

**STATE MEMBERS OF THE FEDERAL STATE JOINT BOARD
ON SEPARATIONS**

1101 Vermont Ave, Suite 200
Washington, D.C. 20005

April 24, 2008

VIA ECFS

The Honorable Deborah Taylor Tate, FCC Commissioner
Chair, Federal State Joint Board on Separations

The Honorable Kevin Martin, FCC Chairman
Commissioner, Federal State Joint Board on Separations

The Honorable Michael Copps, FCC Commissioner
Commissioner, Federal State Joint Board on Separations

The Honorable Jonathan Adelstein, FCC Commissioner

The Honorable Robert McDowell, FCC Commissioner

Federal Communications Commission
445 12th Street, SW - Portals II Building
Washington, D.C. 20544

RE: NOTICE OF ORAL AND WRITTEN *EX PARTE* CONTACTS
filed in the Proceedings Captioned In the Matters of:

*Petition of AT&T, Inc. For Forbearance under 47 U.S.C. § 160(c) From Enforcement of
Certain of the Commission's Cost Assignment Rules, WC Docket 07-21*

Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket 80-286

Dear Commissioners:

Late yesterday evening, I received requests for amplification of the States comments and specific examples of how States use ARMIS, the USOA, and Separations output. Given time constraints for responding, I did a quick informal survey asking for quick responses – and am providing this written response – which also covers the core of other arguments I presented during the conversations last night and this morning. There are some examples involving commissions operating in AT&T territory – but I also cite responses I received and information I could find online about other jurisdictions.

An important backdrop to any discussion – I pointed out you can't get to all ARMIS data WITHOUT Part 32 (USOA), 64 (allocation of nonregulated costs), and 36 (separations).

I. SEPARATIONS REFORM:

Part 32 and the Part 64 provide the input for the Part 36 Separations outcomes (and ARMIS reports). Forbearing on these parts of the rules does impact separations reform. *No one contends that*

reform of the separations reform is not needed (and soon). Indeed, the State members have been very anxious to move forward on comprehensive reform. But eliminating the data streams from AT&T feeding into that process eliminates basic data needed to make a record-based determination on reform issues. It also prejudices the choices in play before the agency short circuiting an open FCC proceeding that is already underway – ABOUT A SUBJECT THAT CONGRESS (and the Courts) HAVE BEEN CLEAR IS A MATTER OF JOINT FEDERAL-STATE CONCERN THAT SHOULD BE ADDRESSED VIA THE JOINT BOARD PROCESS.

II. PREEMPTION:

If the FCC grants forbearance, the States may not be able to get needed data or engage in separations or nonregulated cost allocations or look at affiliated transactions. Verizon has already suggested in its petition it should not be preemptive. Section 160(e) of the federal act says that “A state commission may not continue to apply or enforce any provision of this chapter that the commission has determined to forbear from applying under subsection (a) of this section.”

By using “forbearance” instead of a rulemaking proceeding, AT&T creates text-based arguments that the States will not be able to get this data any other ways. It would be naive to think that carriers – including AT&T – *whatever the FCC says in a forbearance order* - won’t press this preemption argument in federal court. The same problems do not arise if the reform takes place in a normal regulatory proceeding. *Whatever the FCC says in any forbearance order*, the carriers will press this point in the federal courts.

III. STATE USES OF ARMIS, USOA, PART 36:

A. USOA

Preemption of USOA accounts would be particularly problematic for some states. New Hampshire rules regarding affiliated transactions are nearly identical to 47 CFR § 32.27, and the State does use the same USOA defined by 47 CFR Part 32, including the accounts used in § 32.27.

New Hampshire is not the only state that either relies directly or mirrors the federal part 32 USOA. For example, **Arizona** has a rule R14-2-510(G) which provides in relevant part: “Each utility shall maintain its books and records in conformity with the Uniform Systems of Accounts for Class A, B, C and D Telephone Utilities as adopted and amended by the Federal Communications Commission or, for telephone cooperatives, as promulgated by the Rural Electrification Administration.”

