FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
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 No. 07-21
	)	
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 No. 07-273
	)	
Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160	)	WC Docket No. 07-204

OPPOSITION OF VERIZON
TO APPLICATIONS FOR REVIEW

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OPPOSITION OF VERIZON[1]
TO APPLICATIONS FOR REVIEW

I. INTRODUCTION AND SUMMARY.

There is no basis for the applications for review of the Wireline Competition Bureau's approval of the cost assignment forbearance compliance plans filed by AT&T, Verizon, and Qwest.[2] The companies submitted the plans to the Bureau for approval as required by the

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[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications, Inc. (collectively "Verizon").

[2] *Wireline Competition Bureau Approves Compliance Plans*, Public Notice, 23 FCC Rcd 18417 (2008) ("*December 31 Public Notice*"); *Application For Review of the Wireline Competition Bureau Approval of the Compliance Plans of AT&T, Verizon and Qwest*, National Association of State Utility Consumer Advocates, New Jersey Division of Rate Counsel, WC Docket No. 07-21 (collectively "NASUCA" and "NASUCA Application") (Jan. 29, 2009); *Application For Review Of Action Taken Pursuant To Delegated Authority*, AdHoc, COMPTEL, WC Docket Nos. 07-21, 07-273, 07-204 (Jan. 30, 2009) (collectively "AdHoc" and "AdHoc Application") (collectively "Applicants" and the "Applications").

underlying forbearance orders to satisfy the conditions for relief.[3] The plans submitted by the companies addressed the specific, required terms of the forbearance orders, and approval of the plans by the Bureau without elaboration is both appropriate and unsurprising. Indeed, at the outset of the compliance plan process the Bureau specifically instructed parties that its role was limited to reviewing the plans for compliance with the forbearance orders and that commenters should not revisit the underlying relief.

Applicants' process argument notwithstanding, there was no need for the Bureau to do anything more than issue a simple notice of approval of the compliance plans, which the Bureau did last year. The forbearance orders themselves included a detailed explanation of the basis for relief and addressed the arguments raised by opposing parties. The Bureau was tasked with the ministerial function of reviewing the compliance plans, submission of which was one of the conditions of relief, to ensure that the plans addressed the requirements specified in the forbearance orders. If they did, there was nothing for the Bureau to do but approve the plans. The Administrative Procedure Act ("APA") requirement of a detailed order does not apply to ministerial agency functions such as the Bureau's approval of the compliance plans. Indeed, in a variety of contexts the Commission's bureaus perform the ministerial task of determining whether conditions established by the Commission are satisfied, the results of which are "announced" by public notice without elaboration. Moreover, if anything for APA purposes the

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[3] *See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008) ("*AT&T Cost Assignment Forbearance Order*"), *pet. for recon. pending; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's ARMIS Reporting Requirements; Petition of Verizon For Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements, et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647 (2008) ("*Recordkeeping and Reporting Forbearance Order*"), *pet. for recon. pending* (collectively the "forbearance orders").

Bureau's approval of the compliance plans was an informal adjudication with a much lower process standard that the Bureau clearly satisfied.

In addition, AT&T, Verizon, and Qwest have already implemented much of the cost assignment forbearance relief, and upsetting the Bureau's approval of the compliance plans would impact the underlying forbearance that was in the making for years. Reversing the Commission's forbearance decision and re-imposing the burdensome and meaningless cost assignment rules uniquely on these carriers could only be justified if there is a legitimate policy basis to do so. No such basis exists. On the larger forbearance question, Applicants merely recycle the same substantive arguments that they raised multiple times below and which are also raised in the meritless pending petitions for reconsideration of the forbearance orders. None of these arguments are valid. The Commission should deny the Applications.

II. THE COMPLIANCE PLAN REQUIREMENTS IN THE FORBEARANCE ORDERS WERE VERY SPECIFIC, AND THE BUREAU DID EXACTLY WHAT IT WAS SUPPOSED TO DO IN CONFIRMING THAT THE COMPANIES' PLANS SATISFIED THOSE REQUIREMENTS.

The Commission, in the forbearance orders, delegated to the Bureau a very narrow, one-time task – *i.e.*, review of the AT&T, Verizon, and Qwest compliance plans to determine if they contained those items required by the forbearance orders. Those requirements included:

- A description of how AT&T, Verizon, and Qwest would continue to fulfill statutory obligations under sections 272(e)(3) and 254(k);
- A description of how the companies' proposed imputation methodologies were consistent with section 273(e)(3);
- A first annual certification of section 254(k) compliance;
- A description of how accounting information would be retained consistent with section 220 and for future Commission access, if needed;

- A description of how accounting data would be maintained in those areas where Verizon and Qwest receive rural high cost universal service support; and
- An explanation of the process, including an expected schedule, of the companies' transition away from the cost assignment rules.

