

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

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

**JOINT REPLY COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL,
PUBLIC COUNSEL SECTION OF THE
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
AND THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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I. INTRODUCTION

On December 3, 2007, the New Jersey Division of Rate Counsel ("Rate Counsel"), the Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel") and the National Association of State Utility Consumer Advocates ("NASUCA") (collectively, "State Advocates") filed comments opposing the petition by Qwest Corporation ("Qwest") for forbearance under 47 U.S.C. § 160(c) from enforcement of certain of the Federal Communications Commission's ("FCC" or "Commission") Automated Reporting Management Information System ("ARMIS") and 492A reporting requirements. Six other parties filed comments opposing Qwest's petition. Significantly, *no* party filed comments in support of Qwest's petition. State Advocates offer these reply comments to reiterate their opposition to Qwest's petition for forbearance.

II. REVIEW OF COMMENTS

A. Commenters provide numerous concrete examples of the uses of ARMIS data.

In their comments, various parties detail the uses made of ARMIS reports by state regulators, the Commission, consumers, and other telecommunications companies. In some cases, ARMIS reporting is the primary, or only, source of comprehensive information for regulators and consumer advocates. The initial comments filed in this proceeding demonstrate that the elimination of Qwest's ARMIS reporting requirements would impede the work of regulatory agencies, and negatively affect consumers.

The Washington Transportation and Utilities Commission ("WUTC") addresses the most basic applications of ARMIS data, stating that Washington regulators "rely on ARMIS reports to monitor carriers' financial condition, service quality, and performance under alternative forms of regulation."¹ WUTC explains that as a result of Qwest's new alternative form of regulation in Washington, "to a large degree, the information contained in ARMIS reports will be used during the course of the plan to monitor and measure critical components of Qwest's operations in Washington State."² WUTC then states that the reports it uses to fulfill its regulatory duties are ARMIS Reports 43-01, 43-02, 43-03, 43-04, 43-05, 43-07, and 43-08.³

The Colorado Public Utilities Commission ("CoPUC") states that it depends on ARMIS reports during this critical phase of regulatory transition in order to monitor the

¹/ WUTC, at 2.

²/ *Id.*, at 3.

³/ *Id.*, at 4-9. WUTC observes that Report 43-07 could be modified to remove outdated reporting components.

telecommunications markets.⁴ CoPUC lists the reports that it uses extensively to carry out its work: ARMIS Reports 43-01, 43-02, 43-03, 43-04, 43-07, and 43-08.⁵ CoPUC also notes that the reports are used by the FCC in the compilation of its *Statistics of Communications Common Carriers, Quality of Service Incumbent Local Exchange Carriers, Trends in Telephone Service*, and the *Universal Service Monitoring* reports.⁶

The California Public Utilities Commission (“CaPUC”) states that in recent years California has attempted to reduce the reporting burden on telecommunications carriers by eliminating certain state-specific reporting requirements, and instead relying more on ARMIS reports.⁷ CaPUC states that the ARMIS reports are essential to its ability to ensure that the market is functioning well and that customers receive quality service at reasonable prices.⁸

Others in the telecommunications industry also support retaining the ARMIS requirements. Sprint Nextel explains several specific uses of ARMIS data. First, Sprint Nextel points to the components of ARMIS reporting that allow for the calculation of the rate of return for each service – “a key indicator of the success – or failure – of Commission policies governing special access services.”⁹ Sprint Nextel also notes that the FCC has underway several proceedings that depend upon ARMIS data – i.e., the special access pricing NPRM, intercarrier compensation reform, and a proceeding

⁴ / CoPUC, at 3.

⁵ / *Id.*, at 6-8.

⁶ / *Id.*, at 4.

⁷ / CaPUC, at 3.

