Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Moultrie Independent Telephone Company	)	
	)	
Motion for Stay of Part 69.605(a) of the Commission's Rules and Petition for Declaratory Ruling	)	
	)	
Request for Waiver of Part 36 of the Commission's Rules	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

ORDER

Adopted: **October 2, 2001** Released: **October 5, 2001**

By the Commission:

I. INTRODUCTION

1. In this Order, we deny Moultrie Independent Telephone Company's (Moultrie) petition for declaratory ruling, request for waiver of Part 36, and motion for stay.[1] Moultrie seeks a ruling regarding the regulatory accounting and separations treatment of "sale and lease-back" arrangements between itself and an affiliate. We disagree with Moultrie's contention that there is a "patent ambiguity" between sections 32.27(a) - (c) and 36.2(c)(2) of the Commission's rules and, thus, decline to approve Moultrie's proposed accounting treatment of its sale and lease-back arrangement with its affiliate for jurisdictional separations and high-cost loop support purposes.[2] Accordingly, with respect to the sale and lease-back transaction, we direct Moultrie to include the property and related expenses with, and exclude the related rent expenses from, the carrier's regulated telephone operations as required by section 36.2(c)(2) of the Commission's rules. Having ruled on the petition for declaratory ruling and waiver request in this Order, we also dismiss Moultrie's motion for stay as moot.

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[1] *Moultrie Independent Telephone Company, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Motion for Stay, filed March 29, 1999 (Motion for Stay); Petition for Declaratory Ruling, filed March 29, 1999 (Petition); Letter from David A. Irwin, Irwin, Campbell and Tannenwald, to Dorothy S. Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, dated December 29, 1999 (Waiver Request).

[2] 47 C.F.R. §§ 32.27(a) - (c) and §36.2(c)(2); Petition at 10.

II. BACKGROUND

2. Under the Commission's rules, incumbent local exchange carriers (LECs) develop their interstate rates in accordance with a four-step regulatory process.[3] First, carriers record their costs, including investments and expenses, into various accounts in accordance with the Uniform System of Accounts (USOA) prescribed by Part 32 of the Commission's rules.[4] Second, carriers assign the costs in these accounts to regulated and nonregulated activities in accordance with Part 64 of the Commission's rules to ensure that the costs of non-regulated activities will not be recovered in regulated interstate service rates.[5] Third, carriers separate the regulated costs between the intrastate and interstate jurisdictions in accordance with the Commission's Part 36 separations rules.[6] Finally, carriers apportion the interstate regulated costs among the interexchange services and rate elements that form the cost basis for their interstate access tariffs.[7] Many smaller rate-of-return carriers, rather than file their own individual tariffs or develop their own individual rates, however, elect to participate in tariff pools administered by the National Exchange Carrier Association (NECA). These carriers charge the tariff rates developed by NECA, and receive an amount from the pool equal to their costs and their *pro rata* share of the pool's earnings.[8]

3. Certain incumbent LECs with embedded subscriber loop costs that exceed 115 percent of the national average loop costs are eligible for federal high-cost loop support pursuant to Subpart F of Part 36 of the Commission's rules.[9] Under the Subpart F methodology, among other things, incumbent LECs with study areas of fewer than 200,000 subscriber loops receive a greater percentage of federal high-cost loop support for these "above-average" loop costs, and

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[3] For purposes of section 251 of the Communications Act, a local exchange carrier (LEC) is regarded as an "incumbent local exchange carrier" (ILEC) for a specific area if, on the date of enactment of the Act, the carrier provided telephone exchange service in that area and was deemed to be a member of the National Exchange Carrier Association, Inc. (NECA), or if the carrier "became a successor or assign" of such a member on or after that date. 47 U.S.C. § 251(h)(1). Pursuant to section 69.601(b) of the Commission's rules, "[a]ll telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by [NECA] shall be deemed to be members." 47 C.F.R. § 69.601(b). Competitive local exchange carriers (CLECs) are not subject to the requirements of Parts 36, 64, and 69 of the Commission's rules. *See* 47 C.F.R. Parts 36, 64, and 69.

[4] 47 C.F.R. Part 32.

[5] The Part 64 cost allocation rules are codified at 47 C.F.R. §§ 64.901-904.

