

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

In the Matter of)	
)	
Petition of AT&T Inc. For Forbearance)	
Under 47 U.S.C. § 160 From Enforcement)	WC Docket No. 07-21
Of Certain of the Commission's Cost)	
Assignment Rules)	
)	
Petition of Verizon For Forbearance Under)	
47 U.S.C. § 160(c) from Enforcement of)	
Certain of the Commission's)	WC Docket No. 07-273
Recordkeeping and Reporting)	
Requirements)	
)	
Petition of Qwest Corporation for)	
Forbearance from Enforcement of the)	WC Docket No. 07-204
Commission's ARMIS and 492A Reporting)	
Requirements Pursuant to 47 U.S.C. § 160)	

Application For Review Of Action Taken Pursuant To Delegated Authority

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SUMMARY

The Wireline Competition Bureau's ("WCB") approval on December 31, 2008 of cost assignment compliance plans submitted by AT&T, Qwest, and Verizon (hereinafter collectively referred to as the "BOCs") fails to satisfy well-settled requirements for reasoned administrative agency decisions. The WCB failed to provide *any* explanation to support its approval of those plans. The Federal Communications Commission ("the Commission") should remand the matter to the WCB with instructions to issue an order consistent with the requirements of the remand order.

Alternatively, the Commission could save time by reversing and vacating the WCB's approval of the BOCs' cost assignment compliance plans. The record in this proceeding documents the serious deficiencies in the BOCs' plans. Other than promising to comply with the Uniform System of Accounts, from which the BOCs did not seek general forbearance, the BOCs' plans would give them virtually unlimited discretion in assigning costs. Their plans are designed to give them the freedom to allocate costs to further their corporate goals, rather than being crafted to give the Commission access to timely and reliable data – data critical to the Commission's statutorily mandated regulatory responsibilities.

Prompt Commission action is required. The BOCs' plans promise the same kind of self-regulation and virtual elimination of regulation that has contributed to the financial crisis roiling our economy. If data are important to satisfy regulatory goals, it makes no sense to approve cost assignment plans that would undermine the Commission's ability to access timely and reliable data relevant to serving those goals. Delay in rectifying

the WCB's mistake will give the BOCs more time to obscure data relevant to the Commission's regulatory responsibilities.

Moreover, as explained in the record of the above-captioned proceedings and repeated below, approval of the BOCs' compliance plans is at odds with efforts to spread the availability of high speed Internet access service in rural areas of our country.

The Commission, of course, could moot this Application if it quickly grants the petitions seeking reconsideration of the order granting the BOCs forbearance relief from the Commission's cost assignment rules.

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**APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DELEGATED
AUTHORITY**

The AdHoc Telecommunications Users Committee, COMPTTEL and Economics and Technology, Inc. (hereinafter "Joint Applicants"), pursuant to section 1.115 of the Commission's Rules, hereby petitions the Commission to reverse and vacate the Wireline Competition Bureau's (WCB) approval of the cost assignment compliance plans submitted by AT&T, Qwest and Verizon (hereinafter collectively referred to as the BOCs). The WCB did not have authority to approve the cost assignment plans as submitted by the BOCs, and, thus, exceeded its delegated authority. In the alternative, Joint Applicants request that the Commission remand the matter to the WCB for disposition in a manner consistent with guidance given in the remand order and the

requirements set forth by the Commission when it approved the BOCs' cost assignment forbearance petitions.¹

Of course, if the Commission grants the pending petitions for reconsideration of the *Forbearance Orders*, it need not act on this petition. A prompt grant of this Petition or the petitions seeking reconsideration of the *Forbearance Orders* should be one of the new Commission's first priorities. Failure to act quickly will allow the BOCs to obscure evidence of cost misallocations, price gouging and grossly excessive returns.

I. The AT&T Cost Assignment Forbearance Order

In the *AT&T Cost Assignment Forbearance Order*, the Commission stressed the critical importance of cost assignment information because of AT&T's continuing exclusionary market power due to its control over bottleneck last mile facilities.² It also reiterated its prior holding that in light of this exclusionary market power nonstructural safeguards such as cost-assignment rules are critical "[s]afeguards for protecting against anticompetitive discrimination and improper cost shifting."³ The Commission went further and described specific circumstances in which reliable cost assignment information would be necessary, such as possibly adjusting the price caps regime,⁴ adjudicating complaints over compliance with sections 201 and 202 of the

¹ *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, 23 FCC Rcd 7302 (2008) (*AT&T Cost Assignment Forbearance Order*), *pet. for recon pending, pet. for review pending*, *NASUCA v. FCC*, Case No. 08-1226 (D.C. Cir. Filed June 23, 2008); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket Nos. 08-190, 07-139, 07-204, 07-273, 07-21, 23 FCC Rcd 13647 (2008) (*Verizon/Qwest Cost Assignment Forbearance Order*), *pet. for recon. pending, pet. for review pending*, *NASUCA v. FCC*, Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008) (collectively the *Forbearance Orders*).