AT&T Cost Assignment Forbearance Order ¶ 31; *Recordkeeping and Reporting Forbearance Order* ¶¶ 27, 30, 32. The Bureau had no authority to add to or subtract from these requirements nor to withhold approval of the plans if they indeed satisfied the requirements. The Bureau sought comment on the proposed plans submitted by AT&T, Verizon, and Qwest but at the same time acknowledged that its role was narrow. In its public notices posting the plans for comment, the Bureau was clear that it was merely tasked with determining whether the compliance plans satisfied the requirements as laid out by the Commission in the forbearance orders.

> Parties are reminded that any comments filed in response to this Public Notice should be limited to Verizon's Compliance Plan and its consistency with the requirements of the *Verizon/Qwest Cost Assignment Forbearance Order*. Comments filed in response to this Public Notice that go beyond its scope, such as comments addressing the merits of granting forbearance relief to Verizon in the first instance, will not be considered.

Comment Dates Set on Verizon Compliance Plan for Forbearance Relief from Cost Assignment Rules, Public Notice, 23 FCC Rcd 13844 (2008); *see also Comment Dates Set on AT&T Compliance Plan for Forbearance Relief from Cost Assignment Rules*, Public Notice, 23 FCC Rcd 11560 (2008); *Comment Dates Set on Qwest Compliance Plan for Forbearance Relief from Cost Assignment Rules*, Public Notice, 23 FCC Rcd 13976 (2008).

Those few parties that commented on the compliance plans largely ignored the Bureau's admonition and, as Applicants do here, used the opportunity to comment on the compliance plans to challenge the underlying forbearance relief. AdHoc went furthest of all, proposing, as discussed below, that the Bureau actually reverse the Commission's decision to forbear from the

cost assignment rules and reestablish an even more burdensome cost assignment system.[4] No commenting party meaningfully challenged, nor could they have, the fact that AT&T, Verizon, and Qwest's compliance plans contained all necessary elements and satisfied the requirements of the forbearance orders.[5] NASUCA itself even acknowledged that Verizon's proposal for maintaining accounting data in those areas where Verizon receives rural high cost universal service support was "adequate." Comments of NASUCA, et al., WC Docket No. 07-21 (Oct. 8, 2008).

The Bureau took its compliance plan role seriously – evaluating the plans over the course of several months – and upon completion of that analysis approved the plans in a simple notice announcing that the plans satisfied the requirements of the forbearance orders. *See December 31 Public Notice*. Though Applicants preferred a different outcome, the Bureau acted prudently and did exactly what the Commission directed it to do.

III. THERE IS NO APA ISSUE WITH THE BUREAU'S APPROVAL OF THE COMPLIANCE PLANS.

Applicants argue that the *December 31 Public Notice* approving the compliance plans violated the APA because (1) the Bureau did not provide a "reasoned explanation" for its decision and failed to "respond to issues" raised by commenters; and (2) the *December 31 Public*

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[4] *See, e.g.*, Letter from James Blaszak, AdHoc, Karen Reidy, COMPTEL, and Thomas Jones, tw telecom and One Communications, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-21 and 05-342 (July 7, 2008).

[5] *See* Letter from Theodore Marcus, AT&T, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-21 and 05-342, with AT&T Compliance Plan (July 24, 2008) (listing and summarizing all cost assignment forbearance conditions; describing all required compliance procedures; providing all required documentation); Letter from Ann Berkowitz, Verizon, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 0-273 and 07-21, with Cost Assignment Forbearance Compliance Plan of Verizon (ILEC Operations) (Sept. 19, 2008) (same); Letter from Melissa Newman, Qwest, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-204 and 07-21, with Qwest Corporation's Compliance Plan (Sept. 24, 2008) (same).

Notice was not supported by "substantial evidence." NASUCA Application at 9-10; AdHoc Application at 3-6. These arguments are misguided. The Bureau's approval of the compliance plans was a ministerial act not subject to the APA requirement of a detailed order. Alternatively, if anything for APA purposes the Bureau's approval was the product of an informal agency adjudication, and thus the Bureau was not required to provide a detailed explanation of its rationale in approving the plans or to offer substantial evidence. Moreover, it is common for the Commission to delegate to its bureaus the task of determining whether specific conditions established by the Commission are satisfied, the results of which are often "announced" in a public notice without elaboration.

