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

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

REPORT AND ORDER

Adopted: December 11, 1995; Released: December 12, 1995

By the Commission:

I. INTRODUCTION

1. In this Order, we extend the duration of the two-year indexed cap ("interim cap") on the magnitude of the Universal Service Fund ("USF") for an additional six-month period.[1] The cap was intended to be effective as an interim measure moderating the growth of the USF during the pendency of our broader rulemaking revising the Part 36 jurisdictional separations rules governing the USF.[2] On October 3, 1995, we issued a notice of proposed rulemaking,[3] proposing the extension of the cap for an additional six months and referred the issues raised in the *Extension Notice* to the Federal-State Joint Board for a recommended decision.[4] The Joint Board has recommended extension of the interim indexed USF cap for an additional six months.[5] For the reasons discussed in this report and order (*Extension Order)* and in the Joint Board's *Extension Recommendation,* we adopt the recommendations of the Joint Board and the interim rules set forth in the Appendix to this order.

II. BACKGROUND

2. In 1984, the Commission adopted the Joint Board's recommendations to enact USF rules to promote "universally available telephone services at reasonable rates."[6] These rules create high-cost assistance mechanisms designed to enable telephone companies and state regulators to establish in areas with high operational costs local exchange service rates that do not greatly exceed nationwide average levels.[7]

3. In 1993, we announced our intention to reappraise the USF high-cost assistance mechanisms to determine whether changes were needed to better tailor the USF to the goal of promoting universally available telephone service at reasonable rates.[8] We imposed an indexed cap on the magnitude of the USF to moderate growth in the USF for the anticipated duration of that rulemaking period.[9] The interim cap is scheduled to expire on January 1, 1996.[10]

4. In advance of the proposed rulemaking,[11] we requested comments on several policy questions relating to high-cost assistance as well as on two broad alternatives to the high-cost assistance mechanisms of Part 36.[12] On July 13, 1995, we issued a notice of proposed rulemaking and notice of inquiry ("Notice") proposing revisions to our USF rules.[13] On August 31, 1995, in response to requests from interested parties, and because we concluded it would serve the public interest, we extended to October 10 and November 9, 1995, the deadlines for filing of comments and reply comments in that USF rulemaking.[14] The resulting record includes 186 comments and 44 reply comments from a diverse group of local exchange carriers ("LECs"), interexchange carriers, trade associations, governmental organizations, citizens' groups and other parties interested in universal service.

5. On October 3, 1995, we issued a notice of proposed rulemaking, proposing the extension of the interim cap for an additional six months.[15] We referred the issues raised in the *Extension Notice* to the Joint Board for a recommended

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[1] 47 C.F.R. § 36.601(c) (1994). Under the interim cap, growth in the magnitude of the USF is indexed to growth in the total number of working loops. *Id.; see also* Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, *Report and Order,* 9 FCC Rcd 303, 305, ¶ 20 (1993) (*Interim Order).* A working loop is "[a] revenue producing pair of wires, or its equivalent, between a customer's station and the central office from which the station is served." 47 C.F.R. Part 36, Appendix-Glossary (1994).

[2] *Interim Order, supra* note 1, at 303, ¶ ¶ 1-2.

[3] Amendment of Part 36 of the Commission's Rules And Establishment of a Joint Board, *Notice of Proposed Rulemaking,* 60 Fed. Reg. 52,359 (1995) (*Extension Notice).*

[4] *Id.,* ¶ ¶ 2, 16. Section 410(c) of the Communications Act requires that the FCC refer all proposed changes in the jurisdictional separations between interstate and intrastate operations of common carrier property and expenses to a Federal-State Joint Board ("Joint Board") for a recommended decision. Section 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 410(c).

[5] Amendment of Part 36 of the Commission's Rules And Establishment of a Joint Board, FCC 95J-1 (released December 8, 1995) (*Extension Recommendation).*

[6] Amendment of Part 67 of the Commission's Rules And Establishment of a Joint Board, *Decision and Order,* 96 FCC 2d 781, 794, ¶ 29 (1984).

[7] *Id.,* at 781, ¶ 30

[8] Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, *Notice of Proposed Rulemaking,* 8 FCC Rcd 7114, 7114-15, ¶ ¶ 2, 11-15 (1993) (*Interim Notice).*

[9] *Interim Order, supra* note 1, at 303, ¶ 1.