[6] 47 C.F.R. Part 36. *See also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 137 (D.C. Cir. 1984) (stating that "'[j]urisdictional separations is a procedure that determines what proportion of jointly used plant should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes").

[7] 47 C.F.R. Part 69. *See also* 47 C.F.R. Part 61 (Commission rules prescribing the procedures for filing and updating interstate tariffs).

[8] *See* 47 C.F.R. § 69.605.

[9] *See* 47 C.F.R. § 36.601 *et seq.*

LECs with greater than 200,000 loops receive lower support percentages.[10] NECA assists with the compilation of data for the administration of the Subpart F high-cost loop support fund. The unseparated costs assigned to the various Part 36 categories are the basis for determining the Subpart F high-cost loop support. In other words, the cost categorizations used to formulate high-cost loop support amounts are those developed through the Part 36 stage, and not the Part 32 USOA accounts.[11]

4. Moultrie is a rural incumbent local exchange carrier (LEC) serving 853 access lines in central Illinois. Moultrie is a rate-of-return carrier that participates in the NECA tariff pools, and also a high-cost rural carrier that receives high-cost loop support pursuant to Subpart F of Part 36. In 1997, Moultrie transferred to an affiliate ownership of certain non-loop related assets, such as motor vehicles, land and buildings, and equipment. The affiliate concurrently leased back those assets at cost to Moultrie.[12] Consistent with sections 32.27(a) - (c) of the Commission's rules, Moultrie reported this transaction to NECA by including the lease costs as an operational expense, and eliminating the costs of the assets from the investment side of its books of account.[13] Sections 32.27(a) - (c) require incumbent LECs, in transactions with their affiliates, to account for those transactions in "direct" fashion, *i.e.,* by recording the revenue or expenses associated with the transaction at the prevailing price or fair market value in the appropriate investment or expense accounts.[14] Moultrie also booked this transaction in its Part 36 cost study, which is used to calculate its high-cost loop expense adjustment, using this same method. As a result, according to Moultrie's cost study, its annual high-cost loop payments would have increased by 2,887 percent, or from $15 per loop per year to $433 per loop per year.[15]

5. NECA subsequently returned the 1997 cost study to Moultrie, stating that it was not prepared in accordance with section 36.2 of the Commission's rules, and informed Moultrie that it must prepare a revised cost study.[16] Section 36.2(c)(2) requires an incumbent LEC, in the case of a substantial sale and lease-back of assets to and from its affiliate, to continue to categorize the assets as an investment, and exclude the lease expenses from its expense

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[10] 47 C.F.R. §§ 36.631(c), (d).

[11] *See* 47 C.F.R. § 36.611 *et seq.*

[12] *See* Petition at 5.

[13] 47 C.F.R. §§ 32.27(a) - (c).

[14] 47 C.F.R. §§ 32.27(a) - (c).

[15] *See* Letter from Gina Harrison, NECA, to Magalie Roman Salas, Secretary, FCC, dated March 10, 1999 (NECA Mar. 10, 1999 *ex parte*). As NECA explained in its *ex parte*, the higher per-loop costs result because high-cost loop support calculations are based upon the relationship between loop-related investment and total investment. When virtually all of the non-loop related investment is removed from the calculation, the cost allocation factors are significantly altered. *Id.*

[16] *See* Letter from Roberta L. Alvir, NECA, to Larry Van Ruler and Steve Bowers, Moultrie, dated March 12, 1999.

categories, in its cost study submitted for separations and high-cost support purposes.[17] NECA simultaneously sought guidance from the Commission's Common Carrier Bureau as to the proper calculation of universal service fund (high-cost loop) expense adjustments when affiliate sale/lease-back arrangements are involved.[18] NECA noted that Moultrie had accounted for the transaction in conformance with Part 32 of the Commission's rules, but questioned whether Moultrie should have gone on to apply section 36.2(c)(2) of the Commission's rules when performing its cost study for separations and high-cost loop support purposes.