A. The Bureau's Determination That The Compliance Plans Satisfied The Commission's Conditions For Forbearance Was A Ministerial Act Not Subject To The APA Requirement Of A Detailed Order.

Applicants erroneously assume, without any explanation, that the Bureau's determination that the compliance plans satisfied the conditions to forbearance adopted by the Commission was subject to the APA requirement of a detailed order. This assumption is flawed. Not every action of the Commission is subject to APA requirements for a detailed, written explanation. Rather, as is the case with the Bureau's decision to approve the compliance plans, ministerial actions of administrative agencies do not require detailed orders. And this makes sense as a policy matter. The alternative would impose new burdens on administrative agencies to publish detailed, written explanations for every ministerial act – an obligation that would require significant resources not envisioned by the APA.

For example, in *aaiPharma Inc. v. Thompson*, 296 F.3d 227 (4th Cir. 2002), the plaintiff alleged that the Food and Drug Administration ("FDA") had a duty to ensure the accuracy of "Orange Book" listings of approved drug products and that the agency's refusal to do so violated

the APA. After determining that it was reasonable for the FDA to conceive of its role in updating the Orange Book listings as a purely ministerial task, the Fourth Circuit rejected aaiPharma's APA challenge and affirmed the district court's holding that an APA challenge could not be brought because the agency's interpretation of its statutory duty as ministerial was reasonable. *Id.* at 241.

Likewise, in *United States v. Sobkowicz*, 1993 U.S. App. LEXIS 11196 (9th Cir. 1993) (unpublished), the Ninth Circuit held that the United States Treasurer's reporting and certifying of applicable interest rates was not subject to the APA. Because such actions did "not rise to the level of the creation of a 'substantive rule' requiring compliance with the APA's notice and comment procedures," the Treasurer "was not required to initiate notice and comment rulemaking procedures under the APA." *Id.* at *9. The Ninth Circuit based its holding on the fact that "[t]he interest rate certified by the Treasurer is purely ministerial; it merely fills in one of the figures in the formula Congress devised for determining treble damages." *Id.*

The Tenth Circuit in *United States v. Thompson*, 687 F.2d 1279 (10th Cir. 1982), also concluded no APA action could be brought against the Atomic Energy Commission arising out of its publication and local notice provision procedures. Those acts, the court observed, were "in reality nothing more than the execution of the regulation by those in the field charged with such administrative duties. Again, these are acts of notice and are administrative functions at the end of the administrative chain." *Id*. at 1283. In essence, the Tenth Circuit held that APA review of the agency's notice provisions was inapposite because the agency action amounted only to the performance of a ministerial function.

Like the agency actions in *aaiPharma*, *Sobkowicz* and *Thompson*, the Bureau's approval of the compliance plans was a ministerial undertaking. The forbearance orders granting cost

assignment relief spelled out, in laundry-list fashion, the very specific requirements that the compliance plans had to satisfy as a condition to forbearance. *AT&T Cost Assignment Forbearance Order* ¶ 31; *Recordkeeping and Reporting Forbearance Order* ¶¶ 27, 30, 32. The Bureau lacked discretion as to the applicable standards or criteria to use in approving the compliance plans. Nothing was left for the Bureau to do but confirm that the plans addressed each of the items established by the Commission as a condition of forbearance. The confirmation that those conditions had been met constitutes a ministerial task delegated to the Bureau by the Commission that is not subject to the requirements of the APA for a detailed order.

Indeed, in a variety of contexts the Commission delegates to its bureaus the ministerial task of determining whether specific conditions established by the Commission are satisfied – determinations that are not subject to the APA requirement for a detailed order. For example, under the Commission's spectrum procedures, an application seeking a *de facto* transfer lease is approved by the Wireless Telecommunications Bureau if it determines that the application meets the conditions established by the Commission; the Wireless Bureau does not issue an approval order pursuant to the APA but merely notes the approval in the Universal Licensing System ("ULS") and sends a letter to the spectrum leasing parties indicating that the application was sufficiently complete and has been granted. *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, ¶ 29 (2004).

Likewise, in the licensing context, when a bureau determines that the specific conditions to the grant of a license have been satisfied, the bureau often will simply release a notice to that

effect. The notice is styled as "informative" and does not contain (nor does it need to) any "reasoned explanation" for the bureau's determination that the conditions to the license have been satisfied. *See, e.g.*, *Policy Branch Information – Actions Taken*, Public Notice, 23 FCC Rcd 14847 (2008) ("The Bureau has determined that SES Satellites (Gibralter) Ltd. has satisfied condition 2 to the grant of IBFS File No. SAT-ASG-20080609-00120").

