

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

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

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES AND
THE NEW JERSEY DIVISION OF RATE COUNSEL
ON THE INTERIM PROPOSALS OF THE STATE JOINT BOARD MEMBERS**

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SUMMARY

In response to initial comments, the National Association of State Utility Consumer Advocates (“NASUCA”) and the New Jersey Division of Rate Counsel (“Rate Counsel”) reiterate their recommendation that the Federal Communications Commission (“FCC” or “Commission”) implement interim adjustments to the flawed separations regime, pending more comprehensive reform. The Proposal of the State Members of the Federal State Joint Board on Separations (“State Members”) provides reasonable and feasible interim remedies to the flawed system of separations that has been in place for nearly a decade.

NASUCA and Rate Counsel acknowledge the FCC’s wish to “provide stability for carriers,” but respectfully disagree with the Commission’s decision to extend the separations freeze rather than to correct egregious distortions in the way that carriers allocate costs. The FCC should reconsider its one-year extension, and instead adopt interim measures by the end of June 2010, with implementation of such measures by August 2010. The essential question before the Commission is not whether the State Members’ interim Proposal perfectly reforms the currently outdated separations regime but rather whether it offers a significant improvement that could be implemented in a timely manner pending more comprehensive reform. The State Members’ interim Proposal will improve the accuracy of the apportionment of regulated costs between the intrastate and interstate jurisdictions.

The FCC should adopt the interim proposal that the State Members submitted, pending the FCC’s consideration of longer-term reform and the FCC’s examination of the relationship of separations reform to intercarrier compensation, universal service, and broadband policy. The alternative – allowing billions of dollars to continue to be mis-allocated to intrastate operations – thwarts state regulators’ efforts to ensure just and reasonable rates and to ensure that carriers invest sufficiently in state operations to provide basic local service at adequate service quality levels.

Table of Contents

	Page
I. INTRODUCTION.....	1
II. DISCUSSION	2
a. The FCC prematurely extended the separations freeze by another year.....	2
b. Rationalizing the separations regime and clarifying states' authority to assign and allocate costs for the purpose of intrastate policy and rate-making is in the public interest.....	3
c. Opposition to the State Members' Interim Proposal is not persuasive.	5
III. CONCLUSION	13

I. INTRODUCTION

In response to initial comments¹ submitted regarding the interim adjustments to the jurisdictional separations factors proposed by the State Members of the Federal State Joint Board on Separations (“State Members”),² the National Association of State Utility Consumer Advocates (“NASUCA”) and the New Jersey Division of Rate Counsel (“Rate Counsel”) reiterate their recommendation that the Federal Communications Commission (“FCC” or “Commission”) implement interim adjustments to the flawed separations regime, pending more comprehensive reform.³ The State Members’ Interim Proposal provides reasonable and feasible interim remedies to the flawed system of separations that has been in place for nearly a decade. Furthermore, the FCC’s adoption of the Interim Proposal would be entirely consistent with the “fact-driven” and “data-driven” policy-making that the current FCC supports.⁴ Presently, incumbent local exchange

¹ Initial comments in support of the State Members’ Proposal were submitted by the California Public Utilities Commission and the People of the State of California (“CPUC”); Gila River Telecommunications, Inc. (“GRTI”); NASUCA and Rate Counsel; and the Virginia State Corporation Commission Staff (“VSCC Staff”). (GRTI indicates that the State Members’ Proposal is less desirable than the relief it sought in earlier petitions and filings, but preferable to the status quo. GRTI, at 5). Initial comments opposing the State Members’ Proposal were submitted by AT&T, Inc. (“AT&T”); Cincinnati Bell Telephone Company LLC (“CBT”); GVNW Consulting, Inc. (“GVNW”); John Staurulakis, Inc. (“JSI”); the National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Eastern Rural Telecom Association and Western Telecommunications Alliance (“Associations”); Qwest Corporation (“Qwest”); Sprint Nextel Corporation (“Sprint”); and the United States Telecom Association (“USTelecom”).

