[Service Date March 31, 2003]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of: Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination	)	DOCKET NO. UT-023003 SEVENTH SUPPLEMENTAL ORDER: GRANTING IN PART AND DENYING IN PART WORLDCOM'S MOTION TO COMPEL

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Synopsis: The Commission grants in part and denies in part WorldCom's motion to compel Qwest and Verizon to allow WorldCom to observe certain aspects of the preparation of time and motion studies.

I. INTRODUCTION

1 **Proceeding.** Docket No. UT-023003 – also referred to as the "new generic cost case" – is a generic proceeding to review unbundled network element ("UNE") loop and switch rates, including the deaveraged loop zone rate structure, previously established by the Commission in other proceedings. The Commission has also decided to consider numerous other related issues.

2 **Background.** The Commission convened a prehearing conference on February 6, 2003, at Olympia, Washington before Administrative Law Judges Theodora M. Mace and Lawrence J. Berg. The primary purpose of the conference was to address the scope of the proceeding and scheduling issues. The parties raised a dispute regarding whether Commission Orders require Qwest Corporation ("Qwest"), and Verizon Northwest, Inc. ("Verizon")[1], to prepare time and motion studies in support of nonrecurring costs for ordering and provisioning elements. The presiding ALJs took the disputed issue under advisement and conferred with the Commissioners. The Commission's Sixth Supplemental Order resolved the dispute by requiring Qwest and Verizon to prepare time and motion studies in support of nonrecurring costs for both ordering and provisioning elements.

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[1] Qwest and Verizon will be referred to jointly as incumbent local exchange carriers or "ILECs")

3 During the prehearing conference, the parties also raised the issue whether they would be allowed to observe the conduct of time and motion studies performed by Qwest and Verizon. Parties seeking to observe the conduct of the studies were required to submit written statements of interest to Qwest and Verizon. In turn, Qwest and Verizon were required to respond with their positions. Motions to Compel observation of the conduct of the studies were required to be filed by March 14, 2003.

4 On March 14, 2003, WorldCom filed a Motion to Compel which, if granted, would require Verizon and Qwest to permit the parties to observe time and motion studies in accord with WorldCom's requested scope of observation.

5 On March 21, 2003, Verizon and Qwest filed answers to WorldCom's motion.

6 **WorldCom Motion to Compel.** World Com requests that it be allowed to obtain a copy of Verizon and Qwest's "Time and Motion Study Work Plan," after which World Com would be better able to articulate specific steps and processes WorldCom should be allowed to observe. WorldCom's primary interest to observe three main processes is:

1. The explanation of the time and motion study work plan to the personnel to be observed;

2. Three to five events chosen by WorldCom wherein two to three WorldCom representatives would be allowed to observe actual measurement activities;

3. Assimilation and compilation of raw data from time and motion study observations.

7 **Response to Motion.** Both Qwest and Verizon agree to provide WorldCom with a copy of their work plans. They also agree to allow World Com to be present when the work plan is explained to the personnel to be observed. Qwest agrees to allow observation by 2 to 3 WorldCom representatives of 3 to 5 individual events.

8 Verizon explains that its plans to perform time and motion studies are still at a preliminary stage, but that it would employ a third party to perform the time and motion study of its Access Service Request ("ASR") ordering process, thus

obviating any need for other parties to observe that aspect of its studies. Also, since computers automatically generate the processing times for Verizon's Local Service Request ("LSR") ordering process, Verizon maintains there is no "process" to observe.

9 Otherwise, Verizon agrees to allow limited WorldCom observation of the measured time interval studies Verizon plans to perform for certain of its provisioning activities, upon reasonable notice and provided the observations do not disrupt Verizon's work schedule.

10 Both Qwest and Verizon object to WorldCom's observation of the assimilation and compilation of raw data for purposes of estimating actual non-recurring charges.