As these examples illustrate, the Commission routinely authorizes its bureaus to perform the ministerial task of determining whether conditions established by the Commission have been met, and those determinations are not subject to any requirement to provide a detailed explanation.

B. In Addition, If Anything For APA Purposes The Bureau's Determination Was The Product Of An Informal Agency Adjudication And Did Not Require The Formality Sought By Applicants In Any Event.

The Bureau's decision was the product of an informal agency adjudication, if anything for APA purposes. As a result, there is no requirement that the Bureau provide a "reasoned explanation" of its rationale in approving the compliance plans or that its decision be supported by "substantial evidence," as Applicants erroneously contend. NASUCA Application at 9-10; AdHoc Application at 3-6.

The *December 31 Public Notice* was an informal adjudication because it is an "agency action that is neither the product of formal adjudication or a rulemaking." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). Applicants do not contend that the Bureau engaged in a rulemaking in approving the compliance plans. Nor was the Bureau's approval of the compliance plans a formal adjudication, since it was not a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing …." 5 U.S.C. § 554(a).

As an informal adjudication, the procedure followed by the Bureau in approving the compliance plans fully satisfied APA requirements. In fact, the Supreme Court approved an informal adjudicatory process nearly identical to the one used here. In *Camp v. Pitts*, 411 U.S. 138 (1973), the Comptroller of Currency denied a bank charter application and notified the applicant of the denial "through a brief letter, which stated in part: '[W]e have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.'" *Id.* at 138-39. As here, "[n]o formal hearings were required by the controlling statute or guaranteed by the applicable regulations …." *Id.*. The Supreme Court reversed the Fourth Circuit's holding the "the Comptroller's ruling was 'unacceptable because 'its basis' was not stated with sufficient clarity to permit judicial review." *Id*. at 139-40. As the Court explained, the fact that "the Comptroller inadequately explained his decision" is *not* a basis for a reviewing court to overturn an informal adjudication. *Id. at* 141.

Additionally, the Fifth Circuit has approved agency procedures for informal adjudication similar to that used by the Bureau in approving the compliance plans. In *American Airlines, Inc. v. DOT*, 202 F.3d 788 (5th Cir. 2000), the Department of Transportation ("DOT") issued an order in which it announced that it would rule on specific legal issues connected to provision of air passenger services. The DOT then allowed interested parties to submit comments on these issues. The DOT reviewed the comments and issued a declaratory order on precisely the issues that it identified. In its review of the DOT's actions the Fifth Circuit ruled that the DOT properly disregarded the APA's requirements for formal adjudications. *See id*. at 797-99. The court concluded that the DOT's procedures, which included identification of the legal issues and the allowance of comments during an extended period, met the minimum notice requirements of informal adjudications. *Id.* at 797.

Agencies are simply not required to issue the kind of detailed explanation based on substantial evidence that Applicants complain about when adjudicating matters informally as the Bureau did here. *American Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (an informal adjudication "requires neither agency findings of fact nor conclusions of law."). As the D.C. Circuit has observed, with informal adjudications "it is common for the record to be spare," and "factual determinations are not normally present in deferential APA review of informal adjudications." *Menkes v. Dep't of Homeland Security*, 486 F.3d 1307, 1314, 1315 (D.C. Cir. 2007).

Furthermore, Applicants ignore that, "[i]n the absence of a statute requiring an agency to conduct its adjudication 'on the record after opportunity for agency hearing,' an agency can define its own procedures for conducting an informal adjudication." *American Airlines*, 202 F.3d at 797 (5th Cir. 2000) (quoting 5 U.S.C. § 554(a)). Concerning the "minimal requirements" for informal adjudication, *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990), courts have inferred a requirement that there be "some sort of procedures for notice [and] comment … as a necessary means of carrying out our responsibility for a thorough and searching review [of agency action.]" *Independent U.S. Tanker Owners Committee v. Lewis*, F.2d 908, 923 (D.C. Cir. 1982). But even if the agency action here rose to the level of an informal adjudication, that requirement has been satisfied: The Bureau solicited from interested parties comments "limited to Verizon's Compliance Plan and its consistency with the requirements of the *Verizon/Qwest Cost Assignment Forbearance Order*." *Comment Dates Set on Verizon Compliance Plan for Forbearance Relief from Cost Assignment Rules*, Public Notice, 23 FCC Rcd 13844 (2008); *see also Comment Dates Set on AT&T Compliance Plan for Forbearance Relief from Cost Assignment Rules*, Public Notice, 23 FCC Rcd 11560 (2008); *Comment Dates*

Set on Qwest Compliance Plan for Forbearance Relief from Cost Assignment Rules, Public Notice, 23 FCC Rcd 13976 (2008).