² 80-286, Letter from Steve Kolbeck, State Chairman, Federal-State Joint Board on Jurisdictional Separations, to Marlene H. Dortch, Secretary FCC (March 5, 2010) (“State Members letter”).

³ In initial comments, NASUCA and Rate Counsel urged the FCC to adopt the State Members’ proposal before the separations “freeze” expired on June 30, 2010. However, the FCC recently extended the separations freeze until June 30, 2011. *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order (released May 25, 2010), FCC 10-89 (“2010 Separations Freeze Extension Order”).

⁴ See, e.g., Chairman Genachowski’s reference to a “data-driven” review of the Verizon-Frontier transaction. Statement of Chairman Julius Genachowski, *Applications Filed by Frontier Communications*

carriers possess far greater information about their operations than do regulators, with the consequence that regulators' efforts to assess claims about profitability⁵ and to exercise general supervisory oversight are hindered.

II. DISCUSSION

a. **The FCC prematurely extended the separations freeze by another year.**

In its order issued in late May, the FCC extended the separations freeze for yet another year.⁶ The decision to extend the freeze occurred before parties had an opportunity to submit reply comments regarding the State Members' Interim Proposal, and without any mention or discussion of NASUCA's and Rate Counsel's proposal for exogenous treatment of the extension (the extension should trigger review under both state and federal price cap plans) nor any mention of NASUCA's and Rate Counsel's recommendation that the FCC should find it in the public interest to permit state commissions to file for a waiver of compliance with the separation freeze in setting intrastate rates, with

Corporation and Verizon Communications Inc. for Assignment or Transfer of Control, WC Docket No. 09-95, Memorandum Opinion and Order, FCC 10-87, released May 21, 2010; Federal Communications Commission, *Connecting America: The National Broadband Plan*, report submitted to the U.S. Congress, March 17, 2010, at 29 (discussing the application of competition tools on a "fact-driven" basis), at 35 and 37 (discussing developing "data-driven" competition policies); *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, released April 21, 2010, Appendix C (OBI Technical Paper No. 1), at 1 (referring to data-driven policy).

⁵ See, e.g., references by Verizon Massachusetts to its purported negative net income and its effort to "return to profitability." Massachusetts D.T.C. 09-1, *In Re Verizon Service Quality in Western Massachusetts*, Rebuttal Testimony of John Conroy, John E. Sordillo, and Paul B. Vasington, March 16, 2010, at 3, 43, and 44 (regarding purported negative net income and the additional expenses that would be necessary to meet service quality standards), Supplemental Testimony of John Conroy and Paul B. Vasington on behalf of Verizon New England Inc., April 23, 2010, at 17 (re returning to profitability).

⁶ *2010 Separations Freeze Extension Order*.

such waiver filings handled on an expedited basis.⁷ NASUCA and Rate Counsel acknowledge the FCC's wish to "provide stability for carriers,"⁸ but respectfully disagree with the Commission's preference for prematurely extending the freeze in a blanket fashion rather than correcting the egregious flaws in the frozen separations factors. This correction could also have occurred within the requisite time frame, that is, before July 1, 2010. NASUCA and Rate Counsel now urge the FCC to move forward expeditiously with separations reform, both interim and comprehensive. The FCC should reconsider its one-year extension, and instead adopt interim measures by the end of June 2010, with implementation of such measures by August 2010.

b. Rationalizing the separations regime and clarifying states' authority to assign and allocate costs for the purpose of intrastate policy and rate-making is in the public interest.

NASUCA and Rate Counsel concur with VSCC Staff that the State Joint Board Members' Proposal "is a practical approach, which may ultimately be the spark that leads to the long promised separations reform."⁹ The CPUC supports the State Members' proposed steps for reform "with the understanding that they are interim only,"¹⁰ and finds them "a necessary step toward rationalizing the current separations process until full-scale reform can be implemented."¹¹ As the CPUC observes, dramatic changes in the use of special access lines combined with the fact that separations studies are at least nine

⁷ 80-286, Reply Comments of NASUCA and Rate Counsel (April 26, 2010), at 2.