II. MEMORANDUM

A. SHOULD QWEST AND VERIZON BE REQUIRED TO ALLOW WORLDCOM TO OBSERVE THE ASSIMILATION AND COMPILATION OF RAW DATA FROM THE TIME AND MOTION STUDIES?

11 WorldCom disagrees with the limitations Qwest and Verizon propose for the observation of time and motion studies. WorldCom argues that WAC 480-120-480(6)(a)(iv)[2] permits discovery of data relevant to the issues in the proceeding, as well as data that is reasonably calculated to lead to the discovery of admissible evidence. WorldCom further argues that the data sought by means of observation of the assimilation and compilation of the raw data is relevant to the validity of the assumptions underlying the Qwest and Verizon cost studies, or, at least is reasonably calculated to lead to the discovery of admissible evidence. WorldCom disputes that observation of the assimilation and compilation of raw data would intrude on attorney/client or work-product privilege. World Com claims that the time and motion studies are not performed by attorneys, but rather by experts, and WorldCom is permitted by the Rule 26 of the Washington Rules of Civil Procedure to discover facts and opinions that form the basis for expert opinions.

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[2] A copy of this portion of the Commission's discovery rule is included in Appendix A attached to this Order.

12 Qwest and Verizon respond that observation is an extraordinary form of discovery and should not be ordered where the information sought is available through other means. WorldCom will be able to obtain the raw data, and the assumptions underlying the assimilation/compilation process, through the normal discovery processes allowed under the rule, obviating the need for observation. Furthermore, the discovery rules do not provide for observation of activities of another party as a type of discovery. The ILECs contend that such observation would allow WorldCom to observe the internal thoughts and discussions of ILEC employees in preparing their cost studies.

13 Qwest asserts that the discovery WorldCom seeks would be disruptive to Qwest's internal processes. Furthermore, Qwest will be performing this assimilation/compilation work in conjunction with the preparation of its cost studies and the testimony in this matter. Qwest contends WorldCom's request for observation would intrude on privileged matters.

14 Verizon contends that Rule 26 of the Washington Rules of Civil Procedure provides for discovery of experts only through interrogatories or depositions, except under circumstances when a witness is not expected to appear at trial. [3] Under Federal rules[4], Verizon asserts, a party may depose an expert only after the expert's report has been provided. Verizon states these rules do not provide for any right to intervene in the conduct of Verizon's time and motions studies, or the actual process of collecting such measurements.

15 Verizon also contends that both Washington and Federal Rules of Civil Procedure provide only for the potential discovery of material "prepared in anticipation of litigation," if the party seeking the discovery "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. 26(b)(3) and Wash Super. Ct. Civ. R. 26(b)(4).

16 Finally, Verizon asserts that the assimilation/compilation process does not lend itself to third party observation because it takes place over many days in a variety of forms; any observation of this process would be disruptive and cause

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[3] Wa. R. Super. Ct. Civ. 26(b)(5); a copy of applicable portions of Washington Rules of Procedure is included in Appendix A attached to this order.
[4] Fed. R. Civ. P. 26(b)(4)(A).

delay; to the extent the process consists of "number-crunching" there would be nothing other than data entry to be observed; and, WorldCom can achieve an understanding of Verizon's study by reviewing the raw data and the final product.

17 WorldCom states that the claim that assimilation/compilation of the data is "internal" is not a valid objection to the production of relevant information. Confidentiality of such information is covered by protective agreements. WorldCom also asserts that the privilege claim asserted by the ILECs is conclusory and without any basis to allow the Commission to assess whether a privilege applies. Finally, World Com asserts that Rule 26 of the Washington Rules of Civil Procedure permits discovery of facts and opinions that form the basis of expert opinion. The assimilation and compilation of the data used in the ILEC cost studies is fact and opinion that underlies the testimony of experts. WorldCom asserts that the ILECs can't avoid discovery of this information by claiming privilege, because it is experts that create cost studies, not attorneys. WorldCom contends that involving attorneys in the process does not in and of itself create a privilege that protects information from discovery.