² *AT&T Cost Assignment Forbearance Order*, ¶ 27

³ *Id.*

⁴ *Id.* ¶ 19.

Communications Act (the Act),⁵ and enforcing compliance with the imputation requirements of section 272(e)(3) of the Act and the prohibition in section 254(k) of the Act against using regulated services to cross-subsidize unregulated activities.⁶ In short, the Commission reaffirmed the importance of continued availability of reliable cost information to the satisfaction of its statutory obligations. Nevertheless, the Commission granted AT&T's cost assignment forbearance petition, provided that AT&T first gains approval of a carrier designed cost assignment compliance plan.

The Commission delegated to the WCB the responsibility to review AT&T's cost assignment compliance plan. AT&T's plan was to describe *in detail* how it will produce the data that the Commission needs to meet its continuing statutory and regulatory responsibilities. Indeed, the Commission emphasized that the WCB should approve AT&T's compliance plan only if it satisfies the order's requirements.⁷

II. The WCB Failed To Render A Reasoned Decision In Violation Of The Administrative Procedures Act And Commission Precedent.

Instead of addressing the serious criticisms lodged against the BOCs' cost assignment compliance plans, the WCB issued a one page Public Notice (DA 08-2827) stating that,

After review of the compliance plans filed by AT&T, Verizon and Qwest, and the record of this proceeding, the Bureau approves the three plans effective immediately. We now find that AT&T, Verizon, and Qwest have satisfied the condition that they obtain Bureau approval of compliance plans describing in detail how they continue to fulfill their statutory and regulatory obligations.

⁵ *Id.* ¶ 22.

⁶ *Id.* ¶¶ 29-30.

⁷ *Id.* ¶ 31.

There is no other statement in the Public Notice setting out reasoning to support the WCB's conclusion.

The WCB's conclusory Public Notice fails to satisfy the requirement that administrative decisions be supported by reasoned explanations. A long line of court decisions stand for the proposition that administrative decisions must do more than merely assert that the record has been considered as justification for a decision. *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance*, 463 U.S. 29 (1983) sets forth standards for administrative agency decisions that the WCB's Public Notice ignores. The Court explained that it must be able to, "[c]onsider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Id.* at 43. In an extraordinarily strong statement that certainly applied to the case before it, and that could easily apply to the WCB's conclusory Public Notice, the Court, quoting language from *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) stressed the importance of reasoned explanations for administrative agency decisions:

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice. . . . Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. *Motor Vehicle Manufacturers* at 48 (footnote omitted).

Accordingly, the Court reiterated that an agency must, "[c]ogently explain why it has exercised its discretion in a given manner." *Id.*

There can be no debate about whether the WCB's Public Notice meets this standard for reasoned decision making. The Public Notice provides a conclusory statement, but absolutely no explanation of why the WCB approved the BOCs' compliance plans in light of the deficiencies identified by Joint Applicants. It is not as though the WCB's explanation is such that parties can argue over whether the explanation is rational or supported by facts found. The Public Notice is devoid of any such explanation. It is a stark example of arbitrary, and, thus, unlawful, decision making.⁸

The Commission itself has acknowledged that subordinate parts of the agency operating pursuant to delegated authority must provide reasoned explanations for their actions. In a decision addressing challenges to a decision of the Consumer and Governmental Affairs Bureau setting compensation rates for TRS, IP Relay STS and VRS, the Commission observed that,

[T]he Bureau had an obligation to provide sufficient information in the *Bureau TRS Order* to allow the public to understand the reasoning behind the Bureau's modification of the VRS compensation rate. We find, however, that the information provided by the Bureau is sufficient to allow such an understanding.⁹

⁸ A long line of judicial authority follows *Motor Vehicle Manufacturers* and requires at least remand to the WCB. These cases include *RCA Global Communications v. FCC*, 758 F.2d 722, 731 (D.C. Cir. 1985) (“[T]he Commission chose not to address the merits of the specific petitions to reject. The ambiguous statement that all matters not discussed were meritless or moot helps the FCC’s position not at all. Without the aid of telepathy, we cannot know which arguments the FCC believed were meritless and which were mooted by wholesale rejection, on other grounds, of all the tariffs submitted pursuant to *Interim Order*.”) (citations omitted); *AT&T v. FCC*, 236 F3d 729, 736 (D.C. Cir. 2001) (“[T]he FCC’s ‘conclusory statements cannot substitute for the reasoned explanation that is wanting in this decision. Accordingly, the FCC’s *Forbearance Order* must be remanded so that the Commission may ‘examine the relevant data and articulate a satisfactory explanation for its action.’”)

