



April 30, 2009

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* filing in WC Docket Nos. 07-21, 07-273, 07-204

Dear Ms. Dortch:

On April 30, 2009, Karen Reidy on behalf of COMPTTEL, Maria L. Cattafesta and Christopher Frentrup on behalf of Sprint Nextel Corporation, and the undersigned representing the AdHoc Telecommunications Users Committee met with Jennifer Schneider, Legal Advisor to Acting Chairman Michael J. Copps, to discuss the Application for Review of the Wireline Competition Bureau's approval of the cost assignment compliance plans submitted by AT&T, Qwest and Verizon. AdHoc and COMPTTEL filed the subject application for review. The substance of the discussion is reflected in the attachment hereto, which was distributed at the meeting.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James S. Blaszak'.

James S. Blaszak

*Counsel for
The AdHoc Telecommunications Users
Committee*

CC: Jennifer Schneider

**Ex Parte Presentation Regarding
WCB Approval of Cost Assignment Plans
(WC Docket Nos. 07-21, 07-273, 07-204)**

- A. The Commission should vacate, then reverse or remand the WCB decision approving the BOCs' cost assignment compliance plans.
- B. *AT&T Cost Assignment Forbearance Order*
 - a. Continuing exclusionary market power
 - b. Continuing regulatory responsibilities
 - i. Guard against improper cost shifting
 - ii. Enforce compliance with sections 201, 202, 254(k) and 272(e)(3), possibly revise price caps
 - c. *Forbearance petition granted, conditioned upon AT&T winning WCB approval of cost assignment plan.*
 - d. Pending petitions for reconsideration
- C. Material deficiencies in cost assignment compliance plans unaddressed by WCB
 - a. Unspecified and probably changing ratios and special studies to allocate costs – when costs are allocated. The Commission must have intended more to preserve the integrity of cost data (§21) and to protect against improper cost shifting (§27).
 - b. Section 254(k) certifications (§30) have no substantive meaning without known allocation procedures.
 - c. No transition plans, but the Commission required transition plans (§31); manifestation of Commission intent for substantive cost assignments.
 - d. Trend data would disappear.
 - e. Admitted incentive and ability to manipulate cost data
 - f. Ominously similar to voluntary regulation of financial services industry
 - g. Impact on availability of high speed Internet access in rural areas
- D. WCB provided “no” explanation of the reasoning supporting the decision to approve the compliance plans.
 - a. Not ministerial
 - b. Rulemaking v. informal adjudication
 - c. WCB action falls within definition of “rulemaking.” Section 551.4 of APA defines “rule” as,
 - i. “[t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ... and includes the approval or prescription for the future of ... prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting or practices bearing on any of the foregoing.” *Emphasis added.*
 - ii. Section 551.5 of the APA, of course, defines “rule making” as the agency process for formulating, amending or repealing a rule.

- iii. Inconsistent with well-settled law on the requirements for reasoned decision making.
 - iv. “Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. *Motor Vehicle Manufacturers*, 463. U.S. 29, 48 (1983)
 - d. Even if an Informal adjudication (which is not conceded), reasoned decision-making is still required.
 - i. In the *TRS Order*, 19 FCC Rcd 12457, 12546, the Commission stated that the Bureau had an obligation to provide sufficient information to allow the public to understand the reasoning behind the Bureau’s modification of the VRS compensation rate.
 - ii. The matters at issue regarding the BOCs’ compliance plans are of the same genre (assessment of costs) and are at least as important.
 - iii. Must reconcile sections 555 and 706(2)(A) of the APA.
 - iv. Supreme Court has stated that section 706(2)(A) imposes a general “procedural requirement by mandating that an agency take whatever steps needed to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of decision.” *PBGC v. LTV Corp.*, 110 S. Ct. 2668, 2680 (1990). See also, *Menkes v. Department of Homeland Security*, 486 F.3d 1307, 1314 (D.C. Cir. 2007), (remand of decision in informal adjudication because no explanation of changed conditions).
 - e. FN 114 does not immunize approval of the compliance plans from the need for a “reasoned explanation.”
- E. In light of material deficiencies in the compliance plans, the best alternative would be to vacate and reverse.