6. On March 29, 1999, Moultrie filed a motion for stay of the Commission's rules and a petition for declaratory ruling on the regulatory accounting treatment of sale and lease-back arrangements.[19] In its petition, Moultrie asks that the Commission issue a declaratory ruling clarifying a "patent ambiguity" between sections 32.27(a) - (c) and sections 36.2(a) and (c) of its rules.[20] Moultrie asks the Commission to find that it need only reflect the lease amount of the property it transferred to its affiliate in its 1997 cost study. Moultrie simultaneously filed a motion for stay of section 69.605(a) of the Commission's rules, to stay NECA's threat of reverting to Moultrie's 1996 cost study until the Commission has the opportunity to review and rule on its petition.[21]

7. On August 4, 1999, the Bureau responded by letter to NECA's inquiry and provided guidance on the treatment of sale and lease-back arrangements for purposes of calculating high-cost loop support.[22] The Bureau stated that the sale and lease-back arrangement described by NECA should be treated in conformance with section 36.2(c)(2) of the Commission's rules by including the property and related expenses with, and excluding the related rental expenses from, the carrier's regulated telephone operations for purposes of calculating the high-cost loop expense adjustments.[23] The Bureau noted that the provisions of Part 36 are not limited to jurisdictional separations, as Subpart F of Part 36 also governs the operation of the high-cost loop support mechanism.[24] Consequently, the Bureau concluded that the underlying principle in section 36.2(c)(2) that governs property rented from affiliates clearly

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[17] 47 C.F.R. § 36.2(c)(2).

[18] NECA Mar. 10, 1999 *ex parte*.

[19] On March 30, 1999, Moultrie filed an erratum to the petition. On April 6, 1999, Moultrie amended the motion for stay to request expedited treatment. On the same day, Moultrie also amended the petition (Amendment to Petition) to request that the Commission direct NECA to reopen the 24 month filing window that NECA established for its members to make adjustments to cost studies. Moultrie also requested that NECA reimburse Moultrie for any amounts that the Commission finds were improperly deducted from Moultrie's payments by NECA from the moment NECA overrode Moultrie's 1997 Study. *See* Amendment to Petition at 1.

[20] 47 C.F.R. §§ 32.27(a) - (c), 36.2(a), (c).

[21] Petition at 2. *See* 47 C.F.R. § 69.605.

[22] *See* Letter from Lisa Zaina, Deputy Bureau Chief, Common Carrier Bureau, FCC, to John Ricker, NECA, dated August 4, 1999 (Aug. 4 Bureau Letter).

[23] *Id.*

[24] *See* 47 C.F.R. §§ 36.601 - 36.641.

applies to computations concerning a carrier's high-cost loop expense adjustments under Part 36. Thus, the Bureau instructed NECA that the transaction should be accounted for as required by section 36.2(c)(2) of the Commission's rules, specifically by including the property and related expenses with, and excluding the related rent expenses from, the carrier's regulated telephone operations, for purposes of calculating the high-cost loop expense adjustment in its cost study.[25] Based on the Bureau's guidance, NECA asked Moultrie to file amended cost studies reflecting the sale and lease-back transaction in accordance with section 36.2(c)(2). Moultrie refused to comply with NECA's requests.[26] As a result, since Moultrie's filing of the disputed 1997 cost study, NECA has not provided Moultrie with the additional high-cost loop support to which Moultrie believes it is entitled.[27]

8. On December 29, 2000, Moultrie filed a letter with the Bureau providing additional information on its petition. While this letter was not styled as a specific request for waiver of Part 36, Moultrie does request that the Commission direct NECA not to apply section 36.2(c)(2) of the Commission's rules to Moultrie's sale and lease-back transaction as reflected in its 1997, 1998, and 1999 cost studies filed with NECA, and thus appears to be requesting a waiver. On February 1, 2001, the Bureau sought comment on Moultrie's petition and waiver request and whether a waiver of the Commission's rules would be appropriate in this instance.[28]

III. DISCUSSION

A. Petition for Declaratory Ruling

9. We disagree with Moultrie that there is any ambiguity or conflict regarding sections 32.27(a) - (c) and 36.2(a) and (c) of the Commission's rules and, as such, deny Moultrie's request to require NECA to accept Moultrie's cost study as submitted. Section 36.2 and section 32.27 of the Commission's rules were established for two distinct purposes. A main purpose of the affiliate transactions rules in section 32.27 is to protect the local ratepayer by preventing "… the ability of carriers to shift the investment risk of nonregulated activities to the regulated entity and its ratepayers."[29] As such, section 32.27 directs carriers on how to value the

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[25] *See* Aug. 4 Bureau Letter.