In conducting an informal adjudication concerning the compliance plans the Bureau provided interested parties with notice and an opportunity for comment. And the Bureau considered those comments before approving the plans, despite the fact that Applicants ignored the Bureau's direction and treated the compliance plan process as another opportunity to challenge the underlying relief. Nothing more was required.

IV. THE COMMISSION SHOULD NOT ATTEMPT TO REVISIT THE UNDERLYING COST ASSIGNMENT FORBEARANCE RELIEF.

Relief from the antiquated cost assignment rules was a long time in coming for AT&T, Verizon, and Qwest. Indeed, it has been more than 15 years since the Commission adopted its price cap regime, which severed the link between carrier costs and rates.[6] *AT&T Cost Assignment Forbearance Order* ¶ 17; *Recordkeeping and Reporting Forbearance Order* ¶¶ 26-27, 31. In that time, competition in the communications marketplace has exploded and new technologies have passed by traditional services and traditional regulation. Yet the Commission's cost assignment rules persisted, skewing the market and harming consumers by hindering introduction and delivery of innovative products and services. *AT&T Cost Assignment Forbearance Order* ¶ 42.

Now is not the time to roll back the clock and reopen these proceedings with an eye toward again saddling only a few among many competitors with burdensome regulations that serve no purpose. Other companies, including cable companies and other VoIP providers and

[6] These forbearance proceedings also began more than three years ago when the former BellSouth first filed for cost assignment relief. *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket No. 05-342 (Dec. 6, 2005).

wireless carriers, were never subject to the Commission's burdensome cost assignment rules and other legacy accounting regulations. And however the market is defined, competition from these intermodal providers with voice services is now pervasive. For example, Comcast now markets VoIP telephony service to more than 46 million homes, which represents 92 percent of its cable footprint, and cable VoIP providers continue to take significant market share from incumbent local exchange carriers.[7] Likewise, there are now more than 262 million wireless subscribers in the United States,[8] and nearly 100 percent of the population has access to wireless service offered by one or more providers; 95 percent of the population lives in areas with at least three wireless providers offering competing services.[9] Approximately 17.5 percent of American households now have no wireline voice service at all, subscribing only to a wireless service.[10]

No company should be expected to compete in such a highly competitive environment while burdened with a cost assignment regime designed for a different era – especially if that regime does not apply to its competitors. Likewise, if they expect to compete effectively, AT&T, Verizon, and Qwest must implement all regulatory relief quickly. And indeed all have.

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[7] Financial Tables *attached to* Comcast Press Release, *Comcast Reports Third Quarter 2008 Results*, http://media.corporate-ir.net/media_files/irol/11/118591/Earnings_3Q08/CMCSAQ3Tables.htm; *see, e.g.*, Bryan Kraft et al., Bank of America, *Battle for the Bundle* at Exhibit 16 (Dec. 1, 2008) (estimating cable accounts for 23 percent of landline subscribers at the end of 2008, up from 10 percent at the end of 2006, representing a subscriber growth of 111 percent over the two-year period); Timothy Horan et al., Oppenheimer & Co., *4Q08 Communication Services Preview* at 4 (Jan. 22, 2009) ("We believe that the large telcos have lost approximately 40% access line market share, and that this will trend to 60% in the next six to eight years.").

[8] *Wireless Quick Facts, Mid-Year Figures*, CITA—The Wireless Association® (June 2008) (available at http://www.ctia.org/media/industry_info/index.cfm/AID/10323).

[9] *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241, ¶ 2 (2008).

[10] *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2008*, Center for Disease Control, Division of Heath Interview Statistics, National Center for Health Statistics, http://www.cdc.gov/NCHS/data/nhis/earlyrelease/wireless200812.htm at 5 (Dec. 17, 2008).

For example, following the Commission's grant of cost assignment forbearance relief last year, the companies for the first time did not prepare and file annual updates and revisions to their Cost Allocation Manuals as previously required by 47 C.F.R. § 64.903(b). Thus a reversal here would impose new burdens on a few carriers to the exclusion of their competitors.

IV. APPLICANTS' COMPLAINTS ABOUT THE UNDERLYING COST ASSIGNMENT FORBEARANCE RELIEF AND THE SUBSTANCE OF THE COMPLIANCE PLANS ARE MERITLESS.

