

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| In the Matter of Review of |) | |
| Unbundled Loop and Switched Rates |) | |
| And Review of Deaveraged Zone |) | Docket No. UT-023003 |
| Rate Structure |) | |
| |) | |
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**OPPOSITION OF VERIZON NORTHWEST INC.
TO WORLDCOM'S MOTION TO COMPEL**

Pursuant to the Commission's Notice dated March 7, 2003, Verizon Northwest Inc. ("Verizon") respectfully opposes the motion filed by WorldCom, Inc. ("WorldCom") to compel Verizon to permit the parties to this proceeding to intercede in (1) the conduct of its time and motion studies (a) by independent third party experts or (b) based on computerized time measurements, and (2) the process by which Verizon assimilates and compiles raw data into activity time estimates in its preparation for this cost proceeding.

INTRODUCTION

As noted below, WorldCom's unprecedented requests have no basis in the discovery rules upon which it purports to rely, or the purposes behind them. Those rules permit WorldCom to seek discovery concerning the facts and assumptions underlying Verizon's studies; they do not serve as a standing invitation for it to participate in the actual process by which those studies are compiled -- any more than Verizon could legitimately seek to participate in the preparation of WorldCom's cost studies. Verizon has nevertheless agreed to permit carefully limited observations by WorldCom of any time and motion studies of its central office and field provisioning activities that Verizon may conduct with its own personnel. In contrast, WorldCom's efforts to interpose itself in the conduct of time and motion studies of Verizon's

ordering processes would be unnecessarily disruptive given independent methods of validating the objectivity of those studies, jeopardize the accuracy of the measurements. It would also pose serious confidentiality concerns with respect to the nature of those ordering processes and the disclosure of the practices of customers as well as other carriers. In any event, no such relief would be warranted without a specific showing by WorldCom in light of the actual details of the work plans for conducting these studies, which Verizon has committed to make available to WorldCom and anticipates finalizing by the end of April.

ARGUMENT

I. THERE IS NO LEGAL BASIS FOR WORLDCOM'S REQUEST TO OBSERVE EITHER THE ACTUAL CONDUCT OF VERIZON'S TIME AND MOTION STUDIES OR ITS ASSIMILATION OF RAW DATA.

WorldCom contends that its request to observe the conduct of time and motion studies should be permitted under Wash. Admin. Code 480-09-480(6)(iv), because the information it seeks falls within the broad scope of relevance outlined by the discovery rules. *See* WorldCom Motion ¶ 11. This is a red herring. As in every other cost docket in which these parties have participated, Verizon recognizes its obligation to provide WorldCom with access to all relevant, non-privileged information underlying its studies — *after* those studies are completed. To permit third parties to intercede in the very *preparation* of those studies, however, would be entirely unprecedented, and inconsistent with well established principles of discovery.

Rule 26 of the Washington Rules of Civil Procedure, the only other authority cited by WorldCom, provides for the discovery of experts “*only* as follows”: (i) through interrogatories or depositions for those witnesses whom the other party expects to call as witnesses at trial; or (ii) upon a showing of “exceptional circumstances” for those witnesses whom the other party does not expect to call as witnesses at trial. Wa. R. Super. Ct. Civ. 26(b)(5) (emphasis added).

Under Washington rules, these are the exclusive means of obtaining discovery of expert witnesses. *See In re the Matter of Firestorm*, 916 P.2d 411, 415 (Wash. 1996) (Rule 26(b)(5) “does not contemplate discovery of experts outside of its explicit requirements”). Similarly, under the Federal Rules of Civil Procedure, a party may depose an expert who has submitted a report pursuant to Rule 26(a)(2)(B) only “*after* the report is provided.” Fed. R. Civ. P. 26(b)(4)(A) (emphasis added). WorldCom will be entitled to take full advantage of the relevant discovery rules to seek access to the data and assumptions underlying any time and motion studies prepared by Verizon’s independent expert. The same is true with respect to the actual measurements taken by computerized processes. None of these rules, however, provides support for the novel proposition that WorldCom or any other party has the right to intervene in the conduct of such studies or the actual process of collecting such measurements.

WorldCom’s desire to sit in on Verizon’s compilation of raw data from these studies and measurements in anticipation of this proceeding is equally unfounded. Both the Washington and Federal Rules of Civil Procedure provide for the potential discovery of material “*prepared* in anticipation of litigation,” not access to the process in which the material is actually being prepared. *See* Fed. R. Civ. P. 26(b)(3); Wash. Super. Ct. Civ. R. 26(b)(4).¹ But even this opportunity is substantially limited. The well established standard has been that a party may not even acquire such material after the fact if — as is the case here of assimilation of raw data — it has not shown that it “has substantial need of the materials” and “is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P.

¹ As the Supreme Court of Washington has noted, “. . . under both the federal and Washington rules, there is no distinction between attorney and non-attorney work product” in this regard. *Heidebrink v. Moriwaki*, 706 P.2d 212, 214-15 (Wash. 1985) (en banc).