[10] 47 C.F.R. § 36.601(c).

[11] Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, *Notice of Inquiry,* 9 FCC Rcd 7404, 7406 n.5 (1994).

[12] *Id.*

[13] Amendment of Part 36 of the Commission's Rules And Establishment of a Joint Board, *Order,* CC Docket No. 80-286, FCC 95-282, at 10, ¶ 17 (rel. July 13, 1995).

[14] Amendment of Part 36 of the Commission's Rules And Establishment of a Joint Board, *Order,* CC Docket No. 80-286, DA 95-1876, at 2, ¶ 4 (rel. Sept. 1, 1995).

[15] *Extension Notice, supra* note 3.

decision.[16] In the *Extension Notice,* we noted that we had limited the duration of the interim cap to two years in the belief that two years would be sufficient for the completion of the Part 36 USF jurisdictional separations rulemaking.[17] We also emphasized that because of the complexity of the issues in the rulemaking, the rulemaking would take more time than the anticipated two years to complete, despite diligent effort by the Commission and Joint Board staff and interested parties.[18] We proposed a six-month extension to the interim cap because we believed that an additional six months would be sufficient to complete the rulemaking in view of the progress made to that time. We sought comment on the proposed extension and also invited interested parties to propose longer or shorter extensions, with accompanying justifications for the length of time proposed.[19]

6. In its recommended decision released December [ ], 1995, the Joint Board recommended extending the interim cap for an additional six-month period. In its recommended decision, the Joint Board specifically reached no conclusions regarding how the issues raised in connection with the USF jurisdictional separations rulemaking should be permanently resolved.[20]

III. SUMMARY OF JOINT BOARD'S EXTENSION RECOMMENDATION

7. In its *Extension Recommendation,* the Joint Board initially observed that some parties reiterated their opposition to the current interim cap in their comments.[21] The Joint Board rejected suggestions that the limitations on the USF imposed by the interim cap are incompatible with the goal of universal service. The Joint Board noted that the Commission's commitment to universal service goals can be found in the Commission's intention to proceed with the underlying USF rulemaking and its decision to use the interim cap to moderate the growth of the USF while ensuring the continued availability of local telephone service at reasonable rates.[22] Other commenters contended that the interim cap is unnecessary because the burden the USF imposes on interexchange carriers is outweighed by the benefit upgrades to the local networks made possible by the USF, and that when it is expressed on a per minute basis, the USF burden on interexchange carriers has not increased over time.[23] The Joint Board concluded that these arguments were beyond the scope of the issues raised in the *Extension Notice* and that the need for the current interim cap had been settled prior to the current cap's implementation.[24]

8. In reaching its recommended decision, the Joint Board next considered whether an extension of the interim cap is necessary.[25] Some parties argued that the USF is not growing and that therefore an extension of the interim cap is unnecessary, pointing to figures in the National Exchange Carrier's Association, Inc.'s ("NECA's") annual USF data submission showing that the estimated 1996 expense adjustment to the USF to be 1.6 percent below the 1995 expense adjustment. Others argued that an extension of the cap is unnecessary because the projected USF after making NECA's projected adjustments for 1996 will fall below the level permitted by the proposed extended interim cap. Some suggested that historical growth in the USF has been reasonable.[26] The Joint Board found these arguments unpersuasive because, if the actual claims fall below the cap, the cap will not reduce USF assistance. The Joint Board found that significant dislocation could result, however, if the interim cap is not extended and the actual USF total, after adjustments, is greater than the amount initially calculated, as has happened in prior years.[27]

9. The Joint Board further noted that the Board, when it initially recommended an interim cap, was concerned with erratic fluctuations in the overall growth of the USF. The Joint Board explained that, in making its *Interim Recommendation,* it found that it was not necessary to reach a definitive conclusion regarding the reasonableness of past USF growth, but, rather, only to determine whether it should recommend measures to deter large increases to the USF during the interim period. The arguments and data advanced by commenters in response to the *Extension Notice* failed to persuade the Joint Board that this finding was incorrect. The Joint Board then concluded that continued moderation of the growth of the USF during the pendency of the rulemaking would serve the public interest.[28]

