Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Jurisdictional Separations and Referral to	)	CC Docket 80-286
the Federal-State Joint Board	)	

COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

May 24, 2017

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I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these comments in response to the two Public Notices issued in April 2017 by the Federal-State Joint Board on Separations ("Joint Board") in the above-captioned proceeding. The first Public Notice[2] seeks comment on possible comprehensive reform of the Federal Communications Commission's ("FCC") Part 36 separations rules. The second Public Notice[3] seeks comment on how the FCC's February 2017 Report and Order[4] revising certain of its Part 32 Uniform System of Accounts ("USOA") accounting rules affect the agency's Part 36 separations rules.

[1] NTCA represents more than 800 independent, community-based telecommunications companies. All NTCA members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

[2] *Federal-State Joint Board on Jurisdictional Separations Seeks to Refresh the Record on Issues Related to Jurisdictional Separations*, CC Docket No. 80-286, Public Notice, FCC 17J-1 (rel. Apr. 24, 2017) ("Comprehensive Reform Public Notice").

[3] *Federal-State Joint Board on Jurisdictional Separations Seeks Comment on Referral for Recommendation of Rule Changes to Part 36 as a Result of Commission Revisions to Part 32 Accounting Rules*, CC Docket No. 80-286, Public Notice, FCC 17J-2 (rel. Apr. 24, 2017) ("Part 32 Public Notice").

[4] *Comprehensive Review of the Part 32 Uniform System of Accounts, Jurisdictional Separations and Referral to the Federal-State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, Report and Order, FCC 17-15 (rel. Feb. 24, 2017) ("Part 32 Order").

Current separations rules may ultimately need modification, if not complete overhaul, to reflect the evolution of the communications marketplace. But precisely because that evolution is ongoing, and for other reasons articulated herein with respect to the prospect of recently reformed systems that "sit atop" the current separations foundation, the Joint Board should, for now, recommend retention of the FCC's existing Part 36 rules.

Trends in the telecommunications marketplace – in the form of changing technologies and consumer preferences – are already producing separations shifts of their own accord under current rules, and the Joint Board's deliberations on comprehensive reform should therefore focus on the "end-state" that will emerge rather than the market as it continues to evolve today. Given these trends – and given that the recently reformed High Cost Universal Service Fund ("USF") and intercarrier compensation ("ICC") mechanisms are actually built upon a foundation that presupposes the current separations framework – the Joint Board should recommend that existing separations rules be retained while these reforms are being implemented and the evolution of technology continues. Reform of separations rules now could create disruption and threaten the success of USF and ICC reforms even as they are not yet complete and while additional work remains to be done to ensure their effectiveness.

The Joint Board should – if it moves forward with any recommendations for separations reform – solicit comment on specific, concrete reform proposals prior to issuing a recommended decision. Such procedural measures are essential to ensure that, by working on the "separations foundation," no damage is being done to the recently reconstructed USF and ICC structures that sit atop that foundation. It should also consider proposing editorial and non-substantive amendments to the FCC's Part 36 separations rules as a result of reforms to that agency's Part 32 accounting rules.

II. SEPARATIONS SHIFTS ARE ALREADY OCCURRING AT THE PACE OF CONSUMER DEMAND AND TECHNOLOGICAL INNOVATION. GIVEN THOSE TRENDS AND THE FACT THAT EXISTING USF AND ICC MECHANISMS – EVEN AS REFORMED – ARE BASED UPON EXISTING SEPARATIONS RULES, THE JOINT BOARD SHOULD FOCUS ON REFORM WITHIN THE CONTEXT OF THESE DEVELOPMENTS.

The Comprehensive Reform Public Notice asks parties to "refresh" the record in this proceeding in anticipation of the Joint Board considering and then issuing to the FCC a recommended decision with respect to comprehensive separations reform. As discussed further below, the Joint Board's current discussion of separations reform must focus on and take as context the "end-state" produced by two important and contemporaneous factors: (1) ongoing shifts in the consumer and technological marketplace that are themselves driving underlying changes in the separation of costs and (2) a regulatory environment that includes substantial USF and ICC reforms made atop and within the context of the existing separations framework. Each of these factors must be considered in developing a strategy for tackling separations reforms and considering whether to dismantle, preserve, or modify the existing framework.