[26] *See* letter of David Irwin, Counsel for Moultrie, to Jane Mago, General Counsel, FCC, dated July 17, 2001.

[27] *See* letter from Steve Bowers. President, Moultrie Independent Telephone Company, to Magalie Roman Salas, Secretary, FCC, Description and Justification (June 18, 2001) (Moultrie Transmittal No. 4). When Moultrie filed its 2001 annual access tariff, it proposed to increase its local switching rate by more than 335 percent, from $0.05713 per minute to $0.191586 per minute, to reflect the loss of high-cost loop support from NECA. *See* Moultrie Transmittal No. 4. The Common Carrier Bureau's Competitive Pricing Division suspended this rate for five months and set it for investigation on July 2, 2001. *See 2001 Annual Access Tariff Filings,* CCB/CPD File No. 01-08, Memorandum Opinion and Order, DA 01-1563 (Comp. Pric. Div., rel. July 2, 2001).

[28] *See* Waiver Request. *See also Common Carrier Bureau Seeks Comment on Moultrie Independent Telephone Company's Request for Clarification of the Affiliate Sale/Lease-Back Rules under Part 36 of the Commission's Rules, Pleading Cycle Established*, Public Notice, CC Docket No. 96-45, DA 01-267 (rel. Feb. 1, 2001) (*Moultrie Public Notice*).

[29] *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for*

assets or services involved in transactions with affiliates, and account for such transactions on the carrier's books. Section 32.27 neither makes a judgment nor provides any direction as to how sale and lease-back transactions should be treated under the Commission's other rules and regulations, including Part 36 of the Commission's rules.

10. By contrast, the rules in section 36.2(c) governing the treatment of rented property, related expenses, and lease payments between carriers and their affiliates for separations and high-cost loop expense adjustments have been included as fundamental principles in separations procedures since the publication of the first NARUC-FCC Separations Manual in 1947, and have been consistently enforced by the Commission.[30] This rule directs incumbent carriers on the proper treatment of property rented to or from affiliates and related costs (*i.e.,* reserves, revenues, expenses, lease payments) in the performance of a Part 36 cost study. In the case of property rented by a carrier from an affiliate, if the transaction is *not* substantial in amount, the carrier should ignore the property costs and simply include the lease payments as an expense in its Part 36 cost study.[31] If the property involved in the transaction *is* substantial, the carrier performing the cost study must include the investment, accumulated depreciation, and associated expenses (*i.e.,* maintenance, depreciation and tax expenses) in, and exclude the lease payments from, the carrier's telephone operations for purposes of the Part 36 cost study.

11. The reason for this specific Part 36 treatment is that, when a substantial amount of investment is involved, the jurisdictional allocation of the lease payment and the combined separations results would be skewed (*i.e.,* the overall interstate allocations may be artificially higher or lower), if the assets were not included in the appropriate separations categories and jurisdictionally allocated based on the rules for the investment-type involved. This occurs because the Part 36 system is premised upon incumbent local exchange carriers owning the majority of their operational assets. Like other utilities, the local exchange telephone industry is, for the most part, characterized as an industry with large, fixed, capital investments that represent a high percentage of total costs. As such, the Part 36 process of jurisdictional cost allocation is predicated on the recognition that incumbent telephone companies will experience large amounts of capital investment cost.

12. Under the Commission's Part 36 rules, each of a carrier's basic components of plant, such as Central Office Equipment (COE) or Cable and Wire Facilities (C&WF), is allocated (*i.e.,* separated) between the intrastate and interstate jurisdictions based either on a fixed allocation or results of studies made on the usage of the plant. Once separated, these basic plant costs provide a foundation upon which most other plant, reserve, and expense accounts are allocated between the jurisdictions. If a company were to sell and lease back one of these "foundation blocks" of plant, and were allowed to exclude the sold investment from its cost

Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, Joint Cost Order on Reconsideration, CC Docket No. 86-111, 2 FCC Rcd 6283, 6295, para. 109 (1987).

[30] *See 1947 Separations Manual*, prepared by NARUC-FCC Special Cooperative Committee on Telephone Regulatory Problems (1947) at Sec. 1, Part 2, Par. 2.13(B); *see, e.g., In the Matter of U.S. West Communications, Inc.*, AAD Docket No. 93-152, Order to Show Cause, 10 FCC Rcd 5523, 5525, para. 11 (1995).