26(b)(3).² As the Supreme Court recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947), which is codified in this rule, there are important public policies underlying it. It reflects the view that “each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.” Fed. R. Civ. P. 26(b)(3) (advisory committee notes). *See also Harris v. Drake*, 2003 WL 1220349, at *2 (March 18, 2003 Wash. Ct. App.) (purpose of rule is “insuring that neither party pirates the trial preparation of another party”). The normal processes of discovery will enable WorldCom to obtain access to the facts at issue in this case. It is WorldCom’s responsibility to do its own compilations of those facts. Thus, it has provided no legal basis for the extraordinary relief it seeks here.

II. IN ANY EVENT, WORLDCOM HAS DEMONSTRATED NO BASIS FOR SUCH UNPRECEDENTED RELIEF IN LIGHT OF THE NATURE OF VERIZON’S PROPOSED STUDIES AND THE ALTERNATIVE BASES FOR VALIDATING THEM.

As WorldCom notes, the Commission has determined “that the former practice of relying on subject matter expert testimony was not acceptable” as a basis for establishing nonrecurring costs. *Fifth Supp. Order* ¶ 4. Based on that conclusion, the Commission determined that, in the new generic case, it may reject any nonrecurring costs “that are not the product of measured time intervals and subject to validation, except under exceptional circumstances.” *Sixth Supp. Order* ¶ 18.

Since this determination, Verizon has been diligently pursuing the preparation of work plans designed to comply with the Commission’s directive, by replacing prior NRC showings premised on SME testimony with new cost data premised on time interval measurements. It has

² Thus, the burden is not on Verizon to establish the privilege, but on WorldCom to overcome it. WorldCom has made no effort to do so.

agreed to provide WorldCom with the specific details of those work plans. As described below, it has also agreed to permit limited participation by WorldCom in the observation of certain provisioning studies conducted by Verizon's own personnel, where there may arguably be a potential for bias, and in circumstances where the resulting disruption can be expected to be relatively minimal. Following written notice last month that Verizon needed additional time to respond to WorldCom's pending request,³ counsel for Verizon also have discussed informally with counsel for WorldCom the general parameters of the studies now contemplated by Verizon. Although these plans are not yet finalized, they consist of a three-part program that, as noted below, will ensure the collection of objective and reliable time measurements capable of independent validation. Even if the discovery rules allowed a request such as WorldCom's, which they do not, in the absence of any specific showing by WorldCom of the inadequacy of established discovery tools for assessing the quality of these studies after they are completed, there is no basis for granting it the extraordinary relief of requiring Verizon to permit WorldCom to inject itself into these processes.⁴

A. Measured Time Interval Studies of Provisioning Activities

In the case of any provisioning activities for which Verizon does not already have time interval measurements available, Verizon plans to rely upon new time and motion studies conducted by Verizon personnel. Because of the limited number of such studies, the absence of

³ See Verizon Response to WorldCom's Time and Motion Proposal (February 28, 2003).

⁴ In light of its recent review of the requirements for conducting these studies, and pursuant to the *Sixth Supplemental Order*, Verizon is filing today a motion for declaratory ruling seeking confirmation that in one limited area covered by this proceeding — the provisioning of virtual collocation arrangements — extraordinary circumstances justify establishing Verizon's costs without relying on a time and motion study. As set forth in that motion, the absence of any requests for such arrangements in five years would make any such studies both unnecessary and statistically unreliable, particularly in light of the unique length of time required for collocation provisioning and the non-continuous nature of that work.

significant potential for disruption at the likely locations, and its desire to rely on its own personnel, Verizon has agreed to allow WorldCom to observe a limited number of “observation activities” of these studies on reasonable notice, so long as they do not disrupt Verizon’s schedule. WorldCom does not object to this proposed arrangement for collecting times.

B. Measured Time Intervals from Verizon’s Systems Data

Verizon currently plans to use measured time intervals captured by its systems to support its NRCs, where such data exists. In processing orders involving Local Service Requests (“LSRs”), those systems work by tracking how long Verizon employees spend processing a particular order. For example, the Decision Support System (“DSS”) is a data warehouse used to track orders electronically, which Verizon has designed and uses for the wholly independent business purpose of studying the productivity and quality of these ordering processes. It is a reporting tool that provides objective ordering process data that helps Verizon understand the overall performance and the contributions of particular teams and ordering centers. Another system is the Standard Time Activity Reporting (“STAR”) system, a system used by network provisioning employees for daily time reporting. Employees regularly record times on a task-by-task basis, and the STAR system collects that data.

