

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

In the Matter of)
)
Petition of AT&T Inc. For Forbearance) WC Docket No. 07-21
Under 47 U.S.C. § 160 From Enforcement)
Of Certain of the Commission's)
Cost Assignment Rules)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
AND THE
NEW JERSEY DIVISION OF RATE COUNSEL
ON AT&T COMPLIANCE PLAN**

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I. INTRODUCTION AND SUMMARY

A. INTRODUCTION

On July 24, 2008, AT&T Inc. (“AT&T”) submitted its cost assignment “compliance” plan to the Federal Communications Commission (“FCC” or “Commission”).¹ The National Association of State Utility Consumer Advocates (“NASUCA”) as an organization,² and one of its members, the New Jersey Division of

¹ / *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 No. 07-21; *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket No. 05-342 (“07-21/05-342”), Compliance Plan filed July 24, 2008 (“AT&T Compliance Plan”).

² / NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others

Rate Counsel (“Rate Counsel”)³ (collectively, “State Advocates”),. hereby submit these reply comments. Although the AT&T Compliance Plan purportedly responds to the specific directives set forth in the Commission’s order approving AT&T’s forbearance from certain cost assignment rules,⁴ the Commission’s review of AT&T’s plan has far-reaching implications because of its likely foundation for plans filed by other incumbent local exchange carriers (“ILEC”), following in the path charted by AT&T.⁵ Also, as these comments demonstrate, the Commission’s deliberations in this compliance phase will affect state and federal regulators’ ability to obtain meaningful data from AT&T in pending and future proceedings.

In its Public Notice, seeking comment on AT&T’s Compliance Plan, the FCC stated, among other things:

Parties are reminded that any comments filed in response to this Public Notice should be limited to AT&T’s Compliance Plan and its consistency with the requirements of the *AT&T Cost Assignment Forbearance Order*. Comments filed in response to this Public Notice that go beyond its scope,

are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

³ / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel’s continued participation and interest in implementation of the Telecommunications Act of 1996 (“Act” or “1996 Act”). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the 1996 Act,” or “the Act,” and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

⁴ / 07-21/05-342, *Memorandum Opinion and Order*, rel. April 24, 2008 (“AT&T Cost Assignment Forbearance Order”).

⁵ / Verizon and Qwest have sought similar cost assignment relief to that afforded AT&T. Letter from Ann Berkowitz, Associate Director – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 07-21, 07-273, 07-204 (filed May 23, 2008) (“Verizon/Qwest Request”).

such as comments addressing the merits of granting forbearance relief to AT&T in the first instance, will not be considered.⁶ Therefore, although State Advocates disagree strongly with the FCC's Order, State Advocates limit the scope of the reply comments to the merits of AT&T's specific plan for compliance. AT&T's compliance plan bears directly on consumer advocates' ability to participate effectively in federal and state regulatory proceedings, and on their success in advocating for just and reasonable rates.

B. SUMMARY

The initial comments on the AT&T compliance plan raise serious concerns about the potential impact of this flawed plan on consumers' and regulators' ability to obtain data that is essential to sound policy making in pending Commission proceedings and to state commissions' ability to fulfill their statutory mandates. Initial comments demonstrate that the proposed plan would tip scales even further, making access to cost information yet more asymmetric between AT&T and all others. Under its proposed plan, AT&T would control to an unacceptable degree the information that it would divulge to the Commission, thereby rendering AT&T's proposed plan ineffective and inadequate to achieve the FCC's directive that AT&T "maintain its accounting procedures and data in a manner that will allow it to provide useable information on a timely basis if requested by the Commission."⁷

Relying on AT&T to choose when and how to update its cost allocation ratios for regulated and unregulated services, and to determine what information to supply to the

⁶ / 07-21, Public Notice, DA 08-1826, July 31, 2008, at 1, with footnote stating: "We note that, separately, a petition for reconsideration of the forbearance order is pending before the Commission. See Sprint Nextel Corporation *et al.*, Petition for Reconsideration, WC Docket Nos. 07-21, 05-342 (filed May 27, 2008)." *Id.*, at fn 4.

⁷ / *AT&T Cost Assignment Forbearance Order*, at para. 31.

Commission would be a parody of regulatory safeguards. Although AT&T may seek to portray cost accounting data as obsolete, the data bears directly on various pending regulatory reform matters.

