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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1025

In the Matter of:)
)
QWEST CORPORATION,)
)
Investigation to Review Costs and) TELEPHONE CONFERENCE
Establish Prices for Certain)
Unbundled Network Elements)
Provided by Qwest Corporation.)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled
Court and cause came on regularly for hearing before the
Honorable Samuel J. Petrillo, Administrative Law Judge,
on Wednesday, the 11th day of June, 2003.

APPEARANCES

Lisa Rackner, Attorney at Law,
Appearing on behalf of the AT&T and MCI;
Michel Singer-Nelson, Attorney at Law,
Appearing on behalf of MCI;
Eileen Benner, Attorney at Law,
Appearing on behalf of AT&T;
John DeVaney and Alex Duarte, Attorneys at Law,
Appearing on behalf of Qwest Corporation;
Michael Trincherro, Attorney at Law,
Appearing on behalf of XO and Eschelon;
Dale Dixon, Attorney at Law,
Appearing on behalf of Allegiance;
Mike Weirich, Attorney at Law,
Appearing on behalf of staff.

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Proceedings recorded by cassette tape recording;
transcript provided by Certified Shorthand Reporter.

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1 (Wednesday, June 11, 2003, 9:00 a.m.)

2 P R O C E E D I N G S

3 (Whereupon, the following telephonic
4 proceedings were held:)

5 THE COURT: Good morning. This is Sam
6 Petrillo. This is the second conference today on
7 June 11 in Docket UM 1025. This conference is going to
8 discuss the motion to compel filed by Qwest Corporation.
9 Let's take the appearances for the record. Somebody
10 begin, please.

11 MS. RACKNER: This is Lisa Rackner for AT&T
12 and MCI.

13 THE COURT: Okay.

14 MS. SINGER-NELSON: Michel Singer-Nelson on
15 behalf of MCI.

16 MR. DEVANEY: Good morning. John Devaney
17 for Qwest.

18 MR. DUARTE: Also Alex Duarte for Qwest.

19 MR. TRINCHERO: Mark Trincherro on behalf of
20 XO and Eschelon.

21 MR. DIXON: Dale Dixon for Allegiance.

22 MS. BENNER: Eileen Benner, AT&T.

23 THE COURT: Okay. Is Ms. Johnson on the
24 line?

25 (No response.)

1 THE COURT: Okay. We have some
2 representatives of staff here.

3 MR. WEIRICH: Mike Weirich for staff with
4 some staff members.

5 THE COURT: Okay. Any other appearances for
6 the record?

7 Okay. Thank you. Now, the last -- in the
8 last conference we had on this particular motion, the
9 parties indicated they were going to attempt to resolve
10 the matter informally. I understand there were several
11 discussions, but that there's been no resolution on
12 either of the two main issues; is that correct?

13 MS. RACKNER: That's correct, Your Honor.

14 THE COURT: Okay. Let's see. And I
15 received some supplemental authorities from AT&T and
16 WorldCom yesterday morning. Frankly, there were like
17 161 pages.

18 I read your memo, Lisa, but unfortunately
19 because of the timing of the submission, I was not able
20 to read the rest of the materials you provided.

21 Another matter is that because of my
22 personal schedule, I am not going to be able to issue a
23 written ruling in this matter, and so the oral ruling
24 that I issue today is going to have to suffice and so
25 the parties should be aware of that. I am making a tape

1 recording in case anyone wants a transcript of it.

2 The two issues, as I understand it, are the
3 relevancy of CLEC cost data generally for purposes of
4 inquiry by Qwest Corporation, and the customer location
5 and clustering data that I understand was requested by
6 Qwest and is in the possession of TNS; is that correct?
7 Those are the two issues that remain?