[31] *See* 47 C.F.R. §36.2(c).

study, but include the lease payments as an expense, distortions to the separations results would occur. This is because the annual lease payment (which acts as a substitute for the "sold" investment) would be jurisdictionally allocated based on some or all of the remaining basic components of plant, whose usage would not be representative of the plant leased. This would, in turn, alter the separations results between jurisdictions in a manner not anticipated by the Part 36 rules. As an example of this distortion, a carrier might sell large amounts of plant with a low interstate allocation (*e.g.*, 25%) and lease it back. The lease payments and other costs that are allocated based on the Total Plant in Service, total COE, or total C&WF will receive an artificially higher allocation to the interstate jurisdiction, due to the higher interstate allocation of the remaining COE and C&WF interexchange plant costs.

13. The distortions caused to the company's separations results by excluding non-loop related investment from its cost study would, as a consequence, also extend to its high-cost loop support. The Subpart F high-cost loop support algorithm uses factors derived from the ratio of loop-related investment to total investment.[32] If an incumbent carrier were to sell large portions of its non-loop related plant to an affiliate, and then lease back those assets and include the lease payment as an expense, the carrier's cost study would be skewed to decrease its assets, and increase its operational expenses, thus resulting in a higher per-loop cost. The higher per-loop costs result because of the relationship between loop-related investment and total investment. When virtually all of the non-loop related investment is removed from the calculation, the cost allocation factors are significantly altered.[33] Because the categories used to determine high-cost loop support pursuant to Subpart F of part 36 are based upon the categorization rules set forth in other sections of Part 36, it is important for incumbent LECs to ensure that their high-cost loop support submissions to NECA conform with all other sections of Part 36, including section 36.2(c)(2).[34]

14. Moultrie admittedly seeks to maximize its federal high-cost support subsidy through the transfer of substantial non-loop related assets to an affiliate.[35] Indeed, Moultrie

[32] NECA March 10, 1999 *ex parte* at 1.

[33] NECA March 10, 1999 *ex parte* at 1. The Subpart F calculation begins with determining the total (unseparated) cost related to the subscriber loops within the exchange classification. Once this cost is determined for the major plant accounts, the ratios of the cost of the loop investment to total investment are applied to the appropriate investment, reserve, and expense account balances to derive the total loop-related cost for the company. The company's total loop cost is then divided by its working loops to arrive at a cost-per-loop for the company, which is then compared to the national average cost per loop. The company will receive high-cost loop support based on the extent to which its cost-per-loop exceeds 115% of the national average cost per loop. If an incumbent carrier were to sell large portions of its interexchange and non-loop related plant to an affiliate and were allowed to leave these investments out of its cost-per-loop calculation, the ratio of loop investment to total investment would increase dramatically, and the resulting inflated cost-per-loop would not be representative of the company's actual loop costs.

[34] For example, sections 36.611(a) – (g) set forth certain cost categories, defined and outlined in other portions of Part 36, that a carrier must submit to NECA when it applies for high-cost loop support. *See* 47 C.F.R. § 36.611 (a) – (g).

[35] Moultrie has not disputed NECA's contention that the transferred assets are substantial. *See, e.g.,* NECA Comments to the February 1, 2001 *Public Notice* at 2. Rather, Moultrie has challenged the application of section 36.2(c)(2) altogether.

clearly states in its pleadings that it structured this transaction "to optimize its recovery under the USF [universal service fund] and to maximize tax benefits."[36] If allowed to eliminate these non-loop related assets from its cost study and instead include the lease payments as operational expenses, Moultrie's annual high-cost loop support would increase from $15 per loop per year to $433 per loop per year, an increase of 2,887 percent. This annual high-cost loop support increase is even more extraordinary considering that, from an operating perspective, Moultrie's network and operations have not substantially changed. Rather, Moultrie appears to have traded with its affiliate the legal ownership of certain assets that it will still use in its operations, for the sole purpose of generating more favorable universal service subsidies. It is well-established that a regulator may choose to ignore transactions between a company and its affiliates that are designed solely to maximize benefits for the company.[37] This case presents us with the exact type of separations or high-cost support manipulation, through the use of sales and lease-backs to and from affiliates, which section 36.2(c)(2) of the Commission's rules seeks to prevent.