AT&T argues, for example, that the cross-subsidy issue is a product of rate-of-return regulation and is less of a concern under price cap regulation.⁸ In the current market, asserts AT&T, “the situation is very different. AT&T faces significant competition for its services from multiple sources” and “is subject to ‘pure’ price caps (without sharing or low end adjustments) or other forms of non-cost-based or incentive regulation in all jurisdictions in which it operates as an incumbent LEC.”⁹ AT&T unpersuasively concludes:

Under this regime, even if AT&T purported to shift costs from a competitively provided service to a service the Commission has not yet classified as such, such cost-shifting would have no impact whatsoever on AT&T’s rates, since its rates are set without regard to costs. Thus, the mechanics and logic of pure price caps and other forms of incentive regulation, combined with the significant competition AT&T faces for all of its services, fundamentally mitigate any legitimate concerns about cost-shifting.¹⁰

AT&T’s shaky reasoning is based on a false characterization of competitive markets as well as on an attempt to keep regulators in the dark about its costs (by portraying them as irrelevant). State Advocates disagree vehemently with AT&T’s characterization of significant competition and with AT&T’s assertion that price caps render cost data irrelevant.¹¹ The Commission presently is investigating intercarrier compensation

⁸ / AT&T Compliance Plan, at 9. Such examples, according to AT&T, include sharing and low-end adjustments.

⁹ / Id., at 9-10.

¹⁰ / Id., at 10.

¹¹ / Excessive interstate special access rates provide one example of how price caps do not in and of themselves lead to just and reasonable rates.

reform, separations reform, special access rates, and universal service fund reform. In each of these proceedings, carriers likely will seek to be “made whole” as a result of regulatory reform. Although such a request should be denied resoundingly, timely access to relevant cost data will be essential for the Commission’s deliberations in these pending dockets.

II. ANALYSIS AND RESPONSE TO COMMENTS

A. BACKGROUND

The Commission conditioned its approval of AT&T’s petition of forbearance from cost assignment rules on the approval of a compliance plan filed by AT&T that would describe “in detail how it will continue to fulfill its statutory and regulatory obligations, including sections 272(e)(3) and 254(k), and the conditions of this Order.”¹²

The Commission ordered that the plan include the following:

- A description of AT&T’s imputation methodology that demonstrates that its access charge imputation methodologies remain consistent with section 272(e)(3) and the Section 272 Sunset Order;
- AT&T’s first annual certification that it will comply with its 254(k) obligations in the absence of cost assignment rules and that it will provide any requested cost accounting information necessary to prove such compliance.
- A proposal for how AT&T will maintain its accounting procedures and data in a manner that will allow it to provide useable information on a timely basis if requested by the Commission to comply with any of the conditions of this relief and its commitment¹³ to the Commission.

¹² / *AT&T Cost Assignment Forbearance Order*, at para. 1.

¹³ / The “commitment” to which the Commission refers is AT&T’s commitment to provide an annual certification that it does not cross-subsidize (and thus complies with its 254(k) obligations) as promulgated in the condition in the preceding bullet. AT&T made this commitment in *ex partes* filed in the proceeding. See, *AT&T Cost Assignment Forbearance Order*, at para. 31 and fn. 113 citing 07-21, Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services Inc., to Marlene Dortch, Secretary, FCC, filed Apr. 18, 2008 (“AT&T Apr. 18 Ex Parte Letter”), at 2 and *id.*, Letter from

- An explanation of the transition process that AT&T will undertake, including an expected schedule, to discontinue compliance with the Cost Assignment Rules and replace them with the procedures outlined in its compliance plan upon approval of the plan.¹⁴

B. IMPACT OF COMPLIANCE PLAN ON CONSUMERS

The Commission’s approval of a cost compliance plan should in no way limit the Commission, states, and interested parties from obtaining the data and information necessary to ensure that interstate and intrastate rates are just and reasonable.