⁸ *2010 Separations Freeze Extension Order*, at para. 1.

⁹ VSCC Staff Comments, at 2.

¹⁰ CPUC Comments, at 1.

¹¹ *Id.*, at 5.

years old mean that the “studies do not reflect current conditions.”¹² On the other hand, GVNW believes that the proposed changes “merit serious evaluation,”¹³ but is concerned that the impact for small rural high-cost companies of implementing the proposal would be to shift costs from the interstate to the intrastate jurisdiction for those companies with loop cost in excess of about 175% of the national average.¹⁴ GNVW also questions whether, under the first proposal (regarding special access costs), billed revenues or settlement revenues would be used, a question that could be resolved prior to the implementation of the proposal.¹⁵

NASUCA and Rate Counsel concur with the CPUC’s position that support for the State Members’ Proposal should not be interpreted as suggesting that state regulators lack jurisdiction over advanced services.¹⁶ Indeed, regardless of the outcome of this proceeding, NASUCA and Rate Counsel continue to assume that state public utility commissions have unambiguous jurisdiction regarding the way that carriers allocate and assign costs to their regulated intrastate operations, and also have jurisdiction over advanced services such as voice over Internet protocol (“VoIP”).¹⁷

¹² Id., at 2.

¹³ GVNW Comments, at 2.

¹⁴ Id., at 4.

¹⁵ Id., at 4.

¹⁶ CPUC Comments, at 6.

¹⁷See recent Examiners’ Report in Maine asserting jurisdiction over VoIP. Maine Public Utilities Commission Docket No. 2008-42, Investigation into Whether Providers of Time Warner “Digital Phone” Service and Comcast “Digital Voice” Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service, Examiners’ Report, May 18, 2010 (finding that voice over internet protocol (VoIP) services provided by Time Warner Cable Digital Phone L.L.C., (TWC) and Comcast Phone of Maine, L.L.C., (Comcast) constitute “telephone services” under Maine law and, thus, are subject to the Commission’s regulation, and further finding that this conclusion is not preempted by federal law. See also Sprint, at 3, observing that state regulators can base intrastate cost allocations on appropriate cost allocation

c. Opposition to the State Members' Interim Proposal is not persuasive.

Not surprisingly, the telecommunications industry opposes the State Members' Proposals for various reasons that NASUCA and Rate Counsel address below, none of which either alone or in aggregate justifies rejecting the State Members' well-considered proposal for implementing short-term corrections to the distorted separations regime that now exists. Among other things, as is discussed below, industry seeks to depict separations as obsolete, irrelevant, and burdensome.

CBT asserts that “[i]n today’s competitive telecommunications marketplace,” the FCC should eliminate separations for carriers that are no longer subject to rate-of-return regulation in any jurisdiction and should simplify separations for rate-of-return carriers,¹⁸ and USTelecom, relying in part on the recommendation in the National Broadband Plan that all carriers move to incentive regulation, contends that the Commission should eliminate separations for all providers.¹⁹ Contrary to the carriers’ assertions, proper separations benefits consumers even where carriers are not subject to rate-of-return

factors.

¹⁸ CBT Comments, at 1-2; see also *id.*, at 5-7.

¹⁹ USTelecom Comments, at 2-3.

regulation.