15. We also disagree that the Commission is forcing carriers to own their own assets rather than lease them.[38] Carriers are free to sell plant to, or lease plant and equipment from, affiliates or non-affiliates. They are not free, however, to ignore the Commission's rules and safeguards designed to prevent abuse of affiliate transactions by incumbent LECs. Section 36.2(c)(2) simply instructs carriers on how to treat sale and lease-back arrangements in the performance of a Part 36 cost study to prevent intentional gaming of their separations or high-cost loop support results.[39] Moreover, we dismiss Moultrie's argument that section 36.2(c)(2) requires Moultrie to file cost studies that are fraudulent because the study does not reflect the Part 32 booking of the accounts. As we have clearly explained above, section 32.27 and section 36.2(c) of the Commission's rules are distinct steps in a process, and in some instances such as sale and lease-back transactions between affiliates, the Part 36 rules dictate a different treatment than the Part 32 booking. Furthermore, the Part 36 treatment does not require Moultrie to go back and change its Part 32 books of account as a general matter. Rather, the Part 36 rules apply only to the specific cost studies that Moultrie must file for separations and high-cost loop support purposes.

16. We note that Moultrie appears to confuse the revenue received from the sale of the assets with the assets themselves. Section 32.27(b) concerns the recording in a revenue account of the carrier the amount received in the sale or transfer of assets, while section 36.2(c)(2) concerns the treatment (for separations and high-cost loop support calculation purposes) of the investment, accrued depreciation and related expenses of the transferred assets. Assuming the carrier records all of the revenue from the sale as income in the year of the transaction, no revenue will be realized by the carrier beyond the first year. Section 36.2(c)(2), however, requires Moultrie to make the same adjustments annually to the telephone operations

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[36] *See* Petition at 5. Moultrie also states that "[b]y transferring the property assets to its affiliate, Moultrie was able to decrease the denominator in the USF ratio by eliminating the value of the property assets …." *Id.*

[37] *See, e.g., Higgins v. Smith*, 308 U.S. 473, 477-78 (1940); *Gregory v. Helvering*, 293 U.S. 465, 469-70 (1935).

[38] *See* ITC *Public Notice* Comments at 1-3; PSI *Public Notice* Comments at 2-3.

[39] 47 C.F.R. § 36.2(c)(2).

reflected in its cost study. In other words, while the Part 32 rule provides instructions to Moultrie as to how to record the one-time revenue from the initial sale of the assets, the Part 36 rule provides specific instructions to Moultrie to include the investment, reserve, and related expenses for the sold facilities and exclude the lease payments, on an annual basis for separations and high-cost loop support calculation purposes.[40]

17. We therefore find that there is no patent ambiguity or contradiction between sections 32.27 (a) – (c) and 36.2(a) and (c) of the Commission's rules, as claimed by Moultrie. Based on section 36.2(c)(2) of our rules, we deny Moultrie's request to approve its proposed treatment of its sale and lease-back arrangement with its affiliate in its cost studies. Due to the substantial nature of the assets involved in this sale and lease-back arrangement, and in keeping with the language and intent of our rules, we direct Moultrie to reflect the application of section 36.2(c)(2) by including the property and related expenses with, and excluding the related rent expenses from, the carrier's regulated telephone operations in a revised 1997 study as well as all other studies in which this or similar sale/lease-back arrangements exist.

18. Finally, we dismiss Moultrie's argument that section 36.2(c)(2), because it is premised upon incumbent LECs owning the majority of their plant and assets, discriminates against Moultrie vis-à-vis its potential competitors. This argument fails to recognize that Moultrie, as an incumbent local exchange carrier that receives federal high-cost loop support and participates in federal common-line pools, is required to comply with the Part 36 jurisdictional separations rules, and the attendant regulatory safeguards established to prevent abuse of transactions between an incumbent LEC and its affiliates. Furthermore, we note that Moultrie is free to sell and lease-back its assets at arm's length to a non-affiliated entity, and thus remove the assets from its investment base and include the lease expenses as an operational expense, providing that it can find a non-affiliated buyer willing to engage in this transaction. When the transaction is between affiliates and thus not a "competitive" transaction, however, the Commission's rules set up certain safeguards to avoid these transactions being conducted solely for regulatory manipulation.