⁸ / *Id.*

⁹ / Sprint Nextel, at 5.

regarding the sunset of Section 272 affiliate regulations.¹⁰ Sprint Nextel also observes that ARMIS data is used for “determining intrastate universal service support, examining service quality levels, and evaluating unbundled network elements rates.”¹¹ Sprint Nextel also observes that states rely on ARMIS Report 43-04 to ensure that companies recover costs in the proper jurisdiction.¹² Finally, Sprint Nextel emphasizes the importance of maintaining ARMIS reporting in order to determine the magnitude of the special access market failure.¹³

Integra Telecom, Inc. (“Integra”) observes that Qwest acknowledges the usefulness to regulators of several reports, in particular with respect to setting pole attachment rates. Integra explains that Qwest is willing to use ARMIS data when it serves the company’s purposes, pointing to a Minnesota proceeding in which Qwest “relies extensively upon ARMIS data in order to establish cost factors to apply to the rates Qwest proposes,” and observes also that several other states, including Arizona, Colorado, and Utah also use ARMIS data to establish cost factors.¹⁴

On the consumer side, Ad Hoc Telecommunications Users Committee (“Ad Hoc”) refers to still another use of ARMIS reporting – monitoring ILECs for evidence of service cross-subsidization. According to Ad Hoc, “elimination of the reporting requirements would leave the Commission with no ability to fulfill its statutory responsibility to ensure just and reasonable rates or to discern cross-subsidization of

¹⁰ / *Id.*, at 5-8.

¹¹ / *Id.*, at 14.

¹² / *Id.*, at 14-15.

¹³ / *Id.*, at 15.

¹⁴ / Integra, at 8-9.

competitive services by USF-supported services.”¹⁵ Ad Hoc continues, “[a]mong the existing obligations BOCs are required to meet are the Commission’s accounting and cost allocation rules and related reporting requirements -- the very reporting requirements from which Qwest seeks forbearance.”¹⁶ Ad Hoc contends that the current special access pricing investigation also necessitates the continuance of ARMIS reporting. Ad Hoc states further that without ARMIS reporting, the Commission would have no way of determining if the rates of return for special access services are just and reasonable.¹⁷

The Commission did not capriciously impose ARMIS reporting requirements on ILECs, but rather, each reporting requirement was designed to serve a specific purpose. The fact that ARMIS reporting covers carriers that provide service to a majority of U.S. consumers, both business and residential, and has resulted in a lengthy time series of data means that the reporting mechanism has become increasingly valuable to understanding and monitoring the evolving telecommunications marketplace. Furthermore, the various comments submitted in this proceeding demonstrate that the reports assist regulators in exercising requisite oversight of the telecommunications industry. It is clear from the various comments filed that many parties – regulators, consumer advocates, and new entrants – have numerous legitimate uses for the data reported via the ARMIS system.

¹⁵ / Ad Hoc, at 2.

¹⁶ / *Id.*, at 6.

¹⁷ / *Id.*, at 7-8.

B. Reporting is not a serious burden on Qwest.

In the initial comments, State Advocates expressed doubt that the task of reporting in the ARMIS system is unduly burdensome for Qwest.¹⁸ CoPUC similarly points out that:

Qwest’s survival is not threatened, its financial status is not endangered, and its overall performance is not impaired by the requirement to produce these ARMIS reports. In other words, Qwest does not *need* to eliminate these reports. There are no significant negative financial or operational consequences related to the continued production of these reports. On the consumer side, there is significant harm incurred from discontinuation and significant benefits to continuation.¹⁹

State Advocates concur with CoPUC’s statements that “[t]he cost of maintaining the ARMIS support systems is largely sunk and the yearly operating costs are minimal. Eliminating those expenses would have no discernible effect on earnings” and that “[c]learly, ARMIS presents no significant financial hardship for Qwest.”²⁰ As CoPUC states, “there is substantial benefit at little cost – the very definition of serving the public interest.”²¹

State Advocates agree with CoPUC’s assessment that the minor costs associated with reporting data through ARMIS are far outweighed by the benefits to consumers of making information about the industry available to regulators. If the Commission eliminates Qwest’s ARMIS reporting, state regulators may then need to create *new* reporting requirements in order to fulfill their regulatory duties. Eliminating ARMIS reporting requirements is not in the public interest.

¹⁸ / State Advocates Initial Comments, at 35.

¹⁹ / CoPUC, at 5 (emphasis in original).

²⁰ / *Id.*, at 6.

²¹ / *Id.*, at 10.