⁹ *Telecom Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 19 FCC Rcd 12475, 12547 (June 30, 2004)

In this case, the Commission cannot find that the information provided in the WCB's Public Notice is sufficient to allow an understanding of the reasoning behind the WCB's Public Notice, because there literally is no "reasoning" provided in that Notice. Indeed, the Commission has no choice but to make a contrary finding.

Accordingly, Joint Applicants request that, if the Commission does not reverse and vacate the WCB's approval of the BOCs' compliance plans as recommended below, it remand the matter to the WCB with direction to provide a full reasoned explanation for its disposition of the BOCs' compliance plans and to provide such explanation by order issued not later than thirty days after the release date of the remand order. The record on this matter should not be supplemented through a further pleading cycle. The need for reliable and timely cost and revenue information is too important to the satisfaction of the Commission's regulatory responsibilities for this matter to languish while the BOCs operate without a requirement to properly assign costs and revenues.

III. The BOCs' Cost Assignment Compliance Plans Suffer From Material Deficiencies, and The WCB Exceeded Its Delegated Authority In Approving The BOCs' Compliance Plans As Filed.

Given that the WCB approved the BOCs' cost assignment compliance plans, an additional question before the Commission is whether the approval was consistent with the requirements of the *Forbearance Orders*. Joint Applicants submit that the WCB should not have approved the BOCs' compliance plans as filed and that in doing so the WCB exceeded the authority delegated to it by the Commission.

AT&T filed its compliance plan first, and Qwest and Verizon almost copied AT&T's plan. Joint Applicants first objected to AT&T's compliance plan and then lodged

the same objections against the Verizon and Qwest compliance plans. The deficiencies described below exist in AT&T's compliance plan and also pervade the compliance plans of Qwest and Verizon.

Joint Applicants brought the following serious deficiencies to the attention of the WCB:

- AT&T's compliance plan, the substance of which is less than two double spaced pages, is nothing more than a proposal to save the instructions that it used for complying with the forbore rules and perform in the future what-ever kind of cost allocation it, *i.e.*, AT&T, sees fit.
- AT&T's compliance plan would give AT&T unbounded discretion to allocate total company costs between regulated and unregulated services. AdHoc stated that, "During a time when AT&T's revenues and costs on the unregulated side of its business (wireless, internet access, TV, etc.) are growing while its regulated business is at best stagnant, a compliance plan that would allow only AT&T to determine when, why and how allocation ratios change in the future is a plan utterly inconsistent with satisfaction of the Commission's statutory responsibilities."¹⁰ Sprint Nextel, COMPTTEL, tw telecom and One Communications pointed out that, "As AT&T's non-regulated service offerings continue to increase relative to its regulated service offerings, the allocation of cost to non-regulated services can be expected to increase relative to the allocation of costs to regulated services. If the cost allocation ratios are frozen at today's levels,

¹⁰ AdHoc, Opposition to AT&T's Compliance Plan, at 7, WC Docket Nos. 07-21, 05-342, August 18, 2008.

cost data for non-regulated services will falsely reflect an increasingly smaller level of cost than is the case in reality.”¹¹ Under these circumstances enforcement of section 254(k) of the Act would become a fiction, regardless of certifications by company officials. The certifications would be meaningless because they would only attest to the carriers’ allocation of costs pursuant to ratios designed by carriers, regardless of whether those ratios are reasonably accurate.

- For cost allocations beyond allocations between regulated and unregulated services, AT&T’s compliance plan would allow AT&T to use “special studies” that are unspecified and subject to definition and change by AT&T. AT&T did not commit to use either then existing procedures or data sources for the allocations. In effect, AT&T’s plan is to do as it pleases. Again, under these circumstances enforcement of section 254(k) would become a fiction.
- AT&T’s compliance plan would allow it to stop regularly allocating and reporting costs, and thus would prevent the Commission and private parties from determining whether allocations deviated from historical trends.
- Given the wide and sole discretion AT&T would reserve to itself, AT&T’s compliance plan would not assure that data requested by the Commission would be either reliable or timely, and would not be sufficient to allow the Commission to satisfy its continuing regulatory obligations.

¹¹ SPRINT NEXTEL, COMPTTEL, tw telecom and One Communications, Comments on the AT&T Compliance Plan, WC Docket Nos. 07-21, 05-342, August 18, 2008.

- Approval of AT&T's compliance plan, with the total discretion it would vest in AT&T, would be inexplicable given that Verizon, in another context, represented that, "Experience suggests that when there is an incentive for carriers to demonstrate high costs, they will do so."¹² AdHoc observed, *inter alia*, that, "Verizon's statement seems reasonably to imply that carriers, including AT&T, will select data and methods that further their interests, whether or not the data present a fully accurate picture."¹³
- Given that the Verizon and Qwest compliance plans are substantively virtually identical to the AT&T compliance plan, the arguments in opposition to the AT&T plan apply with equal force to the other compliance plans.