For example, carriers may use inaccurate representations of their intrastate financial situation to seek to dissuade regulators from requiring investment in local networks to promote service quality.²⁰ Numerous state public utility commissions have been and are continuing to investigate concerns about the quality of basic local service even in the face of industry claims about competitive alternatives purportedly obviating the need for such investigations.²¹ During the transition from basic local service – a transition that is of unknown duration – consumers continue to rely on the public switched telephone network. Carriers assert the need for intrastate rate increases and also seek to justify underinvestment in the network based on the supposed declining profitability of intrastate operations. This supposed decline results directly from the separations freeze and the corresponding distortion of costs and revenues. Thus state regulators require a more accurate view of carriers’ intrastate earnings than they now receive. Contrary to CBT’s assertion,²² adoption of the State Members’ Interim Proposal would benefit consumers by ensuring that regulators have more accurate information about the financial situation of carriers, *regardless of whether they are price cap or rate-*

²⁰ See footnote 5, supra.

²¹ Examples of recently completed and pending state investigations of carriers’ service quality include: Connecticut Department of Public Utility Control (“DPUC”) Docket No. 10-04-12, Notice of Violation and Assessment of Civil Penalty in the Amount of One Million One-hundred and Twenty Thousand Dollars (\$1,120,000), DPUC Proceeding Pursuant to Section 16-41 of the General Statutes of Connecticut to Determine Whether the Southern New England Telephone Company d/b/a AT&T Connecticut Should Be Fined for Failure to Comply with Quality of Service Standards for the Provision of Telecommunications Services, May 20, 2010; West Virginia Public Service Commission Case No. 08-0761-T-GI, Verizon West Virginia Inc., Investigation into Quality of Service, Order, May 10, 2010; Massachusetts Department of Telecommunications and Cable Docket T.C. 09-1, In Re Verizon Service Quality in Western Massachusetts (pending).

²² CBT Comments, at 2.

*of-return carriers.*²³

AT&T contends that for the largest carriers, which are governed by price cap regulation, the State Members' interim proposal would not "have any real-world effect on anything."²⁴ NASUCA and Rate Counsel again disagree. Cost information enables state and federal regulators to periodically assess whether price cap regulation is yielding just and reasonable rates, and adequate service quality. The nine-year freeze has led to distorted cost allocation, which directly affects rates, and, as explained above, revised separations factors would represent an exogenous event, triggering price cap review.

Carriers also contend that as a result of expanding competition, states' deregulation of services and the evolution of technology, separations reform is obsolete.²⁵ NASUCA and Rate Counsel disagree. USTelecom contends that reforming separations is "just busy work."²⁶ However, contrary to US Telecom's assertions, competition does not yet provide an adequate "check on prices."²⁷

Contrary to the carriers' speculations, effective competition does not yet exist in all relevant geographic and product markets. Accurate data continues to be essential to informed policy making, as is evidenced in the FCC's most recent report assessing competitive conditions in the mobile wireless market. The FCC calculated Earnings Before Interest, Taxes, Depreciation, and Amortization ("EBITDA") margins of over 20

²³ See also JSI Comments, at 2-3, asserting that the State Members' proposal should not apply to rate-of-return carriers.

²⁴ AT&T Comments, at 2.

²⁵ See, e.g., CBT Comments, at 6-7.

²⁶ USTelecom, at 4.

²⁷ Id.

percent for the seven largest mobile wireless carriers and over 30 percent for the four largest carriers (AT&T, MetroPCS, T-Mobile, and Verizon Wireless).²⁸ During the transition to effective competition, accurate cost data continues to be important. Contrary to Qwest's assertion, deregulation, price cap regulation, and competition have not yet evolved to the point to render jurisdictional separations unnecessary.²⁹

Some oppose the use of revenues as the basis for cost allocation. According to Sprint, although re-evaluation of special access cost allocation is overdue, direct assignment of special access cost and investment should not be based on revenue streams.³⁰ AT&T also opposes the use of revenues to allocate costs as inconsistent with earlier Commission findings.³¹ As NASUCA and Rate Counsel indicated in their initial comments, "theoretically, direct cost assignment based on studies of actual use would be preferable to the use of a revenues-based assignment of costs,"³² but "[a]lbeit not perfect, the use of a revenues-based allocator for special access services is far preferable to the continuing use of separations factors that have been frozen for nine years."³³ AT&T opposes the percentage allocations proposed by State Members for the local loop investment as arbitrary and as "pre-judg[ing] the answer to a number of questions that the

²⁸ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66 (Terminated), Fourteenth Report (rel. May 20, 2010), at 12-13. The FCC calculated an EBITDA margin of 46.3% in the second quarter of 2009 for Verizon Wireless and 38.3% in the same time period for AT&T. See, generally, *id.*, at 12-15, 123-129.