18 **Discussion and Decision.** The Commission denies WorldCom's motion to compel Qwest and Verizon to allow observation of the assimilation and compilation of the time and motion raw data into Qwest's and Verizon's time and motion studies.

19 The observation of the assimilation/compilation, such as WorldCom requests, is extraordinary because WorldCom seeks to be privy to the actual pretrial preparation of the time and motion studies, not just to observe how the studies are conducted or to audit them for accuracy. While the information WorldCom seeks is arguably relevant under the Commission's discovery rule, under Washington CR26 the Commission must balance the extraordinary nature of the type of discovery requested with the need for the discovered information and the impracticability of obtaining the information elsewhere. WorldCom's need to observe the assimilation/compilation is associated with the Commission's rejection of previous cost studies submitted by Qwest and Verizon. The Commission rejected the studies because of the inability of the parties to verify the underlying work time estimates upon which the studies were based.

20 In their responses to WorldCom's motion the ILECs agree to provide WorldCom with the underlying data that will undergo assimilation and compilation. They have also agreed also to allow WorldCom to observe the performance of the time and motion studies. The observation by WorldCom of the assimilation and compilation of the studies themselves would intrude upon the ILECs pretrial preparation and would not necessarily be productive of information that would lend assurance to the integrity of the result. With the information the ILECs have agreed to provide, as well as the other opportunities for observation available to WorldCom, adequate alternative avenues exist to obtain the information necessary to test the validity of the ILECs' time and motion studies.

B. SHOULD VERIZON BE REQUIRED TO ALLOW WORLDCOM TO OBSERVE THE PROCESS OF TRACKING TIME INTERVALS RELATED TO ORDERS INVOLVING LOCAL SERVICE REQUESTS?

21 Verizon explains that it currently plans to use existing electronic time tracking systems for processing orders involving Local Service Requests ("LSRs") to measure the time intervals required for processing orders. Two systems Verizon intends to rely on are its Decision Support System ("DSS") and its Standard Time Activity Reporting ("STAR") system[5].

22 Verizon states that these systems are designed to capture only the time an employee spends on a particular order. The work required to process and provision orders for UNEs often occurs in numerous small segments over hours or even days. These systems capture all of the time required for the processing of an order, regardless of when the processing activity occurs. The systems have been in place for long periods of time and would provide a large sample of data from which to draw appropriate time intervals. Verizon believes that since these systems were designed for the independent business purpose of measuring the productivity of Verizon's work processes, there is little chance that the data is distorted or inaccurate.

[5] The DSS is a data warehouse used to track orders electronically. STAR is a system used by network provisioning employees that collect the times that employees record daily on a task-by-task basis.

23 Verizon states that the computerized process by which the time data is entered is incapable of observation. However, Verizon has agreed to provide WorldCom with further details of how these systems operate and capture times. Verizon will also provide, through discovery, the same data Verizon uses to determine work time estimates.

24 WorldCom responds that the computer generation of data does not negate the need for observation. WorldCom reiterates its argument that the data is relevant and thus a proper subject of discovery in this proceeding. WorldCom asserts that the Commission rejected the use of SME-based information in the formulation of costs studies because that information was not capable of independent validation by other parties. Observation by parties such as WorldCom is a way for the Commission to ensure that the resultant time and motion study is a scientific measurement of the resources required to perform certain nonrecurring activities. WorldCom claims that the parties should be allowed to verify that the computer-generated time is accurate and that the processes and equipment are necessary and efficient.

25 **Discussion and Decision.** The Commission denies WorldCom's motion to compel Verizon to allow observation of the computerized collection of time data. There is no observable process that otherwise enables WorldCom to perform a bona fide audit of the accuracy of the information. Verizon's agreement to provide operational details of the process by which it captures the times, and to provide the data captured, means that WorldCom will have an adequate alternative means of obtaining information that will allow it to determine the accuracy of the time estimates derived by Verizon.