Joint Applicants did not simply criticize AT&T's cost assignment compliance plan. Joint Applicants submitted for consideration by the WCB a "Blueprint for a Compliance Methodology Cost Assignment Plan." The Blueprint would have greatly simplified AT&T's data collection duties, but would have required consistent and accountable cost allocations. Under the Blueprint, only allocations needed for regulatory purposes would have survived, but the Commission would have retained effective regulatory oversight of AT&T and the other BOCs – certainly not the condition that pertains in the wake of the WCB's New Year's Eve approval of the BOCs' compliance plans.

In an October 3, 2008 *ex parte* letter in the above-captioned dockets, AdHoc also alerted the Chief of the WCB that post-forbearance cost allocation data would be

¹² Reply Comments of Verizon and Verizon Wireless, at 13, *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 and CC Docket No. 96-45 (high cost reform), June 2, 2008.

¹³ AdHoc, Opposition to AT&T's Compliance Plan, WC Docket Nos. 07-21, 05-342, August 18, 2008.

relevant and important to availability of high speed internet access to rural parts of the country. The National Telecommunications Cooperative Association (“NTCA”) explained in a September 12, 2008 *ex parte* filing in CC Docket No. 01-92 and WC Docket No. 04-36 that,

All large, vertically-integrated communications carriers, such as AT&T and Verizon, should be required to provide non-discriminatory, cost-based special access transport services needed to reach the Internet backbone.

[T]o achieve and maintain the goal of universal affordable broadband service for all Americans, the Commission should regulate the terms, conditions and prices of Internet backbone services, including special access transport needed to reach the Internet backbone, to ensure that large, vertically-integrated Internet backbone providers do not abuse their market power.

AdHoc explained that AT&T’s cost assignment compliance plan would virtually guarantee that the Commission would be unable to determine whether special access rates are excessive. AdHoc concluded its October 3, 2008 *ex parte* as follows,

Given the importance of special access transport to the availability of broadband service in rural America, it would be inexplicable for the Commission, on the one hand, to express concern about the availability of rural broadband service but, on the other hand (1) bow to AT&T’s pressure to terminate the special access rate investigation or (2) approve AT&T’s compliance plan.

In another filing, AdHoc cautioned the Chief of the WCB that approval of AT&T’s cost assignment compliance plan would be ominously similar to the regulatory neglect that has contributed to the financial crisis then, and now, afflicting the country.¹⁴ The *ex parte* directed the WCB to a *New York Times* article of September 27, 2008 in which the Chairman of the Securities and Exchange Commission is quoted as saying, “The last

¹⁴ AdHoc, Petition for Reconsideration of *Verizon / Qwest Cost Assignment Forbearance Order*, October 6, 2008

six months have made it abundantly clear that voluntary regulation does not work.” AT&T’s cost compliance plan would be a form of voluntary regulation and would no more serve the public interest than the now discredited voluntary regulation of the financial industry. The compliance plans of the BOCs would make effective Commission oversight impossible and set the stage for even more abusive pricing and practices.

The BOCs did not persuasively refute the above-described deficiencies.¹⁵

In light of all of foregoing documented deficiencies in the cost assignment compliance plans of AT&T, Qwest and Verizon, the WCB could not reasonably have found those plans to satisfy the requirements of the *Forbearance Orders*. Indeed, the WCB has not addressed any of the material deficiencies and dangers identified by Joint Applicants.

Accordingly, the Commission should reverse and vacate the WCB’s approval of these plans, and find that the WCB exceeded its authority in approving plans that did not meet those requirements.

IV. Conclusion

In view of the foregoing, Joint Applicants urge the Commission to reverse and vacate the WCB’s approval of the BOCs’ cost assignment compliance plans. The WCB exceeded its delegated authority in approving plans that plainly fail to satisfy the requirements of the *Forbearance Orders*. In the alternative, the Joint Applicants urge the Commission to remand the matter to the WCB with instructions to issue an order

¹⁵ See SPRINT NEXTEL, *Ex Parte* Communication, WC Docket No. 07-21, Sept. 15, 2008 and tw telecom and One Communications, *Ex Parte* Communication, WC Docket No. 07-21, Sept. 26, 2008

that complies with the directions of the remand order within thirty days of the release date of the remand order.

Respectfully submitted,

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Certificate of Service

I, Dorothy Nederman, hereby certify that true and correct copies of the preceding Reply Comments of AdHoc Telecommunications Users Committee were filed this 30th day of January, 2009 via the FCC's ECFS system and by first-class mail to:

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