Indeed, in comments filed at the FCC in March 2008, at page 4, on a “me-too” forbearance petition, the **California PUC** points out:

“As have a number of other states, the CPUC has relied on and will continue to rely on the FCC’s affiliate transaction rules and related reporting requirements to make important regulatory policy decisions and to establish rules for California. In the last few years, the CPUC has taken significant steps to streamline its regulatory process. In particular, in the CPUC’s Uniform Regulatory Framework (“URF”) Decision (D.06-08-030), this agency relaxed regulation of the retail telecommunications service offerings of the four major California ILECs, including Verizon. Additionally, as part of the streamlining effort, the CPUC’s stated its intent to rely on FCC standard accounting practices and affiliate transaction rules. Verizon itself, as a party to the URF proceeding, asked the CPUC to end California-specific affiliate transaction rules, and instead to base California rules on those adopted by the FCC. (See Opening Comments of Verizon on Proposed Decision at 12 (Aug. 15, 2006). The CPUC adopted Verizon’s recommendation, and eliminated

California's affiliate transaction rules in carriers' future filings and reports made to the CPUC. Specifically, the CPUC concluded as follows:

“We shall defer to the FCC's standard accounting practices and affiliate transaction rules for California carriers. We will no longer require a set of regulatory accounts with California jurisdictional adjustments.”

CPUC Comments available at:

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817078

B. BENCHMARKING IN ARBITRATIONS, RATE CASES & MERGERS/SPIN-OFFS:

The initial Separations Joint Board Commissioners' comments suggested States might use ARMIS data to benchmark rates, service quality, and operations of various carriers across State jurisdictions - as a check on inappropriate intra and interstate allocations. At least one northeast coast staffer confirms that is the case for his state.

1 - ARBITRATIONS:

I have been told that the data that companies put in UNE-L arbitration cases at the State level UNE models frequently are based on ARMIS data. Commission staff uses data from other carriers (and the publically filed ARMIS data) to benchmark what companies submit. This can be true even in states where the large carrier's retail rates are determined by a price cap mechanism without a true-up component.

MICHIGAN: Indeed, the Michigan Commission filed an ex parte citing AT&T forbearance on the ARMIS reports noting:

In fact, witness testimony filed on August 31, 2007, in a current Verizon North, Inc. and Contel of the South, Inc. d/b/a Verizon North Systems TSLRIC/TELRIC case before the MPSC' relies on data from ARMIS Reports as supporting documentation for Verizon North Systems cost study assumptions. Verizon North System's witnesses pointed specifically to two reports, 43-03 and 43-08, as support for the areas of avoided costs, retail percentage, and projection of access lines losses.

CALIFORNIA: I have not confirmed, but it was suggested that California used ARMIS data in its 2001-2004 UNE “relook” proceeding, A.01-02-024 & related proceedings, to set UNE prices or to develop key inputs for UNE prices. I called a former State/FCC staff expert and colleague from his days working on the Federal USF, ex-DC PSC staffer Dr. Robert Loube, and asked about use of ARMIS data in state arbitration proceedings. He told me in two cases, one before the California Commission (testimony filed August 2004) and one before the Michigan commission (testimony filed April 2008) - he filed testimony that updated the FCC's large ILEC synthesis model – a model that uses a significant amount of ARMIS data - to challenge ILEC loop pricing in arbitrations. He sent me the public versions of that testimony which I can forward upon request. Also, in February 8, 2008 comments, at page 3, on a forbearance petition by Frontier seeking similar relief, the California commission argued:

“In the last few years, the CPUC has taken significant steps to streamline its regulatory process. In particular, in 2006, in a move to streamline regulation of telecommunications utilities in California, the CPUC eliminated California-specific monitoring reports required under its previous regulatory framework on the basis that it could and would rely largely on the ARMIS reports instead.[footnote omitted] The CPUC made its decision

largely at the urging of the carriers themselves, who argued that they should not be required to file two separate sets of reports – one with the Commission and one with the CPUC. In response to those arguments, and as part of its overhaul of telecommunications regulation, the CPUC curtailed oversight of the retail telecommunications service offerings of the four major California ILECs.”

These comments are available at:

<http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519839006>

California also filed directly in this AT&T proceeding – echoing many of the State JB members comments with specific references to its impact on California. Its 07-21 comments are available at:

<http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519119964>

OHIO: **In two Ohio cases involving AT&T or a predecessor company, the ARMIS data was used in an impairment and UNE proceeding.** The first, was captioned: *In the Matter of the Petition of XO Communications Services, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Non-impaired*, 05-1393-TP-UNC, 2006 OHIO PUC LEXIS 426, July 26, 2006 (there is also language in an earlier decision in the same case, but it is parallel to the holding here; the earlier decision is dated June 6, 2006, 2006 Ohio PUC LEXIS 347) and focused on, among other things - whether SBC Ohio’s assertion that certain Ohio wire centers meet the non-impairment test is accurate. According to the PUCO:

With respect to the vintage of the ARMIS data to be used for the purpose of business line counts, the Commission finds no reason to change its finding requiring the use of the most recent ARMIS data at the time the wire center is designated by AT&T Ohio to be non-impaired. The Commission has already considered, prior to the issuance of the June 6, 2006 Finding and Order, the CLEC Coalition's arguments on rehearing and finds the proposal to use the line counts provided to the FCC in the TRRO proceeding to be flawed in that it does not follow the FCC's digital equivalency standard for counting high capacity UNE Loops. This decision is also consistent with our 05-887 Order in which we held that "the conditions at the time the wire center was designated by AT&T Ohio as non-impaired would be the deciding factor in any dispute arising from the self certification process" (05-887 Order at 61). Therefore, rehearing on this issue is denied.” (emphasis added)

In an other older 2004 Case, captioned *In the Matter of the Review of SBC's Ohio's TELRIC Costs for Unbundled Network Elements*, 02-1280-TP-UNC, 11/3/04 that focused upon, inter alia – An SBC Ohio request for Commission review and approval of revised recurring and nonrecurring prices for UNEs. According to the PUCO:

“The Commission disagrees with SBC Ohio's contention that network costs cannot be disaggregated in an economically rational manner. In fact, FCC Part 32 accounting rules were designed just for such a purpose. The Joint CLECs have demonstrated, to the Commission's satisfaction through the testimony of Mr. Starkey that using total company data to develop shared and common overhead loading factors for UNEs would allow SBC Ohio to recover a portion of shared and common costs directly attributable to unregulated services to be recovered from regulated UNE rates through higher overhead loadings to the detriment of the CLECs who must rely on SBC Ohio's UNEs to provision competitive telephone services. In fact, the Commission specifically addressed this

scenario in our [*245] Local Service Guidelines wherein we stated that "TELRIC studies shall reflect relevant allocation of regulated investments as determined by the FCC or the Commission." (Emphasis added) Local Service Guideline V.B.4.b.10. Therefore, SBC Ohio is directed to remove unregulated data, *as accounted for in its ARMIS reports* to calculate the allocators for the shared and common cost numerators and denominators for purposes of its compliance run." (emphasis added)

GEORGIA: A lexis search on the Georgia Commission turned up several instances where the Commission relied on ARMIS data:

Docket 7892-U, Order Granting Joint Motion to Approve New Performance Measurement Plan, July 6, 2005, page 2. In list of effects of approving new plans, the order states: "Reduction in BellSouth's total liability for the payment of Tier 1 and Tier 2 Enforcement mechanism from 44% to 36% of net revenues in Georgia, *based upon ARMIS data.*"

Docket 14361-U, Second Order on Reconsideration (UNE rates), September 2, 2003, page 5. In discussion of growth of projected demand for UNEs, the order states: "With respect to the data used in the June 24, 2003 Order, BellSouth is correct that *only ARMIS data was used in calculating the number of switched lines for the years 1995-2000, while UNE-Loops and UNE-P Loops were included for the year 2001.*"

Docket 14361-U, UNE Rate order, March 18, 2003, page 16, 22-23. In discussion of projected growth of lines, footnote three of the order states, "The 2001 switched access line data was *based upon BellSouth's reported ARMIS data and figures* BellSouth reported as part of the 271 proceeding." In the discussion of pole costs: "For example, the number of poles modeled appears to be based on ARMIS data instead of what a forward-looking, least cost, most efficient network would use. BellSouth did not provide any testimony that its current telephone pole placement practices were forward-looking. Because of this flaw in the methodology, the Staff adjusted BellSouth's proposal by approximately 10 percent to account for a network design that is least cost and forward-looking."

Docket 19341-U, Order on Remaining Issues, February 7, 2007, pages 16, 18, 22. In the order's discussion of high capacity loops: "The FCC also states that "The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." Id. (footnotes omitted). BellSouth argues that the TRRO included all UNE loops because it gauges business opportunities in a wire center. (BellSouth Brief, p. 72)." In discussion of counting business lines: "Also, BellSouth treats its own business switched access lines differently than it is proposing the Commission count business lines for purposes of impairment. ARMIS requires that BellSouth report its lines in voice-equivalents, but limit the voice-equivalent line count to only those circuits actually activated to provide business switched access line service. Id. at 18. BellSouth has inflated the number of business lines so that they are misaligned with the thresholds relied upon by the FCC. Id. at 19-24." In discussion of final order and the TRRO: CompSouth's position was summarized as follows, "State commissions have authority to determine whether BellSouth has followed FCC mandates on how to designate non-impaired wire centers. (TRRO ¶100). CompSouth believes that it is most efficient for the Commission to settle disputes on the front end. (CompSouth Brief, p. 30) An orderly process should be established to determine future changes in the wire center list. The process of reclassifying a wire center would be synchronized with the routine filing of ARMIS 43-08. BellSouth has not offered an alternative. Id. at 31." The Commission concluded: "Therefore, state commissions have the authority to determine whether an ILEC's estimates are accurate. CompSouth's proposed method of having BellSouth file its ARMIS data and allowing time for the CLECs to review it, with a scheduled date for a Commission decision seems reasonable."