C. Alternative sources of data are not adequate substitutes for ARMIS reporting.

State Advocates argued in initial comments that ARMIS reporting has several advantages over alternative data sources such as Form 477s and SEC filings for parties interested in the telecommunications market.²² ARMIS reporting provides a consistent, comprehensive, and streamlined approach for giving regulators the tools they need to make informed policy decisions. This argument is corroborated by other parties' comments detailing why various other sources of data are inadequate substitutes for ARMIS reports.

WUTC states that Form 477 data as currently reported are “less accessible [than ARMIS reports] to policymakers and consumers because of the confidentiality provision that attend upon their use, as well as delay experienced between reporting the data and releasing the data to regulators.”²³ WUTC observes that ARMIS reports, in contrast, are relatively timely and easily accessible.²⁴ Integra and CoPUC explain that SEC reports are an inadequate substitute for ARMIS reporting because the information contained therein is reported on a consolidated basis, not at the state-level.²⁵

Integra responds to Qwest's suggestion that regulators use audits to supplement other sources of data by observing that such a policy would impose a significant burden on regulators. Integra further asserts that other entities would have no access to the data achieved as a result of such audits.²⁶ State Advocates recommend that ARMIS reporting

²² / NASUCA Initial Comments, at 39.

²³ / WUTC, at 11.

²⁴ / *Id.*, at 12.

²⁵ / Integra, at 6; CoPUC, at 4.

²⁶ / Integra, at 7.

not be supplanted by sporadic audits because the audits would undoubtedly be far more costly for all parties involved, and would provide less systematic data upon which to base important decisions. Audits should supplement rather than substitute for ARMIS reporting requirements.

CoPUC states that it “is unaware of another source for this crucial data or of a suitable substitute.”²⁷ CoPUC further states that it “is concerned that if ARMIS reporting is abolished, it will be difficult – if not impossible – for the COPUC to obtain from Qwest the data needed to properly oversee the Colorado telecommunications market.”²⁸ Sprint Nextel echoes this sentiment, stating that “[f]or many states, the ARMIS reports are the only publicly available source of state-level cost data.”²⁹

State Advocates acknowledge that regulators, consumer advocates, and others use the data submitted via Form 477, as well as SEC reports, in carrying out their duties. These sources, however, do not provide the complete set of data required to maintain oversight over the industry, and to protect consumers, and also are typically afforded proprietary treatment. The extensive cost accounting and investment data provided through ARMIS reporting is not available from any other source. The ARMIS system is invaluable because it enables regulators to examine trends over time, and to make state-by-state or company-by-company comparisons. In sum, granting Qwest’s petition for forbearance from these reporting requirements would thwart the Commission’s and states’ ability to fulfill their regulatory responsibilities.

²⁷ / CoPUC, at 2.

²⁸ / *Id.*, at 4.

²⁹ / Sprint Nextel, at 14.

D. Contrary to Qwest’s assertions, price cap regulation does not sever the connection between rates and costs.

In its petition, Qwest claimed that price cap regulation obviates the need for cost reporting because costs are delinked from rates paid by consumers.³⁰ However, several commenters provide evidence that important linkages between costs and rates remain. Sprint Nextel points out that “even under price cap regulation, the Commission must continue to collect cost information from the ILECs, including Qwest, because the costs they incurred to provide regulated services form the basis of setting initial rates under price caps.”³¹ Any subsequent adjustments to the price cap plan, Sprint Nextel argues, must be based on cost data collected on an ongoing basis. In addition, Sprint Nextel points out that several of the ARMIS reports are useful in determining Qwest’s productivity factor, or “X-factor,” used in comparing Qwest’s productivity rate to that of the economy as a whole.³² Sprint Nextel also notes that the Commission must have access to cost data in order to make adjustments to Qwest’s price cap plan based on exogenous costs.³³

Ad Hoc also sees the price cap plan regime as an ongoing process, subject to adjustments, rather than as a one-time arrangement, and asserts that costs continue to matter. Ad Hoc echoes Sprint Nextel in reference to the impact costs might have in adjusting price cap plans:

Contrary to Qwest’s representation, the data reported in the ARMIS 43-03 reports could impact Qwest’s prices under price caps regulation. The split of costs and revenues between regulated

³⁰ / Qwest Petition, at 2.