With respect to the telecommunications marketplace, the ongoing IP transition is continuing apace, having a profound influence on every communications service which a consumer can choose today – and consumers are responding. Consumers are taking advantage of the expanded universe of IP-enabled services to which they now have access and are continuing a rapid shift away from the services that existed when today's separations rules were first crafted. Perhaps most directly relevant to the purposes of the instant proceeding is the increased consumer demand for standalone broadband Internet access service ("BIAS"). On top

of that is the increased consumer use of over-the-top ("OTT") services, such as OTT video,[5] and Internet of Things ("IOT") devices.[6] In addition, consumers' rapid migration to Voice over Internet Protocol ("VoIP") (facilities-based and OTT)[7] and mobile wireless services continues as well.[8]

As it relates to the instant proceeding, *such technology transitions are already of their own accord carrying out separation shifts at the pace of consumer demand*. More specifically, as an example, under current Part 36 rules, the costs associated with a voice only Plain Old Telephone Service ("POTS") or voice/data line are currently subject to the 75/25 gross allocator rule, assigning 75 percent of the costs of that line to the intrastate jurisdiction. Yet once a customer drops their traditional voice line in favor of a standalone broadband option, *100 percent* of the costs of that line are directly assigned to the *interstate jurisdiction under today's separations rules*. A consumer's move to a facilities-based VoIP service as a replacement for a traditional POTS line has a similar effect, shifting additional costs to the interstate jurisdiction. Thus, as consumers increasingly adopt the kinds of services that are interstate or jurisdictionally

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[5] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 16-247, Eighteenth Report, DA 17-71 (rel. Jan. 17, 2017), ¶¶ 128-132.

[6] *See* Department of Commerce Internet Policy Task Force & Digital Economy Leadership Team, *Green Paper: Fostering the Advancement of the Internet of Things*, (rel. Jan. 12, 2017) (pointing to estimates that "between the years of 2015 and 2020, the number of connected devices in the United States will nearly double from 2.3 billion to 4.1 billion"), available at: https://www.ntia.doc.gov/files/ntia/publications/ iot_green_paper_ 01122017.pdf.

[7] *See* Voice Telephone Services: Status as of December 31, 2015, Industry Analysis and Technology Division Wireline Competition Bureau, Federal Communications Commission (November 2016), p. 2 (finding that over the period 2012 to 2015, for retail consumers, "interconnected VoIP subscriptions increased at a compound annual growth rate of 12%").

[8] *See* Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 16-137, Nineteenth Report, DA 16-1061 (rel. Sep. 23, 2016), ¶ 13 (chart II. B. 1.).

mixed in nature, this has an "organic" effect of altering the underlying separations treatment of the networks that enable such services even as the same separations framework governs.

Contemporaneous to these changes in the telecommunications marketplace (and their consequent separations shifts occurring even under current rules), the regulatory environment that exists today has undergone substantial change and reform. But such change has been predicated and built upon the existing separations foundation; to take that foundation apart now could very well undermine, or at the very least complicate, the reforms that were built and still rest atop it. For example, the FCC in 2016 revised its rules governing High-Cost USF support for broadband loops, creating a mechanism that for the first time explicitly supports broadband-only customers under a modernized CAF mechanism. While additional work needs to be done to ensure that this new mechanism is successful in making such a service *affordable* and ensuring that reforms touch additional consumers with faster speeds,[9] it sets in motion the increased consumer adoption of standalone broadband services *the cost of which are assigned entirely to the interstate jurisdiction under current separations rules*.[10] In addition, in terms of the FCC's ICC rules, switched access costs were frozen and both costs and rates are transitioning down under reforms adopted in 2011,[11] and it seems clear that traditional switched access charges are becoming less relevant to the emerging all-IP world.

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[9] *See* Ex Parte Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission (the "Commission"), WC Docket No. 10-90 (fil. May 1, 2017) (pointing to several "punch list" items that the Commission should complete work on to promote the proper functioning of the RLEC High Cost program and to ensure that reforms adopted in 2016 will function as intended and will advance the statutory mandates governing universal service); *See also*, Petition for Reconsideration and/or Clarification of NTCA, WC Docket No. 10-90, et al. (fil. May 25, 2016).