Initial comments stress the importance of ensuring that any compliance plan not limit future access to data that is necessary for participating in regulatory proceedings. State Advocates concur with the cautionary advice of the Public Service Commission of Wisconsin (“PSCW”) that the Commission “take care to ensure that its approval of AT&T’s Compliance Plan [] not inadvertently limit the FCC, state commissions, or other affected entities from obtaining any data needed to effectively participate in any federal or state proceedings to ensure applicable statutory duties are met.”¹⁵ State Advocates concur with the similar point expressed by the State Members of the Federal State Joint Board on Separations (“State Separations Members”) that “[a]pproval of a Compliance Plan should not limit the FCC or States from developing, or state commissions from having, ongoing reporting requirements in the future.”¹⁶ The approval of any compliance plan should not limit the Commission, states, and interested parties from seeking additional information that may be necessary to enable them to ensure that rates are just and reasonable. Also, the approval of any compliance plan should not preclude those

Robert W. Quinn, Senior Vice President – Federal Regulatory, AT&T Services Inc., to Marlene Dortch, Secretary, FCC, filed Apr. 22, 2008 (“AT&T Apr. 22 Ex Parte Letter”), at 3.

¹⁴ / *AT&T Cost Assignment Forbearance Order*, at para. 31.

¹⁵ / PSCW, at 1-2.

¹⁶ / State Separations Members, at 2.

regulators from seeking and obtaining information that may be necessary for them to assess related matters such as, but not limited to, separations, intercarrier compensation reform, special access rates, and universal service programs,¹⁷ and, also, the approval of a compliance plan should not provide an excuse for AT&T later to refuse to provide such information because it would require a “special study.”¹⁸ State Advocates urge the Commission to heed PSCW’s concern that “a simple approval of a Compliance Plan should not be treated as an implied limitation upon the information which the FCC, state commissions, and other affected entities can request in the future.”¹⁹

State Advocates concur with Sprint Nextel Corporation, COMPTEL, tw telecom, inc. and OneCommunications Corp. (“Sprint Nextel et al.”) that the AT&T plan should “be publicly available in a searchable format to provide all interested parties complete access to such data.”²⁰ Furthermore, State Advocates urges the Commission not only to have the plan (if and when approved) publicly available, but also all of the underlying data, “special studies,” work papers and other documentation related to AT&T’s compliance that the Commission or state regulators may request subsequent to the filing of any approved plan.

¹⁷ / It is important that any attempts by carriers to be “made whole” as a result of regulatory reform in any or all of these pending proceedings (an attempt that State Advocates oppose) is informed by accurate cost data. Sprint Nextel, et al., at 14. State Advocates share Sprint Nextel, et al.’s view that cost data would assist the Commission in ensuring that AT&T does not over-earn, which could “result in unnecessary increases in end user costs.” *Id.* Also, State Advocates echo the concern of State Separations Members that the ability to disaggregate cost data between jurisdictions is “vital” to the efforts underway to develop permanent separations reform before the separations freeze ends in July 2009. State Separations Members, at 4.

¹⁸ / Rate Counsel and NASUCA members encounter such responses frequently in discovery in state proceedings. *See also*, WPSC, at 4, stating that although “AT&T offers to perform special studies to provide costs based on other factors [regarding jurisdictional separations], it does not indicate any time frame in which the data would be made available or whether it would challenge the regulatory purpose of a request.”

¹⁹ / WPSC, at 2-3.

²⁰ / Sprint Nextel, et al., at 5.

The AT&T Compliance Plan underscores the urgency of the FCC’s completion of its review of separations factors.

The AdHoc Telecommunications Users Committee (“AdHoc”) raises the concern that the AT&T Compliance Plan lacks provisions “to ensure that cost assignments between unregulated affiliates and entities that offer FCC regulated services are made in a manner that allows the FCC to fulfill its responsibilities.”²¹ More than ten years ago, in its passage of the sweeping Telecommunications Act of 1996, Congress explicitly prohibited subsidization of competitive services by noncompetitive services. Section 254(k) of the 1996 Act states:

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.²²

Despite this unambiguous statutory mandate, the FCC and state regulators have not yet established and enforced the necessary cost allocation rules and cost accounting safeguards to “ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.”

The FCC’s pending investigation of “separations” in Docket No. 80-286²³ bears directly on its ability to prevent and to detect improper cross-subsidization, particularly as

²¹ / AdHoc, at 5.

²² / 47 U.S.C. § 254 (k).

²³ / *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Further Notice of Proposed Rulemaking (rel. May 16, 2006) (“*FCC Separations FNPRM*”).

carriers use extensive common network and resources as an invaluable strategic and physical platform from which to enter unregulated lines of business, such as digital subscriber line service, bundled offerings, and FiOS-based and U-verse-based Internet and video services. Although the FCC's Part 64 rules address cross-subsidization in principle, they fail to protect consumers adequately in their implementation.

