weighting factor for a carrier that experienced continued line growth between 2001 and 2006, the Commission ensured that the carrier's LSS assistance would be based on its current line count – not a pre-freeze historic line count – and, consequently, the carrier would be entitled to a lower level of assistance. This exception, therefore, prevented carriers that experienced growth in access lines during the freeze from receiving greater LSS assistance than other small carriers with the same number of access lines.

The Commission explicitly addressed only the contingency of an increase in a carrier's access line count because it reasonably did not anticipate that a carrier's access

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[6] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, ¶ 2 (2001) ("*2001 Separations Order*").

[7] *See* 47 C.F.R. § 36.125(j).

line count might increase and then decrease during that period.[8] The trend of steadily increasing incumbent LEC access lines, however, began to change subsequent to the issuance of that order and some incumbent LECs for the first time experienced access line decreases. Incumbent LECs, both large and small, including Coalition members, in recent years have experienced reductions in access lines due to many factors, for example, the replacement of access lines used for dial-up Internet service with broadband connections.

In 2006, the Commission extended the separations freeze until June 30, 2009.[9] The *Separations Extension Order*, however, did not discuss the issue of the eligibility standards for LSS nor did it revise the text of section 36.125(j). Despite the fact that that section continued expressly to refer only to the freeze period that ended in June 2006, incumbent LECs that experienced access line decreases after July 1, 2006 have been denied LSS assistance based on their actual, reduced access line counts.[10] Consequently, eligible incumbent LECs that experienced line *increases* during this period were assigned

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[8] Similarly, section 54.301(a)(2)(ii) – which was adopted in 1997 – also only addressed the contingency of the effect on LSS of an *increase* in access lines because in 1997 the industry had experienced only increases in access lines. *See* 47 C.F.R. § 54.301(a)(2)(ii). In modifying section 36.125(j) as proposed, to the extent the Commission finds it advisable, it may wish to make conforming changes to section 54.301(a)(2)(ii).

[9] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, ¶ 16 (2006) ("*2006 Separations Extension Order*").

[10] The initial part of section 36.125(j) referred to the period "from January 1, 1997 through June 30, 2006." The last sentence of subsection 36.125(j) directed companies to use the lower weighting factor "for the duration of the freeze period." The Commission did not define the term "freeze period" more precisely. The specific reference to the period ending June 30, 2006 earlier in the same rule, however, clearly suggests that the Commission at the time contemplated that the requirements of section 36.125(j) would expire on June 30, 2006.

a DEM weighting factor based on their then-current line counts, whereas carriers that experienced line *increases and then decreases* (or were already being denied proper LSS assistance because their access lines increased and decreased between 2001 and 2006) were assigned a DEM weighting factor based on a line count from some earlier period. The latter carriers, therefore, were assigned a lower DEM weighting factor than carriers with exactly the same number of access lines that had not experienced a comparable increase above a DEM weighting benchmark followed by a decrease below the benchmark.

B. 2009 Proceeding

The Commission released a *Notice of Proposed Rulemaking* in March 2009 seeking comment on extending the separations freeze from July 1, 2009 to June 30, 2010. The Notice asked parties to comment on, *inter alia*, "how costly and burdensome an extension of the freeze . . . would be for small incumbent LECs, and whether an extension would disproportionately affect specific types of carriers or ratepayers."[11] The Commission also proposed to revise section 36.125(j) in a manner that would reinstitute the rule in effect between 2001 and 2006 that led to the discriminatory LSS treatment of small incumbent LECs that experienced line losses.

A diverse group of parties, including the Coalition, filed comments in the separations docket urging the Commission to eliminate the unjustified discriminatory LSS rule and require that all eligible small incumbent LECs receive local switching assistance during the freeze based on their actual line count for the relevant reporting

[11] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 24 FCC Rcd 4227, ¶ 17 (2009).

period.[12] Those supporting this position included, *inter alia*, all of the state members of the Joint Board on Separations and several prominent industry associations.[13] Significantly, not a single commenter supported the Commission's proposed rule or opposed the calls for rectifying the unwarranted discrimination against small carriers that lose access lines.

In the *2009 Separations Freeze Extension Order*, the Commission simply ignored this record and, without explanation, reinstituted the inequitable rule for the period of the freeze extension.[14]

III. THE COMMISSION SHOULD PROMPTLY RECONSIDER ITS *2009 SEPARATIONS FREEZE ORDER* TO ENSURE THAT SMALL TELEPHONE COMPANIES ARE TREATED ON A NON-DISCRIMINATORY BASIS IN THE PROVISION OF LSS ASSISTANCE

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[12] *See, e.g.*, Reply Comments of the Iowa Telecommunications Association, CC Docket No. 80-286, at 2 (filed May 5, 2009); Comments of Mid-Communications, Inc. dba HickoryTech, CC Docket No. 80-286, at 1 (filed April 17, 2009); Reply Comments of the Minnesota Telecom Alliance, CC Docket No. 80-286, at 1-2 (filed May 1, 2009). In doing so, the commenters informed the Commission about the phenomenon of decreasing access lines affecting local exchange carriers, including those receiving LSS. *See, e.g.*, Comments of the Coalition for Equity in Switching Support, CC Docket No. 80286, at 4 (filed April 17, 2009).

[13] *See* Letter to Chairman Copps and Commissioners Adelstein and McDowell, Federal Communications Commission from State Members, Federal-State Joint Board on Separations, CC Docket No. 80-286 (filed May 12, 2009); *see also* Comments of National Exchange Carrier Association, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Eastern Rural Telecommunications Association, and Western Telecommunications Alliance, CC Docket No. 80-286 (filed April 17, 2009).