8 MR. DEVANEY: That's correct.

9 MS. RACKNER: Yes.

10 THE COURT: And I've read the parties'
11 responses on that and I'm prepared to make a ruling now.

12 With respect to the issue of the relevancy
13 of the CLEC cost data, I start with the FCC's rule on
14 TELRIC which is FCC Rule 51.505(b) which requires an
15 inquiry into the most efficient telecommunications
16 technology and the lowest cost network configuration.

17 The CLECs are offering the HAI model in this
18 case as the appropriate methodology for determining
19 TELRIC for unbundled network elements and Qwest, as I
20 understand it, is offering a different cost model. And
21 so in evaluating those models, I believe the important
22 issue is whether they incorporate those two things that
23 the FCC is looking for; that is, the most efficient
24 telecommunications technology and the lowest cost
25 network configuration.

1 As I understand it, the CLECs are basically
2 arguing with respect to this motion that their costs,
3 practices and technology that are employed in Oregon
4 shouldn't be considered to substantiate the cost
5 estimates incorporated in the HAI model because of at
6 least three things: One, that the TELRIC inquiry is
7 limited to ILEC data only. Two, that the CLEC costs are
8 not included as cost inputs in the HAI model. And,
9 three, that the CLEC networks are of more limited scale
10 and scope, and, therefore, not relevant to the inquiry.

11 With respect to the first issue, and that is
12 the scope of the TELRIC inquiry, in general, I believe
13 that -- that what the FCC rule contemplates is that the
14 most efficient technology available and lowest cost
15 network configuration contemplate an examination of the
16 technology available to all telecommunication carriers
17 in the relevant marketplace.

18 And so if non-incumbent carriers are
19 experiencing lower costs because of more sufficient
20 technology or lower cost network configurations, then
21 those costs are, indeed, relevant to the TELRIC inquiry.
22 I believe this interpretation is supported by the
23 Supreme Court's decision in the latest TELRIC case,
24 Verizon v. FCC, dealing with TELRIC cost methodology.

25 I think the statements by the Court in that

1 case clearly suggests that the costs included --
2 incurred by new entrants may be used to establish the
3 quote, unquote, most efficient TELRIC price for a
4 network element.

5 I haven't been provided with any case law or
6 statement from the FCC which indicates that the costs
7 and practices incurred by new entrants are irrelevant to
8 determining the TELRIC of network elements, and absent
9 such a decision, I interpret Rule 505(b) to permit an
10 inquiry into the technology employed by all
11 telecommunications carriers providing service in the
12 relevant market, and not merely the incumbent carriers.

13 Now, with respect to the second issue, which
14 is that the HAI model doesn't include CLEC costs, my
15 opinion is that the fact that the CLEC costs are not
16 included in the HAI model does not mean that those costs
17 are irrelevant to determining the most efficient
18 telecommunications technology or the lowest network --
19 cost network configuration.

20 Let's assume, for example, that the HAI
21 model includes a cost for a network element at \$100, but
22 the evidence shows that the ILECs and the CLECs can only
23 acquire that element in the market for \$200. That
24 information, in my opinion, is clearly relevant to
25 whether the costs include the model are accurate; in

1 other words, Qwest is inquiring in that instance whether
2 the costs incorporated in the HAI model represent costs
3 currently paid by telecommunications carriers for
4 network elements available in the real world.

5 So I do think that information is relevant.
6 Also to the extent that the CLEC costs and practices are
7 relevant to ascertaining UNE costs, the failure of the
8 HAI model to include those costs and practices could be
9 used by Qwest to impeach the accuracy and reliability of
10 the model itself, so that's my ruling on that issue.

11 With respect to the final issue, which is
12 that the CLEC costs are not relevant to TELRIC cost
13 inquiry because they're more limited in scale and scope
14 than the Qwest network, I find that that fact is -- goes
15 to the weight of the evidence adduced as opposed to its
16 admissibility.