³¹ / Sprint Nextel, at 12.

³² / *Id.*

³³ / *Id.*, at 13.

and non-regulated operations is a key element of the formulation of exogenous cost changes under the existing price caps plan and is an element that comes into play each year during the annual access tariff filing process and at subsequent points during the year as exogenous costs changes are made.³⁴

Ad Hoc asserts that the use of a price cap plan does not necessarily include just and reasonable rates, and therefore, that ARMIS data reporting remains necessary. Ad Hoc states that “even in a price caps regime, the ultimate test of the reasonableness of a rate is not whether the rate is consistent with the price caps showing required at the time it is filed but whether the rate produces revenues far in excess of what is required to cover operating expenses and capital costs.”³⁵ The accounting information available from the ARMIS system is essential to assist regulators in assessing whether rates are just and reasonable. State Advocates urge the Commission to reject efforts to eliminate these valuable tools for protecting consumers.

E. Qwest has failed to demonstrate that the three criteria necessary for forbearance are met.

Several commenters agree with State Advocates that Qwest makes only a feeble attempt to show that the three criteria necessary for forbearance have been met. Specifically with regard to the requirement that forbearance be granted if it is consistent with the public interest, Qwest relies on the unsupported argument that forbearance would reduce its regulatory burden, and thus make it more competitive. According to Sprint Nextel, however, Qwest makes “absolutely no attempt to quantify the burden of complying with these reporting requirements supposedly imposes and it has failed to

³⁴ / Ad Hoc, at 4.

³⁵ / *Id.*, at 7.

show how it is unable to effectively compete because of its ARMIS and 492A reporting obligations.”³⁶

In addition, regarding the requirement that forbearance be granted if the regulation in question is not necessary for the protection of consumers, Integra notes that Qwest’s assertion that there is “*virtually* no relationship” between the information found in ARMIS reporting and consumer protection represents an acknowledgment that there actually *is* some relationship between ARMIS reporting and consumer protection.³⁷ Integra states that “Qwest has provided no basis by which this Commission can conclude that any of the forbearance requirements are met, but instead simply repeatedly makes the claims that these provisions are met as it lists through the reports for which it is seeking forbearance.”³⁸

Ad Hoc agrees with Sprint Nextel and Integra that Qwest “has not come close” to showing that the three criteria for forbearance have been met.³⁹ “Moreover, because these reports are relevant to assessing the reasonableness of Qwest rates by the Commission and the public, grant of Qwest’s Petition would be inconsistent with the public interest.”⁴⁰

State Advocates agree with these commenters that Qwest has failed to demonstrate how its petition satisfies the three criteria. State Advocates urge the Commission to recognize that incumbent local exchange carriers have little to lose from making forbearance requests such as this, but much to gain if they are successful. The

³⁶ / Sprint Nextel, at 21.

³⁷ / Integra, at 10 (emphasis in Integra’s comments).

³⁸ / *Id.*, at 5.

³⁹ / Ad Hoc, at 2.

⁴⁰ / *Id.*, at 5.

Commission should not only deny Qwest’s petition in this case, but also discourage other future weakly-supported requests for forbearance.

F. The forbearance process needs an overhaul.

Several commenters agree with State Advocates that the forbearance process is broken, and that changes to reporting requirements are better addressed in comprehensive, industry-wide rulemakings, rather than on a company-by-company basis.

WUTC notes that forbearance is:

procedurally inappropriate ... for effecting generally applicable changes to the Commission’s reporting requirements... The petition addresses issues that affect many reporting companies, and the ability of the FCC and state regulators to monitor them. For this reason, changes to the requirements should be addressed through a comprehensive and well-noticed rulemaking that looks at the industry as a whole, ... and where appropriate, provides meaningful alternatives to state and federal regulators for obtaining necessary information.⁴¹

Sprint Nextel agrees that a petition for forbearance is not the appropriate vehicle to “implement dramatic changes in the ARMIS reporting requirements”⁴² Sprint Nextel continues that, “[g]iven the significance of these reporting requirements, any proposed reporting modifications should only be addressed through a comprehensive and industry-wide rulemaking – not through a petition for forbearance that impacts only a single company.”⁴³

According to CoPUC, “rather than granting forbearance on an individual company basis, a broader review of such reporting requirements across all

⁴¹ / WUTC, at 11.