Other than their misguided APA claim, Applicants limit their arguments for review of the Bureau's compliance plan approval to complaints about the underlying forbearance relief and a repeat of their comments below. All lack merit.

A. The Compliance Plans Appropriately Account For Future Commission Data Needs.

Applicants complain generally that the AT&T, Verizon, and Qwest compliance plans will not adequately preserve cost assignment data in case the Commission should need allocated data at some point in the future. NASUCA Application at 6, 8, 9; AdHoc Application at 7-9. And if that were to happen, Applicants complain that the plans provide the companies with too much discretion. *Id*. There is no validity to these complaints.

Foremost, any future Commission need for cost assignment data at all assumes a world where costs are relevant to regulated rates. But the Commission's price cap regime, adopted more than 15 years ago, is cost agnostic. *AT&T Cost Assignment Forbearance Order* ¶ 17 (quoting *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, ¶ 55 (1991), *vacated in part sub. nom., California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert denied*, 514 U.S. 1050 (1995); and *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993) ("[Price cap regulation] reduces any BOC's ability to shift costs from unregulated to regulated activities,

because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling”)). And in today’s environment, even if the Commission were to make adjustments to price caps, which the Commission has *not* indicated a desire to do, those changes must foremost be driven by the competitive landscape and not by a return to a traditional analysis of carrier costs.

Further, the compliance plans reasonably propose a multi-step process for preserving data and systems, and freezing existing allocations and factors so that cost data could be approximately reproduced if needed in the future.[11] And if there is a particularized need that cannot be satisfied with this methodology, the companies commit in their plans to conducting a special study.[12] This approach is certainly reasonable.

Indeed, Applicants largely do not bother to challenge the specifics of the compliance plans but instead complain generally that these steps are not sufficient. NASUCA Application at 6, 8, 9; AdHoc Application at 7-9. Applicants insist that AT&T, Verizon, and Qwest retain unbounded discretion should some unspecified need for undefined allocated data arise at some point in the future. *Id*. Applicants are wrong. Again, costs are not relevant to AT&T, Verizon, and Qwest’s rates under price caps, even for regulated services. But even if the Commission were to seek access to such data, the core amounts would be based on well-established standards. Accounting standards apart from the Commission’s cost assignment rules require defensible decision-making, and no public company is free to simply “make up” accounting data. AT&T,

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[11] *See* Letter from Theodore Marcus, AT&T, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-21 and 05-342, with AT&T Compliance Plan, at 11-13 (July 24, 2008); Letter from Ann Berkowitz, Verizon, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 0-273 and 07-21, with Cost Assignment Forbearance Compliance Plan of Verizon (ILEC Operations), at 2-5 (Sept. 19, 2008); Letter from Melissa Newman, Qwest, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-204 and 07-21, with Qwest Corporation’s Compliance Plan, at 3-5 (Sept. 24, 2008).

[12] *Id*.

Verizon, and Qwest all follow – and commit to follow in their compliance plans – Generally Accepted Accounting Principles ("GAAP") or a successor standardized accounting regime.[13] AT&T, Verizon, and Qwest are also subject to Securities and Exchange Commission scrutiny and must adhere to the Sarbanes-Oxley Act and the Foreign Corrupt Practices Act, which require that they maintain detailed records accurately and fairly reflecting transactions and dispositions of assets. Moreover, the companies must still follow the Commission's Uniform System of Accounts ("USOA"), which ensures that much of the accounting data that exists today will continue to be available to the Commission upon appropriate request. *AT&T Cost Assignment Forbearance Order* ¶ 12. And the Commission, as it always has, retains the ability to audit and examine carrier records. 47 U.S.C. § 220(c).

In addition, without knowing whether the Commission will ever request cost assignment data or the uses to which such data would be put in the future, a certain degree of flexibility is essential. Such flexibility would be completely lost if the compliance plans were to spell out every detail concerning how cost allocation ratios will be updated or special cost studies conducted. Furthermore, it is impossible to provide such details at this juncture because the specific accounting information the Commission may require for future regulatory purposes is unknown. Indeed, it is unlikely that the Commission will ever have a need for any cost assignment data in the future given the Commission's now long-established price cap regime under which regulated rates do not depend on carrier costs.

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[13] *See* Letter from Theodore Marcus, AT&T, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-21 and 05-342, with AT&T Compliance Plan, at 12 (July 24, 2008); Letter from Ann Berkowitz, Verizon, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 0-273 and 07-21, with Cost Assignment Forbearance Compliance Plan of Verizon (ILEC Operations), at 4 (Sept. 19, 2008); Letter from Melissa Newman, Qwest, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-204 and 07-21, with Qwest Corporation's Compliance Plan, at 5 (Sept. 24, 2008).