2 – RATE CASES (ROR)

From a fast survey it appears that New Hampshire – like ME and some other ROR states - does use separations data, including data from 47 CFR Parts 32, 64, and 36, to arrive at intrastate rates. The need here is pretty obvious. What's not obvious is AT&T data is useful for benchmarking ROR carriers operating in any of its jurisdictions. It may be, for example, that ARMIS data from AT&T states can be used as benchmarks to determine whether particular expenses in these ROR states are just and reasonable.

3 - MERGER REVIEWS

Some states have relied heavily on ARMIS data in mergers/spin-offs. As an example, I was informed that ARMIS data was often used for analysis in the recent Fairpoint proceeding in the Northeast, where that company petitioned to acquire Verizon's wireline business in Vermont, Maine, etc. ARMIS data were used to analyze trends in line counts as well to benchmark depreciation ratios and average expenses per line.

4 - PRICE CAPS

I have not done a comprehensive survey but I did seek input last night from some western states late in the evening after I received inquiries. At least two States that did respond - AZ (with Quest) and WA (with four large ILECS) and NV - either have a true-up mechanism for their price cap/AFOR program or otherwise are required to monitor rates and use Part 32-64-36 as a basis for their actions (to look at intrastate revenue requirements.) I believe there really isn't any other audited publically available benchmarking source for this type of data. I am still trying to find out if any AT&T state has recently re-initialized or otherwise examined an AT&T AFOR OR has a rule or requirement that requires them to do so. If a state ever does what to examine the interstate revenue requirement to check for excessive rates of return or inappropriate allocations from one state to another or from the federal vs State jurisdiction, ARMIS is the only source.

5 - UNIVERSAL SERVICE:

Over 21 State have intrastate universal service programs.

I have been told that California, Texas and South Carolina have USF funds that include line cost data, partially drawn from ARMIS. The Texas USF is based on the HAI Model. [Any state that uses the HAI or Synthesis Model to set UNE rates is using ARMIS.] Texas recently concluded (through stipulation) a very large and important USF case. I managed to track down another former Texas Staff person, former USF Joint Board State Chair, and former NARUC Telecom Staff Subcommittee chair Rowland Curry – who was acting as a consultant in the case. He said that although "ARMIS" is not in the stipulation, it was used (1) to update the HAI cost model (by AT&T and Verizon)(recall ARMIS is public/audited and useful to check state specific filings and benchmark costs against a carrier operations in other states.) (2) by Texas staff to review the pleadings and (3) filed by CLECs and Cable to argue ILECs were not reinvesting in their network and, successfully, that ILECs had recovered most of their investment and did not need support.

Indeed, in December 2007 comments, at pages 2-3, on a related forbearance petition, the Colorado commission points out:

“Second, the COPUC uses ARMIS data in the ordinary course of business and has no other data, which can serve these purposes. For example, the COPUC oversees the Colorado High Cost Support Mechanism (CHCSM), a support mechanism for telephone services in typically rural, high cost areas. The successful administration of this fund relies upon ARMIS data to determine subsidy levels for providers eligible for monetary

support. The COPUC also relies on ARMIS data to fulfill other reporting requirements, which are an integral component of Qwest's current regulatory scheme initiated in 2005. In that scheme, many Qwest services, as well as those of other providers, were either deregulated or regulated in a light-handed manner. Both the initial change in regulatory scheme and ongoing monitoring of that scheme are inextricably linked to and rely upon Qwest data filings with the FCC, including ARMIS data. The COPUC is unaware of another source for this crucial data or of a suitable substitute."

COPUC Comments can be downloaded at the following URL:
<http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817078>

A 5th Circuit decision says that STATE Universal Service programs "cannot burden" the federal USF fund. That court said states cannot assess against interstate revenues. If the FCC grants forbearance from Part 64, carriers won't know what parts of their revenues are from regulated telecommunications services, much less intrastate telecommunications services. Moreover, carriers would have an incentive to shift more revenues to the jurisdiction with the lowest percentage assessment. This could leave the states unable to determine the level of intrastate revenues of the carriers paying the state's USF surcharges.

If you have any questions about the foregoing, please do not hesitate to contact me at 202.257-0568 (cell).

Respectfully Submitted

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