⁴² / Sprint Nextel, at 3.

⁴³ / *Id.*, at 5.

telecommunications providers is appropriate and equitable.”⁴⁴ CaPUC agrees that if the Commission needs to alter the reporting program, it “should do so through a broader rulemaking proceeding and not on a piecemeal basis.”⁴⁵

G. The Commission should halt all forbearance proceedings until the Forbearance Governance Rulemaking is complete.

State Advocates reiterate their position that the Commission’s recent Notice of Proposed Rulemaking (“NPRM”)⁴⁶ brings to bear on this proceeding a topic larger than the specifics of Qwest’s petition itself. Namely, through the NPRM, the Commission recognizes that the forbearance process is out of control, that it is not being used as it was intended, and that this improper use may have harmful consequences for telecommunications consumers.

In his statement accompanying the NPRM, Commissioner McDowell wrote, “By all accounts, most Members of Congress, most proponents of individual forbearance petitions, most opponents of forbearance petitions, and a majority of the FCC all agree that the forbearance petition process is flawed and should be fixed.”⁴⁷ Commissioner Copps stated, “I do not believe that forbearance is being used today in the manner intended by Congress. Permanently addressing these flaws will require a legislative fix but there are procedural protections that the FCC can implement on its own authority to mitigate some of these problems.”⁴⁸

⁴⁴ / CoPUC, at 1.

⁴⁵ / CaPUC, at 4.

⁴⁶ / *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*, WC Docket No. 07-267, Notice of Proposed Rule Making, FCC 07-267 (rel. November 30, 2007).

⁴⁷ / *Id.*, Statement of Commissioner Robert M. McDowell.

⁴⁸ / *Id.*, Statement of Commissioner Michael J. Copps.

State Advocates encourage the Commission to reject Qwest's petition on its substantive deficiencies. In the alternative, however, State Advocates urge the Commission to deny forbearance petitions such as this on the basis of the serious flaws in the system referred to by Commissioners McDowell and Copps above. The Commission should fix the system itself before using it to process any more petitions for forbearance.

H. The denial of Verizon's Six MSA petition shows that forbearance is an exception, not a rule.

The Commission's December 5, 2007 Memorandum Opinion and Order denying Verizon Communication's petition for forbearance in six metropolitan statistical areas also sheds light on the use of forbearance to adjust regulatory responsibilities.⁴⁹ In his statement accompanying the order, Commissioner Copps stated that "I support today's Order which denies petitioner forbearance relief from dominant carrier regulation and from its UNE and Computer III obligations. In doing so, the Commission further supports its view that Qwest-Omaha and ACS-Anchorage were *truly unique situations*."⁵⁰ Commissioner Copps' acknowledgement that the Qwest-Omaha and ACS-Anchorage forbearance petitions exemplified the exception, rather than the rule, lends validity to the arguments of State Advocates, and other commenters, that regulatory changes should not be made through one-by-one proceedings, but rather should be addressed in comprehensive rulemakings.

⁴⁹ / *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order.

⁵⁰ / *Id.*, Statement of Commissioner Michael J. Copps (emphasis added).

III. CONCLUSION

State Advocates urge the Commission to deny Qwest's petition because Qwest has failed to show that the three criteria required for forbearance have been met. Furthermore, State Advocates, and other parties have demonstrated that forbearance is an improper avenue for Qwest to pursue changes in reporting requirements.

State Advocates agree with CoPUC when it states that ARMIS reporting provides "substantial benefit at little cost"⁵¹ and with WUTC's observation that "[i]t is not in the public interest to allow a dominant carrier in the western United States to be excused from its reporting obligations without a thorough review of the potential impacts and consideration of regulatory alternatives."⁵² State Advocates urge the Commission to deny Qwest's petition.

Respectfully submitted,

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⁵¹ / CoPUC, at 10.

⁵² / WUTC, at 13.

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