[10] As noted in greater detail in Section III, *infra*, for rate-of-return carriers with frozen categorization factors, shifts in consumer usage of interstate services are taking place, yet due to frozen categorization factors interstate costs assignments are not taking place at the pace of consumer demand.

[11] *Connect America Fund,* WC Docket No. 10-90, et al., Report and Order and Further Notice of

Put together, these marketplace trends and regulatory changes are occurring atop and within the existing separations structure; there is nothing to indicate that the existing separations framework is holding back these trends. Moreover, these changes in the marketplace and in regulation are already having significant implications themselves *upon* traditional separations methods – they are in fact, under current rules, carrying out separation shifts *at the pace of consumer demand and technological innovation*. Indeed, as discussed further below, the changes to regulatory regimes were made atop, rather than departing from, existing separations rules. Pulling at separations threads <u>*now*</u> by undertaking comprehensive reform, particularly as the marketplace continues to shift and the substantial regulatory changes that have been made in recent years continue to be transitioned and take effect, could impact the substantive effectiveness of reforms made to High Cost USF and ICC mechanisms.

To be clear, this discussion should not be interpreted as an assertion that the current separations rules should continue in perpetuity without any modification or that there is no need to consider comprehensive reform for the long-term. Rather, this discussion is intended to ensure that the "end-state" that will result from marketplace and regulatory shifts is the focus of the Joint Board's current separations reform discussions. In other words, the Joint Board should understand that "end state," account for the fact that the market and regulatory environment are already transitioning separations to its end-state, and consider the cost and benefits of any comprehensive rules changes at this time to account for the marketplace that will emerge. Moreover, as discussed in the section that follows, the Joint Board should take account of the fact that many recent significant and substantive policy changes rest atop a foundation of the

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Proposed Rulemaking, FCC 11-161 (rel. Nov. 18 2011) ("*USF/ICC Transformation Order*"), ¶¶ 736-810.

current separations rules – changing those rules now might only damage or disrupt the ongoing implementation of and transitions built within those reforms.

III. THE FEDERAL COMMUNICATIONS COMMISSION SHOULD IN THE NEAR TERM ENSURE THAT REFORMED USF AND ICC MECHANISMS ACHIEVE DESIRED POLICY OUTCOMES (AND UNDERTAKE ADDITIONAL SUBSTANTIVE USF AND ICC REFORMS AS NECESSARY THAT ALSO FURTHER THOSE DESIRED OUTCOMES), RATHER THAN REMAKE THE SEPARATIONS RULES UPON WHICH THOSE REFORMS WERE DESIGNED

The Commission should for now retain existing separations rules – with a limited exception that grants RLECs a one-time opportunity to update Part 36 categorization factors – for reasons addressed below. This would ensure that High Cost program and other regulatory reforms critical to RLECs and their subscribers can be completed and would avoid any disruption that could undermine the effectiveness of these reforms. It would also allow the natural evolution of technology changes already causing substantial shifts in cost assignments even under current rules to effectively carry out separations shifts at the pace of consumer demand and technological innovation. As High Cost and other regulatory reforms are implemented and as ensuing marketplace transitions occur (*e.g,* the reforms enable more rural consumers to adopt broadband-only services that are interstate in nature), the FCC can then turn its attention to evaluating the need for any modifications to separations rules that both effectuate the purposes of those reformed programs and account for the emerging all IP environment.

As discussed above, the FCC has over the last six years substantively remade the regulatory landscape in which RLECs operate today. The *2011 USF/ICC Transformation Order* set in motion a reduction in RLECs' switched access rates and adopted mechanisms designed to enable these carriers to continue recovering those costs.[12] The FCC has also nearly remade the

[12] *Id.*, ¶¶ 847-932.

High Cost USF program, modernizing the program for the broadband world in which these carriers operate. Most importantly, these reforms were made on top of existing separations rules. Put another way, existing separations processes are the foundation on which RLECs' existing cost recovery mechanisms are built. Pulling at separations threads at this juncture would provide little apparent benefit but could severely complicate efforts to see the reforms implemented successfully. Shifting the allocation of costs faster than they are already shifting at the pace of consumer demand could, for example, result in additional demand on federal High-Cost support mechanisms that are already insufficient and not properly sized to handle such shifts or even to provide RLECs with the support necessary to achieve reasonably comparable broadband-only rates as required by statute. Reforms that reallocate costs amongst jurisdictions *now* could confound the careful balance struck in many USF and ICC reforms, and ultimately undermine, rather than advance, important public policy objectives related to technology transitions and universal service.