²⁹ Qwest Comments, at 2, note 3.

³⁰ Sprint Comments, at 2.

³¹ AT&T Comments, at 15.

³² NASUCA/Rate Counsel Comments, at 8.

³³ *Id.*, at 9.

Commission itself has not considered or answered.”³⁴ The percentages proposed by State Members clearly provide a *more accurate* reflection of today’s use of the network than does the current and outdated 25% allocator. The FCC, exercising its administrative expertise and judgment, possesses the authority to adopt the State Members’ allocation percentages as reasonable gauges of the changing use of the local loop. Leaving the 25% allocator intact is far more egregious, because it totally fails to reflect changing consumer demand patterns.

AT&T asserts that the State Members’ Proposal purportedly shows that ARMIS-derived special access returns are meaningless.³⁵ But unless and until carriers provide complete and comprehensive data in lieu of the ARMIS data, the FCC must continue to rely on the special access cost, price and return data that has been submitted in the FCC’s special access docket.

Some oppose the State Members’ Interim Proposal because it purportedly would require work, resources, and time, and because carriers have re-assigned separations staff to other parts of their businesses.³⁶ The FCC should give this argument little weight: The opposing parties fail to quantify the purported burden and cost of implementing the proposal, especially compared to the billion-dollar benefits that would accrue to the intrastate jurisdiction. NASUCA and Rate Counsel are not persuaded, for example, that AT&T with its fifty million access lines across the nation lacks the requisite

³⁴ AT&T, at 19.

³⁵ Id., at 16-17.

³⁶ See, e.g., CBT Comments, at 3-4; AT&T Comments, at 4-5; USTelecom Comments, at 3.

sophistication to modify its billing systems to gather the necessary data.³⁷ The fact that AT&T repeatedly sought to expand the scale of its operations through a series of acquisitions leading to the fifty million lines it now professes to serve, and now cites its size as an excuse to avoid accountability, rings hollow. AT&T's mergers and acquisitions (which occurred as a direct result of its own business decisions and which led to its current scale) should not now justify AT&T's non-compliance with different steps for separations reform. Furthermore, carriers' reassignment of staff as necessary to ensure accountability to regulators should be considered a normal cost of doing business and not a reason to avoid improving the distorted separations regime that now exists.

Several commenters contend that separations reform should not occur in isolation, but rather should occur in tandem with universal service fund ("USF") and intercarrier compensation ("ICC") reform.³⁸ NASUCA and Rate Counsel understand the theoretical appeal of reforming USF, ICC, and separations simultaneously but caution the FCC against this line of reasoning because the pursuit of such a Herculean endeavor could become an excuse for endless delay of action on any one of these three critically

³⁷ AT&T Comments, at 5.

³⁸ Qwest Comments, at 2-3, 6-7; Associations Comments, at 8-10.

important areas. The State Members' proposal is interim in design and would not in any way prevent more comprehensive separations reform.

NASUCA and Rate Counsel disagree with Qwest's characterization that the State Members' interim proposal "merely tinkers with the rules to achieve a more favorable allocation of costs from the States' viewpoint."³⁹ The allocation of costs affects whether intrastate rates are just and reasonable. Furthermore, a change in separations factors would constitute an exogenous event under price caps, which, in turn should trigger re-evaluation of rates under price caps. The interim proposal includes long-overdue measures to align costs more accurately with the underlying services. NASUCA and Rate Counsel do not dispute Qwest's recommendation that separations rules "be as administratively simple and competitively neutral as possible,"⁴⁰ but believe that the State Members' Interim Proposals achieve both goals.