[14] To the extent the FCC's changes to the Part 36 rule were an attempt to suggest that carriers that experienced line losses between July 1, 2006 and June 30, 2009 were not entitled to LSS assistance based on their actual line counts, such an attempt plainly would constitute unlawful retroactive rulemaking. Affected local exchange carriers were entitled to any LSS relief that was available to them under the rules in effect during that period.

As explained above, the LSS program is designed to provide small incumbent LECs with a sliding scale of assistance for switching costs. As an eligible carrier's line count increases, LSS assistance decreases. The Commission properly decided in the *2001 Separations Order* that it should not freeze the allocation of LSS assistance during the period that it was undertaking comprehensive separations reform, because that would lead to unwarranted discriminatory treatment of similarly situated carriers. Absent the exception to the freeze, an eligible carrier whose line counts rose from 9,000 to 12,000 some time between 2001 and 2006 would continue to be permitted to use a DEM weighting multiplier of 3 whereas a carrier that experienced no change in demand and had exactly the same 12,000 access lines would be required to use a multiplier of 2. The Commission prevented this unjust discrimination by requiring that a carrier that experienced such line growth to base its LSS assistance on the basis of its current line count, rather than the pre-freeze count.[15]

Precisely the same public interest and non-discrimination objectives mandate that the Commission reconsider and revise the recent changes to section 36.125(j) to ensure that small incumbent LECs that experience line losses during the separation freeze are not subject to unjust and unreasonable treatment. Specifically, the Commission can and should amend that rule to specify that eligible carriers that suffer line losses during the freeze are entitled to LSS assistance based on their current, reduced line counts. Otherwise, eligible incumbents with exactly the same number of access lines may receive substantially different levels of LSS assistance. No sound public policy consideration

[15] Attached as Appendix A to this Petition are the suggested changes to section 36.125(j).

can support such unwarranted discrimination and the Commission did not attempt to offer one in the *2009 Order*.

Moreover, all of those commenters, including the state members of the Separations Joint Board, that addressed this issue emphasized that eligible incumbent LECs that experience access line losses should not be penalized by the LSS rules, just as those that experience access line increases should not receive an unjustified windfall in LSS assistance. Simply stated, eligible incumbents with similar line counts during an applicable period should be assigned the same DEM weighting factor.

The discriminatory denial of LSS assistance to eligible incumbents is particularly pernicious in these circumstances. The affected carriers already will have suffered revenue losses caused by the decline in their active access lines. Refusing to provide them with the LSS assistance that they properly should receive would compound the adverse effects of the line loss.

As the Commission previously has recognized, small incumbent LECs, like Coalition members, rely heavily on LSS assistance to maintain and over time upgrade their local exchange networks and to enable them to offer end users in these rural areas access to a full array of voice and data services, including broadband services.[16] The discriminatory treatment of eligible incumbent LECs that have lost access lines is flatly inconsistent with the Commission's stated commitment to ensuring that rural consumers

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[16] *See, e.g.*, *Federal-State Joint Board on Universal Service; Dixon Telephone Company; Lexcom Telephone Company; Citizens Telephone Company of Higginsville, Missouri; Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date*, Order, 21 FCC Rcd 1717, ¶ 8 (WCB 2006); *see also Federal-State Joint Board on Universal Service; Smithville Telephone Company, Inc., Petition for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date for an Average Schedule Company*, Order, 19 FCC Rcd 8891, ¶ 6 (WCB 2004).

are not denied access to such services. Moreover, failure to correct the discriminatory distribution of LSS assistance may lead to consequences that the Commission surely does not intend – the loss of needed upgrades to the networks of affected incumbent LECs, degradation in service quality, and needless delay in the availability of advanced services to communities served by affected carriers.

IV. CONCLUSION

For the foregoing reasons, the Commission should reconsider and modify section 36.125 of its rules to permit eligible carriers, during the extended period of the

separations freeze, to receive local switching support based on the number of access lines that they serve for the relevant reporting period, consistent with the record in this proceeding.[17]

Respectfully submitted,

COALITION FOR EQUITY IN SWITCHING SUPPORT
Bixby Telephone Company
Chequamegon Communications Cooperative, Inc.
Cross Telephone Company
Farmers Telephone Cooperative, Inc.
Granite State Telephone, Inc.
Hargray Telephone Company, Inc.
Ketchikan Public Utilities
Northeast Florida Telephone Company
Randolph Telephone Membership Corporation
Roanoke and Botetourt Telephone Company
Star Telephone Membership Corporation
Telephone Service Company of Ohio
Vermont Telephone Company, Inc.
Waitsfield and Champlain Valley Telecom
Warwick Valley Telephone Company

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[17] As noted *supra* note 8, to the extent the Commission finds it advisable, it may wish to make conforming changes to section 54.301(a)(2)(ii) of the rules.

APPENDIX A

The Commission should modify section 36.125(j) as follows:

> (j) If ~~during the period from January 1, 1997, through June 30, 2010,~~ the number of a study area's access lines changes ~~increased or will increase~~ such that, under § 36.125(f) the weighting factor would be modified ~~reduced~~, the~~at~~ new ~~lower~~ weighting factor shall be applied to the study area's 1996 unweighted interstate DEM factor to derive a new local switching support factor. The study area will restate its Category 3, Local Switching Equipment factor under § 36.125(f) accordingly. ~~and use that factor for the duration of the freeze period.~~