B. Request for Waiver

19. In its waiver request, Moultrie requests that the Commission direct NECA to ignore the requirements of section 36.2(c)(2) and instead apply section 32.27 of the Commission's rules to the sale/lease-back transaction found in its 1997, 1998, and 1999 cost studies filed with NECA.[41] Moultrie argues that section 36.2(c)(2) -- which requires that Moultrie's cost studies continue to include assets that had lawfully been transferred to an affiliate as if the transaction had not occurred -- would force Moultrie to make an unlawful and fraudulent representation of its accounts.[42] Furthermore, Moultrie asserts without support in its waiver request that it is in the public interest to grant Moultrie's request because Moultrie's sale of

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[40] *See* 47 C.F.R. §§ 32.27(b), 36.2(c)(2).

[41] *See* Waiver Request at 4.

[42] *See id.*

assets will increase its universal service support and permit it to maintain affordable local service rates for Moultrie's rural customer base and the viability of Moultrie itself.[43]

20. Generally, the Commission's rules may be waived for good cause shown.[44] As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.[45] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[46] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[47] Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[48]

21. Moultrie has not provided any persuasive arguments that special circumstances exist to justify a waiver of the Commission's rules. All incumbent LECs are subject to the same standards and receive high-cost loop support on the same terms. Moultrie's dissatisfaction with the amounts currently available to it under the existing high-cost loop support mechanism does not constitute a "special circumstance" that would justify a waiver of section 36.2(c)(2) of the Commission's rules, a regulatory safeguard that exists to prevent incumbent LECs from using affiliate transactions to distort their separations and high-cost loop support results. Furthermore, Moultrie's claims of economic hardship caused by NECA's refusal to accept its cost study as submitted do not constitute "special circumstances," because NECA has consistently stated that it would accept Moultrie's cost study if it were filed in accordance with the Commission's rules, and would provide high-cost loop support to Moultrie on the same terms as any other incumbent LEC would receive such support. Moultrie's mere claim that its current rates are unaffordable is unsupported and thus cannot form the basis for a waiver.

22. Moultrie has not shown that granting its request would be in the public interest either. Moultrie has provided no documentation to demonstrate that its rates were suddenly less "affordable" than its rates prior to the 1997 sale and lease-back transaction, nor that its universal service support prior to the 1997 transaction was inadequate. We furthermore conclude that a waiver of section 36.2(c)(2) is not in the public interest because there is a likelihood that many small rural carriers may, if they were allowed to do so, take advantage of affiliate transactions to artificially inflate their universal service support. Thus, allowing the separations treatment as requested by Moultrie for all such carriers clearly has the potential to dramatically increase the size of the common line fund and overall federal high-cost support funding in a way not intended by the Commission's rules.

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[43] *See* Waiver Request at 6; ITC *Public Notice* Comments at 4-6; PSI *Public Notice* Comments at 3-6.

[44] 47 C.F.R. § 1.3.

[45] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[46] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[47] *WAIT Radio*, 418 F.2d at 1157.

[48] *Id.*; *Northeast Cellular*, 897 F.2d at 1166.

C. Motion for Stay

23. Moultrie also requested that the Commission stay NECA from collecting and recording cost information from Moultrie under section 69.605(a) of the Commission's rules, until the Commission has ruled on the accompanying petition for declaratory Ruling.[49] As we have ruled on the petition for declaratory ruling and the waiver request in this Order, however, the motion for stay is now moot.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 254, and and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Statement filed by Moultrie Independent Telephone Company, Inc. on March 29, 1999, and amended April 6, 1999, IS DENIED.

25. IT IS FURTHER ORDERED that the Request for Waiver of Section 36.2(c)(2) of the Commission's Rules filed by Moultrie Independent Telephone Company, Inc. on December 29, 2000, IS DENIED.

26. IT IS FURTHER ORDERED that the Motion for Stay filed by Moultrie Independent Telephone Company, Inc. on March 29, 1999, and amended on April 6, 1999, IS DENIED.

27. IT IS FURTHER ORDERED that this Order is effective upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[49] *See* Motion for Stay at 1.