B. There Is No Basis For A New Cost Allocation Regime Under The Guise Of A Compliance Plan.

Also ostensibly targeting the Commission's requirement that AT&T, Verizon, and Qwest be able to produce accounting data in the event of a future need, Applicants again suggest that in approving the compliance plans the Bureau actually should have established an entirely new cost assignment system. NASUCA Application at 6; AdHoc at Application at 9. Earlier, some of these same parties proposed a self-serving "blueprint" for the compliance plans.[14]

At the outset, the Bureau had no authority to invent a new cost assignment system. The Blueprint Plan would effectively reverse the Commission's judgment in the *AT&T Cost Assignment Forbearance Order* that forbearance from the cost assignment rules is in the public interest. *AT&T Cost Assignment Forbearance Order* ¶ 39. For the Bureau to revise the Commission's cost assignment regulations or to promulgate new rules would also have violated section 10, which requires that the Commission "forbear from applying" regulations that are not necessary to an appropriate federal objective, not promulgate new regulatory regimes. 47 U.S.C. § 160(a); *AT&T Cost Assignment Forbearance Order* ¶ 13 (citing *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001)). Before the Commission could adopt a new cost assignment system, standard notice and comment rulemaking would be necessary. 5 U.S.C. § 553. And the Bureau has never been vested with authority to conduct a new rulemaking. *See* 47 C.F.R. § 0.291(e) ("The Chief, Wireline Competition Bureau, *shall not have authority* to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing. . .") (emphasis added).

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[14] Letter from James Blaszak, AdHoc, Karen Reidy, COMPTEL, and Thomas Jones, tw telecom and One Communications, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-21 and 05-342 (July 7, 2008) (attaching "Blueprint For A Compliance Methodology Cost Assignment Plan") ("Blueprint Plan").

Moreover, the Blueprint Plan makes even less sense in today's competitive market under price cap regulation than the cost assignment rules the Commission just eliminated. For example, current carrier non-regulated cost allocation methodologies rely on general ledger accounting data, augmented where necessary by special studies. The accounting data is jurisdictionally separated mostly using frozen factors. The Commission's USOA, which is the basis of a carrier's accounting data, groups like kind telecommunications plant together even though it can be used to provide a variety of services. The Blueprint Plan upsets this approach and introduces another level of meaningless detail, requiring an examination of all carrier equipment to determine which services should be ascribed to particular plant. This is the same type of examination carriers had to perform prior to the separations freeze. There is no relevance to any such cost-based requirements under price cap regulation. *AT&T Cost Assignment Forbearance Order* ¶ 17. As another example, the Blueprint Plan would require a return to pre-separations freeze procedures for direct assignment of special access facilities. Blueprint Plan at 7 n.10. Such an approach cannot be reconciled with the Commission's decision to eliminate the cost assignment rules altogether for AT&T, Verizon, and Qwest.

C. Special Access Returns Cannot Be Determined From Cost Assignments.

Similarly, Applicants again complain that the Commission will need allocated cost data to calculate special access rates of return in the future. AdHoc Application at 10. As Verizon has explained many times, it is not possible to determine a special access-specific rate of return using allocated costs. Allocating shared and common costs inevitably yields arbitrary results, and for more than a decade, the Commission has been clear that such allocations, as previously reflected in ARMIS reports, do "not serve a ratemaking purpose."[15] The Commission has also

[15] *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637, ¶ 199 (1991).

concluded that the need for costing data in its pending special access proceeding is "speculative." *AT&T Cost Assignment Forbearance Order* ¶ 45. Even the authors of the special access report recently commissioned by NARUC agree that the special access cost allocation data previously reflected in the ARMIS reports is "virtually" meaningless because the reports contain arbitrary allocations that produce "unreliable" special access earnings results.[16]

D. Separations Reform Is Independent Of Cost Assignment Forbearance.

Pending jurisdictional separations reform, Applicants again suggest that the Commission should have delayed all cost assignment relief and that the Bureau should have delayed approval of the compliance plans. NASUCA Application at 7. Neither the Commission in granting the underlying relief nor the Bureau in approving the compliance plans had such authority. As the Commission recognized, "section 10 does not allow us the leeway to choose our procedural vehicle and the timing of resolution outside the limitations of section 10. . . Thus, by the terms of the statute, we may not adopt the approach advocated by the State Members to deny these petitions in favor of referral to the Joint Board with presumably a rulemaking to follow, concluded well beyond the statutory deadline imposed by section 10." *AT&T Cost Assignment Forbearance Order* ¶ 13. The Commission was required to address cost assignment forbearance by the statutory deadlines. The Bureau could not, as Applicants suggest, effectively circumvent the statute by withholding approval of the compliance plans.