Moreover, even as the High Cost USF program has been substantially reformed, critical additional work remains, work that is necessary to ensure that those reforms are *successful* for every rural consumer. Work on a sufficient budget that promotes rather than undermines the availability and affordability of broadband for rural consumers,[13] introducing predictability into

[13] *See Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (fil. Mar. 31, 2017) (discussing "the negative impacts of continuing universal service fund ("USF") budget shortfalls on the availability and affordability of broadband in rural America, including the fewer number of locations that would be reached over the next decade under the cost model, the higher rates that consumers will continue to pay for standalone broadband notwithstanding reforms, and the chilling effect upon investments arising out of the unpredictability of the new budget control mechanism under the non-model mechanism").

limits on operational expenditures,[14] and resolving competitive overlap processes,[15] among other things, are conditions precedent to a properly functioning High Cost USF program that will promote standalone broadband adoption and continue the IP transition that is already producing the separations shifts as discussed herein. The FCC would be better served by turning its attention and limited resources to these immediate substantive needs rather than chipping (or hacking) away at the separations foundation beneath reforms that are not yet fully completed and/or are hitting their stride. Such changes risk creating and enhancing uncertainty, rather than allowing carriers to adjust to and manage in light of the substantive reforms adopted over the past several years.

It must also be noted that in addition to serious question as to whether there is any meaningful benefit to be gained from such reforms in light of marketplace trends, it is quite clear that the burdens that would arise out of separations reform almost certainly outweigh any benefits. In the wake of comprehensive separations reform, smaller providers – already stretched thin with regulatory compliance, adjustment to reformed mechanisms, and the need to operate under insufficient budgets – would be forced to return to a pre-2001environment, retraining staff and revising internal procedures and cost studies to come into compliance with newly adopted Part 36 rules. Even worse, given the trends in technologies noted above, as well as likely changes in regulatory regimes at both the state and federal levels to account for such trends, any

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14 *See Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (fil. May. 1, 2017) ("Presuming that the goal of such a cap is to provide clear guidance to carriers regarding what the Commission considers efficient operations, carriers must be able to plan and execute effectively against such a cap – which is far more difficult if the cap is "reset" every few years rather than being a set formula indexed like the corporate operations expense cap.")

15 *See Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (fil. May 9, 2017) (asking that the Commission "specify as soon as possible the 'dataset' that will be used as the preliminary baseline for competitive overlap determinations for CAF-BLS support" and that it also "clarify how competitive overlap data will be validated").

reformed separations rules could soon be outdated. Thus, much of the effort to come into compliance with new in the very near term would be wasted.

While comprehensive separations reform need not be undertaken at this time due to the shifting technology and regulatory trends discussed above, the FCC should grant rate-of-return carriers with frozen categorization factors a one-time option to "unfreeze" their part 36 category relationships and cost allocations provided that resulting adjustments can be made in tariff rate calculations. For these carriers, the technology shifts noted above are not carrying out separations shifts at the pace of consumer demand; shifts in consumer usage of interstate services are taking place, yet due to frozen categorization factors interstate costs assignments are not taking place at the pace of consumer demand. RLECs that froze their categorizations years ago now find themselves hindered by outdated cost categorizations that limit their ability to recover their costs, and they should be provided with the ability to calculate categories of investment and expenses based on today's actual data, rather than allocations reflecting a network investment environment fifteen years old. Unlike more wide-ranging separations reform, this would represents a simple, straightforward exercise to recalibrate (but not upend) the separations framework for companies for whom the frozen categories are extremely outdated.

IV. THE JOINT BOARD SHOULD SOLICIT COMMENT ON SPECIFIC SEPARATIONS REFORM PROPOSALS PRIOR TO ISSUING ANY RECOMMENDED DECISION IN THIS PROCEEDING.