The Commission's examination of ILECs' separation of costs between regulated and unregulated services and between the intrastate and interstate jurisdiction is long overdue: Absent such an investigation, AT&T's mere filing of a compliance plan will not enable the FCC to ascertain whether AT&T is assigning and allocating sufficient costs to the various services that have been deemed interstate or unregulated.

Furthermore, as initial comments demonstrate, the economic incentives that AT&T confronts are not entirely compatible with the interests of consumers,²⁴ and, therefore, an outside, objective assessment of AT&T's accounting data is essential to ensure that rates are just and reasonable. State Advocates recommend that the Commission require the AT&T Compliance Plan to include a provision for a third-party audit, to be conducted under the FCC's supervision. Without provisions for accountability and enforcement, AT&T's Compliance Plan will not protect consumers and competitors from improper cost allocation. Periodic audits of AT&T's accounts, conducted by a third party of AT&T's and subject to review by the Commission and interested parties, are essential to ensure that the Commission's regulatory objectives are realized.

²⁴ / AdHoc, at 2.

The Commission should reject AT&T’s proposed unilateral approach to updating ratios between regulated and non-regulated cost categories.

State Advocates concur with AdHoc’s concern about AT&T’s proposed ability to “update” ratios between regulated and non-regulated cost categories “if it sees fit to do so.”²⁵ AT&T proposes to keep its most recent calendar year’s CAM audit-based cost allocation ratios by Part 32 account,²⁶ and reserves the right to “update” the ratios if the Commission requests accounting cost data from AT&T “to take into account changes that have taken place since the data of this Compliance Plan, to the extent those changes have rendered the ratios significantly less reliable than they were at the time of adoption of the Compliance Plan in reflecting appropriately allocated costs, and if such updates are not excessively burdensome.”²⁷ However, as Sprint Nextel et al. observe, AT&T fails to describe the methodology that it would use to update the CAM ratios.²⁸ Furthermore, AT&T’s proposed discretion over modifications to the CAM ratios would enable it to “skew the results to its advantage.”²⁹

In other proceedings, State Advocates have demonstrated that incumbent local exchange carriers have the incentive and ability to subsidize improperly their forays into new lines of business with regulated services by failing to attribute sufficient common

²⁵ / AdHoc, at 6; *see generally*, AdHoc, at 6-7 and also, Sprint Nextel et al., at 5.
²⁶ / AT&T Compliance Plan, at 11. AT&T notes that the allocation ratios have been frozen for a number of years. *Id.*, at 12.
²⁷ / AT&T Compliance Plan, at 12.
²⁸ / Sprint Nextel, at 7.
²⁹ / Sprint Nextel, at 7.

cost and expenses to unregulated ventures.³⁰ Rather than approve AT&T's proposed ability to modify cost ratios based on its own judgment, the Commission instead should consider the approach that AdHoc proposes, whereby the Commission could discern cost allocation trends, and which relies on direct cost assignment, to the greatest extent practical.³¹

AT&T's proposal to perform special cost studies lacks sufficient detail.

AT&T proposes to perform special cost studies to determine allocation factors if the Commission seeks allocated accounting cost data based on other factors, and further indicates that it will maintain documentation of its current methods and procedures for cost allocation as well as backup electronic systems, spreadsheets and software that it currently uses for allocation.³² However, AT&T fails to provide sufficient detail about *how* it proposes to conduct its special studies, and, therefore, the Commission lacks the requisite information to gauge the merits of these proposed studies.³³ As AdHoc indicates, AT&T's proposed use of special studies lacks "effective oversight to protect the public interest."³⁴ Furthermore, asymmetrical access to relevant information, where

³⁰ / *FCC Separations FNPRM*. As noted above, Rate Counsel and NASUCA are participating in this proceeding. See, Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate in CC Docket No. 80-286, August 22, 2006; Reply Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate in CC Docket No. 80-286, November 20, 2006; Affidavit of Susan M. Baldwin on behalf of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates in CC Docket No. 80-286, August 22, 2006.

³¹ / AdHoc, at 7; AdHoc Telecommunications Users Committee, COMPTTEL, tw telecom inc., One Communications Corp., "Blueprint for a Compliance Methodology Cost Assignment Plan, July 7, 2008; Sprint Nextel et al., at 8, 13-14.