C. SHOULD THE COMMISSION REQUIRE VERIZON TO ALLOW WORLDCOM TO OBSERVE THE CONDUCT OF TIME AND MOTION STUDIES BY AN INDEPENDENT THIRD PARTY?

26 Verizon states that in some instances, related to Access Service Requests ("ASRs"), the company does not have computerized systems in place to capture the time required to process and provision orders. In those instances, Verizon plans to retain a third party expert to conduct stop-watch style time and motion studies. Both the resulting data and the procedures by which the study will be conducted will be subject to discovery and thus available to parties who wish to verify or challenge the results. However, Verizon suggests that to alleviate any

possible concern about bias, the company would agree to rely on an independent expert that was jointly selected with WorldCom and that would share its results with both WorldCom and Verizon, provided that WorldCom pay half the cost of the study.

27 Verizon points out that the National Access Customer Center ("NACC"), where ASR orders are processed, handles a huge volume of orders per day and is configured in such a way that an observer, such as WorldCom, would be unable to avoid getting an intimate glimpse of Verizon's competitive and proprietary operations. Allowing WorldCom to observe these operations would create a heavy burden that should not be forced on Verizon under circumstances when it is taking pains to provide independent third party verification of its ordering and processing time intervals.

28 WorldCom reiterates its earlier arguments about the relevance of the time data to this proceeding and recommends that independent validation of time and motion studies is best achieved by allowing the other parties to observe the performance of the studies. WorldCom contends that, even if a third party performs the test, the other parties should be allowed to verify the accuracy of the time calculations and the necessity and efficiency of the processes and equipment employed.

29 **Discussion and Decision.** The Commission grants WorldCom's motion to compel Verizon to observe the conduct of time and motion studies by an independent third party. As indicated above, the Commission remains concerned that time and motion studies are accurate, verifiable and unbiased. Performance of such studies by a third party does not guarantee lack of bias. Even if WorldCom were to accept Verizon's offer to join in selecting the third party vendor, Verizon would still bear the burden of demonstrating that the third party expert was both accurate in its observations and unbiased in its representations.

30 Observation of the third party expert's conduct of time and motion studies differs from the observation of assimilation and compilation of the data derived from the study because it relates to the way in which the data are captured as opposed to the way the ILECs interpret the data for purposes of hearing.

31 Verizon's concern that WorldCom observers at the NACC would be able to obtain proprietary information about Verizon's business operations can be allayed by requiring observers to sign appropriate confidentiality agreements under the protective order currently in place in this proceeding. Observation of three to five events by two to three WorldCom observers, such as Qwest agrees to, is appropriate for WorldCom's observation of Verizon's independent third-party "stop-watch" time and motion studies, and should also be permitted.

ORDER

32 THE COMMISSION ORDERS That WorldCom's Motion to Compel is granted in part and denied in part.

Dated at Olympia, Washington and effective this _____ day of March, 2003.

WASHINGTON UTILTIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Administrative Law Judge

THEODORA M. MACE
Administrative Law Judge

NOTICE TO PARTIES: This is an interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within ten (10) days of the service of this Order pursuant to *WAC 480-09-760.*

APPENDIX A
APPLICABLE LAW

WAC 480-09-480(6)(a)(vi): Scope of request. The scope of any request for data shall be for data relevant to the issues identified in the notices of hearing or orders in the adjudicative proceeding. It is not grounds for objection that the information sought will be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to discovery of admissible evidence. The frequency, extent, or scope of discovery shall be limited by the commission if it determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; the party seeking discovery has had ample opportunity to obtain the information sought; or the discovery is unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties' resources, scope of the responding party's interesting the proceeding, and the importance of the issues at stake in the adjudicative proceeding.

Wash. CR 26(b)(1): Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods as set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court

may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

Wash. CR26(b)(5): Trial preparation. Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as a n expert witness at trial.(ii) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impractical for the party for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(3): Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trail by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(4): (A) Trial preparations: experts. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.