Should the Joint Board move forward with adopting a decision recommending near term comprehensive reform of existing separations rules – despite the concerns noted herein – it should release and seek comment on a draft recommended decision prior to issuance to the FCC. As explained above, near term comprehensive reforms to separations processes are very likely to be highly disruptive to both the success of USF and ICC reforms and to small companies' day-

to-day operations. By making a draft recommended decision available, interested stakeholders can analyze the expected effects of specific changes in methodology and fully inform the Joint Board (and ultimately the FCC) of potential ramifications for recent ICC and USF reform initiatives more generally and RLECs more specifically. Such an open and transparent public process would promote an ongoing effort to fine-tune draft proposals and minimize unnecessary complications that could otherwise emerge further down the road, complications that could inadvertently threaten the success of above-referenced reforms. Again, while NTCA continues to believe that comprehensive separations reform need not take place in the short-term, any effort to do so must be done via a public and ongoing discussion amongst interested stakeholders in order to limit disruption.

Soliciting public comment of potential recommended decisions would also be consistent with processes newly adopted by the FCC, under which "open meeting" items to be considered by the commissioners are available well ahead of the meeting.[16] This process enables interested industry stakeholders and the public at large, as well as policymakers, to identify possible improvements to, mistakes in, or unintended consequences of proposed rules and draft orders (sometimes earlier in the rulemaking process in the case of proposed rules) and engage in more open and productive back-and-forth discussions. Such a process cannot but help to produce better results for every stakeholder involved, and the Joint Board would well-advised to adopt similar processes in this proceeding.

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[16] *Federal Communications Commission, FCC Chairman Pai Takes First Step to Increase Transparency of Rulemakings, Pilot Program Will Release Documents to Public for the First Time*, Press Release (rel. Feb. 2, 2017).

V. THE JOINT BOARD SHOULD CONSIDER PROPOSING LIMITED, CONFORMING AMENDMENTS TO THE FCC'S PART 36 SEPARATIONS RULES AS A RESULT OF REFORMS TO THAT AGENCY'S PART 32 ACCOUNTING RULES.

The Joint Board should also consider non-substantive, editorial conforming amendments to the FCC's Part 36 separations rules to account for revisions made to that agency's Part 32 USOA rules adopted in February 2017. In doing so, it should put out for comment any recommended Part 36 rules amendments prior to formal issuance of a recommended decision to the FCC to ensure that all interested parties can provide necessary feedback.

In adopting amendments to its Part 32 USOA rules in February, the FCC among other things consolidated "Class A" and "Class B" accounts contained in those rules, effectively eliminating the distinction between the two classes of carriers for the purposes of Part 32. The resulting consolidation now requires all carriers subject to Part 32 to record assets, expenses and revenues in the approximately 80 accounts in what was formerly known as Class B accounts, a change that reduced the accounts that Class A carriers were once required to maintain by one-third.[17] However, several separate sections of the FCC's Part 36 provisions continue to reference "Class A telephone companies" and "Class B telephone companies" or "Class A companies" and "Class B companies." Non-substantive, editorial amendments to Part 36 separations rules to mirror the changes to Part 32 rules may be necessary to "clean up" those rules, and adopting such changes could avoid any possible confusion. In addition, in the FCC's Part 36 rules, there are several instances where price cap carriers are directed to allocate costs in specific Part 32 accounts; these may need amendment as well to reflect that those carriers' newly granted option to adopt Generally Accepted Account Practices in lieu of Part 32 accounting methods.

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[17] Part 32 Order, ¶ 16.

VI. CONCLUSION

Given the trends discussed above – and given that the recently reformed USF and ICC mechanisms continue to be built upon a foundation that includes the current separations framework – the Joint Board should recommend retention of the existing separations rules. The Joint Board should also solicit comment on specific separations reform proposals prior to issuing a recommended decision and should consider proposing conforming amendments to the FCC's Part 36 separations rules as a result of reforms to the agency's Part 32 accounting rules.

Respectfully submitted,

By: /s/ Michael R. Romano
Michael R. Romano
Senior Vice President –
Industry Affairs & Business Development
mromano@ntca.org

By: /s/ Brian J. Ford
Brian J. Ford
Senior Regulatory Counsel
bford@ntca.org

4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203
703-351-2000 (Tel)

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