10. In its *Extension Recommendation,* the Joint Board has now recommended a six-month extension.[29] In so doing, the Joint Board rejected suggestions that the interim cap be linked to broader rulemakings or to federal telecommunications legislation as beyond the scope of the *Extension Notice* and its duration be extended accordingly.[30] The Joint Board also rejected proposals for a longer or indefinite extension that were premised upon skepticism about the ability of the Commission and the Joint Board to complete the rulemaking within the proposed six-month period. The Joint Board noted that the extension of the interim cap beyond the proposed six months might lessen the need for timely resolution of the issues involved in the USF rulemaking.[31] The Joint Board concluded that six months was the appropriate duration for an extension and recommended that the Commission make the expeditious conclusion of the USF rulemaking a priority.[32] The Joint Board further concluded that the Commission should consider a longer extension if, despite the goals of the Joint Board, it appears that the USF rulemaking would not be completed by July 1, 1996.[33]

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16 *Id.,* ¶ ¶ 2, 16.
17 *Id.,* ¶ 10; *see also Interim Notice, supra* note 11, at 7114, ¶ 4.
18 *Extension Notice, supra* note 3, ¶ 10.
19 *Id.,* ¶ 11.
20 *Extension Recommendation, supra* note 5, ¶ 1.
21 *Id.,* at ¶ 9.
22 *Id.,* ¶ 11.
23 *Id.,* ¶ 10.
24 *Id.,* ¶ 12.
25 *Id.,* ¶ ¶ 14-19.
26 *Id.,* ¶ 14.
27 *Id.,* ¶ ¶ 16-17.
28 *Id.,* ¶ 18.
29 *Id.,* ¶ ¶ 24-26.
30 *Id.,* ¶ ¶ 23-24.
31 *Id.,* ¶ 25.
32 *Id.,* ¶ 26.
33 *Id.* The Joint Board deferred the questions of whether companies can accommodate mid-year rule modifications to the rules governing the USF or whether a transition period in which companies may plan for the institution of new rules should be follow completion of the USF rulemaking. *Id.,* ¶ ¶ 26-27.

IV. DISCUSSION

11. As an initial matter, we disagree with commenters who perceive extension of the interim cap as incompatible with the long-established goals of universal service.[34] We believe that our commitment to universal service has been demonstrated by our initiation of the extensive and complex rulemaking that is currently proceeding on Part 36 jurisdictional separations rules governing the USF.[35] We emphasize, as we did in our original *Interim Order*, that we remain committed to the provision of universal service assistance in a manner that is fair, effective, efficient and consistent with changes in the technological and market environment of the telecommunications industry.[36]

12. We agree with the Joint Board's conclusion that, at this time, in connection with a decision to extend the interim cap we need not make a global assessment of the benefits and burdens80 imposed by the USF. We concur with the Joint Board that such determinations go beyond the scope of the *Extension Notice*.[37] Many of the issues raised by the commenters, however, are properly the subject of the rulemaking on USF jurisdictional separations, and will be considered if submitted as part of that process.

13. We agree with the Joint Board's conclusion that continuation of the interim cap is necessary. While some commenters pointed to an apparent reduction in the USF based upon comparing NECA's 1996 calculations in its recent USF filing[38] with the 1995 USF,'[39] the erratic growth in the fund's level is well documented.[40] The estimated one-year decline, which is based upon projected rather than actual costs, is insufficient to overcome our concern about possible erratic growth in the USF in the future. Further, we agree with the Joint Board that in light of the problems that could occur if the projected USF total is less than the actual total,[41] the prudent approach is to extend the interim cap.

14. We concur in the Joint Board's recommended decision that six months is the appropriate duration for an extension of the interim cap. We also agree with the Joint Board's rejection of suggestions that extension of the USF interim cap be linked to a wider range of rulemakings.[42] In addition to the Joint Board's determination that expanding the USF rulemaking is beyond the scope of the *Extension Notice*, we are concerned that linking the interim cap to resolution of a wider range of complex issues might impede our ability to enact revisions to the USF jurisdictional separations rules in a timely and efficient manner.