These systems provide a reliable and verifiable basis for determining current work times. First, the systems are designed to capture only the time an employee spends on a particular order. Second, even though the work required to process and provision CLEC requests for UNEs often occurs in numerous small segments over hours or even days, the systems capture *all* of the time required for the order, regardless of when it occurs. Third, the systems have been tracking work times for months or years, and thus provide a large sample from which to draw times. Because these systems were designed for independent business reasons of measuring the productivity of Verizon’s ordering and provisioning processes, Verizon has a strong incentive to ensure that they

are accurate. In fact, the DSS system's extraction of data from various source systems is currently being audited by an independent accounting firm in compliance with FCC Merger Condition 5. This data is used to produce the average work times included in Verizon's cost study.

As noted above, Verizon has agreed to provide WorldCom with further details of how these systems operate and capture times, as well as its work plan to determine current work times from the data produced by the systems. WorldCom "disagrees . . . that the computer generation of data negates the need for observation." WorldCom Motion ¶ 10. But Verizon's computerized systems simply measure, on an objective basis, the time spent working on a particular order and produce summary reports from which Verizon may determine average work times for the activities at issue. WorldCom will be able to "observe" this process through ordinary discovery tools — by obtaining access to the same data Verizon uses to determine work times.

C. Third Parties Measured Time Interval Study of ASR Activities

Where Verizon does not have systems capable of capturing the time required to process and provision orders, Verizon plans to conduct stop-watch style time and motion studies. In the case of Access Service Request ("ASR") activities, Verizon is seeking to retain an independent third party expert to conduct these studies. As noted above, Verizon has not yet finalized its work plan. However, Verizon intends to employ a variety of safeguards to ensure that the independent party is objective.

As with the LSR and provisioning systems data, such a study would be "independently verifiable" even if it were conducted by Verizon employees. Both the resulting data and the procedures by which the study will be conducted will be discoverable by any party wishing to validate Verizon's conclusions. The question thus is not whether "employing a third party to

perform a study negates the need for observation.” WorldCom Motion ¶ 10. The question, rather, is whether there is a need for further *validation*. See *Sixth Supp. Order* ¶ 18 (emphasis added) (Commission may reject any nonrecurring costs “that are not the product of measured time intervals and *subject to validation*, except under exceptional circumstances”). Given the parties’ ability to view the data and see how Verizon arrived at the times in its studies, Verizon believes that there is not. Nevertheless, Verizon has voluntarily agreed to provide further validation by having an independent expert collect the work times. And to alleviate any possible concerns of bias, Verizon would have no objection to relying on an independent expert that was selected jointly with WorldCom and that would share its data with both WorldCom and Verizon, provided WorldCom funds one-half of the cost of that study.

These various protections, procedures, and discovery rights provide a reasonable basis for validating Verizon’s ASR time and motion studies, as the Commission has required. At the same time, there is a compelling need for confining observation of Verizon’s ASR process to such an independent expert. First, the National Access Customer Center (“NACC”) in Durham, North Carolina, where ASR orders are processed, consists of one floor where a high volume of work is performed for CLEC, IXC, and switched and special access customers. Verizon estimates that the NACC processes roughly 3,682 orders per day. The work operations are not segregated, nor would it be possible to segregate them. As a result, there would be no way to prevent WorldCom from observing work done for these customers or other carriers. It would be inappropriate for WorldCom, as a customer and as a competitor, to observe Verizon’s operations, including escalations, status calls, and jeopardy information discussions. There are additional security, safety, CPNI, and other competitive and proprietary information concerns that Verizon would have difficulty in adequately addressing. It would be wholly inappropriate to force

Verizon to run these significant risks given the far less burdensome alternatives for ensuring verifiable ASR ordering times.

D. Compilation and Assimilation Process

WorldCom's proposal that it be permitted to observe the process by which Verizon assimilates and compiles the raw data from its measured time interval studies into activity time estimates goes far beyond its already-unprecedented request to observe facts as Verizon observes them. WorldCom is, of course, entitled to request relevant and non-privileged information in discovery about the data and assumptions upon which Verizon bases its times. WorldCom is not, however, entitled to observe the internal thoughts and discussions of Verizon's employees in preparing its cost studies. There is no reason to allow WorldCom access to information *now* that it would not be entitled to *later*.

Moreover, the process by which Verizon compiles and assimilates the data it collects through time and motion studies does not lend itself to observation by a third party. The process takes place over many days in a variety of forms, and is not simply a matter of some Verizon employees sitting down for a few hours to discuss and assimilate data into its study. Second, any observation of this activity would obviously be disruptive to the process of preparing Verizon's cost studies in a timely and accurate way. Third, to the extent the assimilation and compilation process is pure "number crunching," there is nothing to observe other than a person entering numbers into a computer. Finally, WorldCom can "observe" the assimilation and compilation process simply by reverse-engineering Verizon's study. As with the LSR and other systems data, WorldCom can understand all it needs to know about Verizon's study simply by viewing the data upon which Verizon relies and the final product of the study itself. Thus, as *Hickman* recognized long ago, there is absolutely no basis to allow WorldCom to intrude on this process of preparation for dispute resolution.

CONCLUSION

For the reasons stated above, the Commission should deny WorldCom's motion to compel.

Respectfully submitted,

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