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[16] *Competitive Issues in Special Access Markets, Revised Edition*, National Regulatory Research Institute, at 70, http://www.naruc.org/Publications/09%200121%20NARUC%20NRRI_spcl_access_mkts_jan09-02%20_2_.pdf (Jan. 21, 2009) ("Buyers have criticized the FCC's current regulatory regime because it has apparently allowed excessive earnings. For their part, the RBOCs contend that the ARMIS figures are virtually meaningless. We agree with the RBOCs.")

E. Verizon's Universal Service Comments Are Unrelated To These Proceedings.

Yet again, AdHoc repeats its misguided claim that a Verizon statement regarding carrier cost incentives in an unrelated universal service proceeding is somehow an "inadvertent admission against interest." AdHoc Application at 9. How this statement allegedly supports full Commission review of the Bureau's approval of the compliance plans is unclear from the AdHoc Application. Nonetheless, Verizon's comments in the universal service proceeding seized upon by AdHoc – that "[e]xperience suggests that when there is an incentive for carriers to demonstrate high costs, they will do so" – accurately describe Verizon's concern about universal service proposals by which competitive eligible telecommunications carriers would receive subsidies by demonstrating their own costs. Reply Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, CC Docket No. 96-45, at 13 (June 2, 2008). A universal service subsidy program that rewards competitive carriers for higher costs is not well-suited to encourage efficiency. But unlike a universal service system that would allow a carrier to receive higher subsidies by demonstrating higher costs, AT&T, Verizon, and Qwest have no incentive to overstate their costs here because their costs have no bearing on rates under price cap regulation. *AT&T Cost Assignment Forbearance Order* ¶ 17; *Recordkeeping and Reporting Forbearance Order* ¶¶ 26-27, 31.

F. The Economic Downturn Is Irrelevant To Forbearance And The Adequacy Of The Compliance Plans.

Finally, AdHoc repeats its claim that the Commission should reverse its forbearance decision and the Bureau's approval of the compliance plans because of the underlying causes of the global economic downturn, as chronicled in the *New York Times.* AdHoc Application at 10-11. The standard for forbearance under the Act is whether a Commission regulation is necessary to a legitimate federal need. 47 U.S.C. § 160(a). The standard for the Bureau's approval of the

compliance plans was whether they met the requirements of the Commission's forbearance orders. The economic downturn does not change the fact that, as the Commission found in the forbearance orders, carrier costs are not relevant under price cap regulation. *AT&T Cost Assignment Forbearance Order* ¶ 17; *Recordkeeping and Reporting Forbearance Order* ¶¶ 26-27, 31. Nor does the economic downturn have anything to do with whether the compliance plans satisfied the requirements of the forbearance orders, which they indisputably did.[17] Regardless, the current economic downtown provides further justification for the Commission to eliminate burdensome and meaningless regulations to clear the way for companies to focus increasingly scarce resources on the efficient deployment of new products and services that consumers demand.

[17] *See* Letter from Theodore Marcus, AT&T, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-21 and 05-342, with AT&T Compliance Plan (July 24, 2008) (listing and summarizing all cost assignment forbearance conditions; describing all required compliance procedures; providing all required documentation); Letter from Ann Berkowitz, Verizon, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 0-273 and 07-21, with Cost Assignment Forbearance Compliance Plan of Verizon (ILEC Operations) (Sept. 19, 2008) (same); Letter from Melissa Newman, Qwest, to Dana Shaffer, FCC Wireline Competition Bureau, WC Docket Nos. 07-204 and 07-21, with Qwest Corporation's Compliance Plan (Sept. 24, 2008) (same).

V. CONCLUSION.

For these reasons, the Commission should deny the Applications.

Respectfully submitted,

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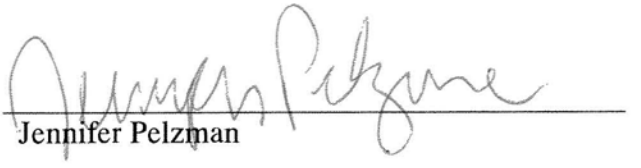
February 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of February 2009, I caused copies of the foregoing Opposition of Verizon to Applications for Review to be served upon each of the parties listed below by first-class mail, postage prepaid.



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