15. We also agree with the Joint Board's conclusion that a six-month extension should be adequate to complete the underlying jurisdictional separations rulemaking.[43] We concur with the Joint Board's conclusion that a longer extension might divert momentum from this rulemaking process and unnecessarily delay its completion.[44] At the same time, we agree with interested parties who emphasize the importance of continuing the interim indexed cap until the ongoing USF rulemaking has concluded.[45] Consistent with the Joint Board's recommendation, we will consider a longer extension of the interim cap only if, despite the best efforts of the Commission and the Joint Board, it becomes clear that the rulemaking will not be completed by July 1, 1996. For that reason, we hereby reserve discretion to further extend the interim cap, without further notice, on the basis of the record already developed in this proceeding regarding the issue of extending the cap. *See* 5 U.S.C. § 553(b)(B).

16. We indicated in the Extension Notice our intention to put interim rules extending the interim cap in effect by the January 1, 1996, the date on which expiration of that cap would otherwise occur.[46] In order to moderate the growth of the USF effectively during the pendency of the USF jurisdictional separations rulemaking, we believe that the interim cap should continue uninterrupted for six months beyond the January 1, 1996, expiration date of the existing interim cap.[47] Accordingly, we find good cause for making the rule amendments effective on less that 30 days notice[48] and shall require that the interim rules become effective on January 1, 1996.

V. ORDERING CLAUSE

17. Accordingly, pursuant to Sections 1, (4)(i), 221(c), and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 221(c), and 410(c), IT IS ORDERED that Part 36 of the Commission's Rules and Regulations, 47 C.F.R. Part 36, Subpart F - Universal Service Fund, IS AMENDED as shown in the Appendix to this report and order, effective January 1, 1996.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[34] *Id.*, ¶ 9.
[35] Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, *Notice of Inquiry, supra* note 11. Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, *supra* note 13.
[36] *Interim Order, supra* note 1, at 305, ¶ 16.
[37] *Extension Recommendation, supra* note 5, ¶ 12.
[38] NECA Universal Service Fund (USF) 1995 Submission of 1994 Study Results (Sept. 29, 1995).
[39] *Extension Recommendation, supra* note 5, ¶ 14.
[40] *Interim Order, supra* note 1, at 305, ¶ 18.
[41] *Extension Recommendation, supra* note 5, ¶ 16.
[42] *Id.*, at ¶ 24.
[43] *Id.*, at ¶ ¶ 24-26; *see also Extension Notice, supra* note 3, ¶ 11.
[44] *Extension Recommendation, supra* note 5, ¶ 25.
[45] *Id.*, at ¶ ¶ 22-23.
[46] *Extension Notice, supra* note 3, ¶ 3.
[47] 47 C.F.R. § 36.601(c).
[48] *See* 5 U.S.C.§ 553(d)(3).

APPENDIX

Part 36 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 36--JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES.

1. The authority citation for Part 36 continues to read as follows:

Authority: 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

2. Section 36.601 is amended by adding a new paragraph (c) to read as follows:

§ 36.601 General.

* * * * *

(c) During an interim period commencing on January 1, 1996, and terminating on July 1, 1996, the annual amount of the total Universal Service Fund shall not exceed the amount of the total Universal Service Fund for the immediately preceding calendar year, increased by a rate equal to the rate of increase in the total number of working loops during the calendar year preceding the June filing. The total Universal Service Fund shall consist of the Universal Service expense adjustments, including amounts calculated pursuant to §§ 36.612(a) and 36.631. The rate of increase in total working loops shall be based upon the difference between the number of total working loops on December 31 of the year preceding the June filing and the number of total working loops on December 31 of the second year preceding that filing, both calculated pursuant to § 36.611(a)(8).

3. Section 36.622 is amended by revising the first sentence of paragraph (a) and by adding a new paragraph (c) to read as follows:

§ 36.622 National and study area average unseparated loop costs.

(a) National Average Unseparated Loop Cost per Working Loop. Except as provided in paragraph (c) of this section, this is equal to the sum of the Loop Costs for each study area in the country as calculated pursuant to § 36.621(a) divided by the sum of the working loops reported in § 36.611(a)(8) for each study area in the country. * * *

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(c) During an interim period commencing on January 1, 1996, and terminating on July 1, 1996, the National Average Unseparated Loop Cost per Working Loop shall be the greater of:

(1) The amount calculated pursuant to the method described in paragraph (a) of this section; or

(2) An amount calculated to produce the maximum total Universal Service Fund allowable pursuant to § 36.601(c).