³² / AT&T Compliance Plan, at 12. AT&T indicates that it will not retain former BellSouth information. AT&T had been integrating BellSouth cost allocation processes into AT&T and intends to cease that effort.

³³ / AdHoc, at 7-8.

³⁴ / *Id.*, at 8.

AT&T possesses all the data and doles out to the Commission only selected subsets of such data, combined with the vaguely defined special cost studies “is ripe for misuse.”³⁵

These various attributes demonstrate that AT&T’s proposed compliance plan is deeply flawed: the special studies are ill-defined; AT&T uniquely possesses access to relevant data and would control the information that it unilaterally deigns suitable for submission to the Commission and interested parties; and AT&T possesses the incentive and ability to under-allocate costs to its unregulated services, thereby rendering them more profitable, and rendering rate-regulated services less profitable.

The ILECs’ overlapping, yet non-identical petitions for forbearance underscore the importance of addressing overarching policy and procedural matters in a single proceeding rather than a fragmented one.

Among other things, in support of its proposed imputation and procedures to ensure compliance with Section 272(e)(3) and the Section 272 Sunset Order, AT&T asserts that that the imputation amounts are “readably identifiable through coding of the debit amounts on the revenue journal and the related supporting data,” and states that the imputed amounts are also identified in ARMIS Reports 43-01, 43-02, and 43-03 in footnotes.³⁶

AT&T’s proposed reliance on ARMIS Reports, however, simply underscores the fragmented approach to policymaking that ensues as a result of multiple overlapping petitions for forbearance being filed separately with the FCC by carriers.³⁷ For example,

³⁵ / Sprint Nextel, et al., at 8.

³⁶ / AT&T Compliance Plan, at 6.

³⁷ / *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, FCC WC Docket No. 07-267, Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings, September 19, 2007 (“CLEC Petition”). See initial and reply comments of State Advocates, March 7, 2008 and March 17, 2008, respectively.

Verizon, which has sought similar cost assignment relief to that afforded AT&T,³⁸ has separately sought forbearance from *all* ARMIS reporting requirements and also from various property recordkeeping requirements³⁹ (by comparison, AT&T has sought forbearance from “only” ARMIS Reports 43-05 through 43-08).⁴⁰ Therefore, if AT&T subsequently seeks the same level of comprehensive relief from ARMIS reports that Verizon has sought, AT&T’s proposed reliance on ARMIS reports 43-01, 43-02, and 43-03 as part of its proposed compliance plan in the instant proceeding would then become meaningless. Moreover, if Verizon succeeds with its “me-too” request, in which it seeks the same relief from cost assignment as AT&T has been granted, and also succeeds with its separate request for forbearance from all ARMIS reporting, the imputation information to which AT&T cites in its proposed compliance plan would evaporate as a possible compliance measure for Verizon.

The ILECs’ overlapping, yet non-identical petitions for forbearance underscore the importance of addressing overarching policy and procedural matters in a single proceeding rather than a fragmented one. The combination of the various petitions for forbearance, including the “me-too proceedings,” jeopardizes the Commission’s efforts for coherent policy making.

III. CONCLUSION

The Commission should reject AT&T’s proposed compliance plan because it lacks adequate detail and should require the kind of cost-causation

³⁸ / Verizon/Qwest Request.

³⁹ / Petition of Verizon For Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission’s Recordkeeping and Reporting Requirements, WC Docket 07-273.

⁴⁰ / *In the Matter of Petition of AT&T for Forbearance Under 47 U.S.C. §160(c) from Enforcement of Certain of the Commission’s ARMIS Reporting Requirements*, WC Docket No. 07-139.

methodology described in the AdHoc Blueprint. As Sprint Nextel et al. state, AT&T's plan "is no 'plan' at all; it is a cynical and dismissive refusal to comply with the requirements of the *AT&T Order*."⁴¹ Furthermore, State Advocates concur with the recommendation of State Separations Members that the Commission "should reiterate and amplify its conclusions in paragraphs 33 and 34 of the *AT&T Forbearance Order* that State commissions may exercise their own state authority to conduct their rate and other regulation, that the FCC is not preempting any state accounting requirements adopted under state authority, and that States can require their own cost allocation rules."⁴²

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