17 So if -- if you have the same scenario that
18 I indicated earlier where the HAI model incorporates a
19 cost of \$100 for a network element and Qwest shows that
20 the CLECs actually paid \$200 for that element, the value
21 of that information may be lessened if the CLECs can
22 establish that their higher costs are due to a more
23 limited scaled and scope of their network as opposed to
24 carriers with more extensive network operations.

25 It does not, in my opinion, mean that the

1 evidence adduced is irrelevant. So that's my ruling
2 with respect to CLEC cost data generally.

3 Now, with respect to the customer location
4 and clustering data, I've reviewed that in some -- some
5 detail; and, as you know, the Commission is guided, in
6 addition to its own rules, by the Oregon Rules of Civil
7 Procedure, and in particular Rule 36(b)(1), which
8 entitles the parties to discover any information that's
9 reasonably calculated to lead to the discovery of
10 admissible evidence.

11 The Commission -- Commission's rules in
12 addition require that the rules be liberally construed.
13 So I believe that based on the submissions that the
14 customer location data and the clustering algorithm
15 requested by Qwest are, indeed, relevant. I'm not sure
16 that the parties even dispute that fact, but if they do
17 that's my ruling.

18 I think the transcript provided by the joint
19 CLECs in this case of the SBC proceeding, I believe in
20 that case the witnesses in that proceeding indicated
21 that the clustering algorithm is, in fact, a principal
22 cost driver and the model and has a direct impact on the
23 amount of outside investment the model estimates
24 necessary to serve customers, so I do believe that that
25 information is relevant.

1 I believe without that information, Qwest
2 would not effectively be able to recreate how the HAI
3 model operates. Now, there's -- there's some arguments
4 that have been raised with respect to that data, and I'd
5 like to go over those briefly. AT&T, and I believe it's
6 MCI, make the argument that -- that they shouldn't have
7 to provide the customer location and clustering data
8 because they don't have possession of it.

9 And, frankly, I'm not persuaded by that
10 argument for a couple of reasons. One is that the fact
11 that a party chooses to use a third party provider to
12 supply important inputs to a cost model shouldn't
13 insulate them from the duty to disclose relevant
14 information about that model. It seems to me that --
15 that going into these proceedings, all of the parties
16 were aware that competing cost models would be presented
17 for the Commission's consideration, and I think it was
18 obvious to everyone upfront that extensive discovery
19 would be required.

20 Under those circumstances, I believe it's
21 both logical and reasonable that if a party chooses to
22 rely on a third party to provide critical data inputs to
23 a model, that party should know that the basis
24 underlying those inputs would be subject to discovery.

25 In addition, I'm very concerned about the

1 public policy implications of an argument that parties
2 would be able to effectively foreclose discovery of
3 relevant information simply by using third parties to
4 develop models or analyses.

5 It seems to me that that rationale could be
6 used, for example, in the future to deny discovery
7 requests made by the Commission or its staff. If
8 discovery were denied simply because a third party
9 developed data, it would create an incentive for every
10 party to do the same and effectively deny the ability to
11 discover altogether.

12 It's hard for me to imagine if that were the
13 case that anybody would ever choose to develop their own
14 information. They would simply farm it out to third
15 parties. And I can, frankly, only imagine the
16 intervenor's response in this case if this argument had
17 been presented by Qwest. So I am not persuaded by the
18 argument that you don't have possession of the data.

19 I have similar concerns about AT&T and MCI's
20 argument that Qwest is not prejudiced because it can
21 obtain customer location and clustering data from TNS
22 for a fee. Even if it were acceptable to require
23 parties to pay for discovery, this proposal is
24 unsatisfactory because, as I understand it, under AT&T
25 and MCI's latest proposal, Qwest is still denied the

1 opportunity to look at the clustering algorithm and
2 would only be allowed to look at the customer location
3 data.

4 And, in addition, I have the same sort of
5 public policy concerns about requiring people to pay for
6 discovery. It -- it would have, in my opinion, negative
7 implications on future proceedings. It's totally
8 unreasonable, in my opinion, to have the Commissioner
9 and staff pay for discovery, and it disadvantages
10 parties who do not possess significant financial
11 resources.