AT&T also seeks to do an end-run around the State Members' proposal by summarily concluding that Section 10 of the Act requires forbearance from any allocation factors that would not be used for interstate services.⁴¹ If that were true, AT&T could have no objection to states adopting their own allocation factors for intrastate services.

The Associations oppose the proposed cost re-allocations for the C&WF Category 1 and assert that the State Members' proposal would create upward pressure on

³⁹ Qwest Comments, at 5; see also AT&T Comments, at 4.

⁴⁰ Qwest Comments, at 7.

⁴¹ AT&T Comments, at 8-11.

broadband rates.⁴² The Associations further recommend that rate-of-return carriers have the option but not the requirement of changing special access investment and expenses levels.⁴³ According to the Association's illustrative calculation of the impact of allocating costs to DSL and to their interpretation of the State Members' Proposal, interstate revenue requirements for DSL could increase as much as 340 percent.⁴⁴

NASUCA and Rate Counsel concur with the FCC's conclusion cited by the Associations that broadband prices affect broadband adoption rates (and fully support affordable broadband rates),⁴⁵ but disagree that the Commission should not seek to reallocate costs based on the evolving use of the local loop category. As NASUCA and Rate Counsel understand the Associations' argument, the FCC's National Broadband Plan implicitly justifies the Associations' opposition to reforming the allocation of the local loop – that is, any reform that might lead to an increase in broadband rates should be rejected.⁴⁶ The result is that basic local service is paying for the broadband network.⁴⁷ The Associations have not provided the underlying data for their calculations nor have they demonstrated that such broadband rate increases would be necessary. Furthermore, where carriers sell broadband service as part of a bundled package, NASUCA and Rate

⁴² Associations Comments, at 2, 5-8.

⁴³ *Id.*, at 4.

⁴⁴ *Id.*, at 6.

⁴⁵ *Id.*, at 7-8.

⁴⁶ See also JSI Comments, at 3-5 (asserting that the State Members' Proposal was issued before the release of the National Broadband Plan, and therefore does not take it into account).

⁴⁷ See 47 U.S.C. § 254(k).

Counsel assume that the price for the bundled intrastate and interstate service need not change (any shift in cost *to* DSL would be offset by a corresponding shift *away* from the local exchange component). Also, ultimately, where carriers face competition in broadband markets, the markets will affect the prices that carriers can charge, and will cause carriers to become more efficient in their supply of broadband services. Finally, NASUCA and Rate Counsel respect and support the current FCC's efforts to engage in fact-driven analyses, which the State Members' Proposal would further.

III. CONCLUSION

The essential question before the Commission is not whether the State Members' Interim Proposal perfectly reforms the currently outdated separations regime but rather whether it offers a significant improvement that could be implemented in a timely manner pending more comprehensive reform. NASUCA and Rate Counsel concur with the CPUC that "the proposed interim allocations are more rational than the current rules."⁴⁸ However, although the adoption of interim steps is critically important, it should not substitute for comprehensive separations reform. NASUCA and Rate Counsel concur with the CPUC that the Joint Board should issue a recommendation for permanent reform of the outdated separations scheme.⁴⁹

The State Members' Interim Proposal will improve the accuracy of the

⁴⁸ CPUC Comments, at 5.

⁴⁹ *Id.*, at 5-6.

apportionment of regulated costs between the intrastate and interstate jurisdictions. Furthermore, carriers could implement the State Members' Interim Proposal without confronting significant implementation or operational issues, and within a reasonable time frame pending more comprehensive reform.

For the reasons set forth in initial comments and in these reply comments, the FCC should adopt the interim proposal that the State Members have submitted, pending the FCC's consideration of longer term reform and the FCC's examination of the relationship of separations reform to intercarrier compensation, universal service, and broadband policy. The Commission should correct the *2010 Separations Freeze Extension Order* to allow this result.

Respectfully submitted,

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