12 I haven't been supplied with any case law
13 addressing this issue specifically. I know there have
14 been some instances where commissions have required
15 parties to share the costs or something like that; but,
16 in my opinion, the public policy implications of this
17 kind of scenario are so negative that I would not want
18 to contemplate having it occur in the future.

19 Now, with respect to the -- there's another
20 argument that's been advanced by AT&T and MCI and that
21 is that Qwest doesn't need the TNS data to test the
22 accuracy of the clustering algorithm because substantial
23 data has already been provided to permit Qwest to
24 conduct its own investigation.

25 I don't think that Qwest should be required

1 to perform a separate investigation and analyses and
2 basically be required to guess whether it has accurately
3 recreated the algorithm and how it will function.

4 That process would not only keep Qwest in
5 the dark but it would keep the Commission in the dark as
6 well. Someone can't be -- it seems to me that if the
7 algorithm is relevant to -- to this inquiry, it should
8 be supplied, and a party should not be required to
9 attempt to recreate it.

10 Now, there are some other considerations
11 here that I want to go over, too. I indicated earlier
12 that this case involves the likelihood of substantial
13 discovery. I think everybody knew going in that
14 substantial discovery would be required, and I don't
15 think that it should surprise anybody that Qwest would
16 be requesting information about AT&T's cost model as
17 much as AT&T requested information from Qwest.

18 I also want to point out that we have a
19 protective order in place now, and it's unclear to me
20 why that protective order would not adequately protect
21 the confidentiality of the information requested by
22 Qwest. I indicated briefly that I have some concerns
23 about AT&T and MCI's latest proposal basically for
24 the -- for the reasons set forth in Mr. DeVaney's letter
25 dated May 20, basically that Qwest wouldn't have any

1 custody of the customer location data.

2 It would be able to view it only and not be
3 able to manipulate the data or replicate the clusters or
4 understand how TNS created them. And, again, Qwest
5 would have no access to the formulas, or algorithms
6 themselves, but be placed in a position of attempting to
7 replicate them. And as I indicated earlier, that --
8 that's unacceptable.

9 Now, the final thing that's been stated, and
10 that is that, you know, Qwest is responsible for all of
11 this in the first place because it was unwilling in the
12 first instance to provide its customer location data on
13 a timely basis.

14 In my opinion, the appropriate way to have
15 dealt with this issue would have been for the joint
16 CLECs to file a motion to compel that data. To come
17 back now and say, "Well, if Qwest had done this, we
18 wouldn't be in this pickle," just doesn't cut it. So I
19 am not persuaded by that argument.

20 Now, given the fact that in the prior
21 conference we've -- I've ordered an extension of the
22 schedule in this docket, it may be that AT&T and MCI
23 want to reconsider using Qwest data, particularly if TNS
24 refuses to disclose the algorithm it used to -- for
25 purposes of the clustering data.

1 So that concludes my ruling in this case.
2 Basically, I'm granting the motion to compel with the
3 following exceptions. In my review of the Qwest
4 requests, I found three that I believe were either
5 unnecessary or too broad, and I'm going to go through
6 them with you.

7 The first one is Request No. 1-013(b). And
8 that request asks for the identity of the utility
9 companies with which WorldCom has shared replacement
10 costs in Oregon and other states. I don't believe it's
11 necessary to disclose the identity of those companies,
12 merely whether sharing has occurred and the percentage
13 of costs incurred by WorldCom.

14 With respect to the next item is -- I
15 believe it's Request 1-021. And I'm going to get that
16 real quick here. That request I think is -- is simply
17 too broad. The first sentence of that request says,
18 "Please provide copies of all materials relating in any
19 way to the HAI model that has been provided to WorldCom,
20 and by Taylor Nelson's Softrays, TNS, including the
21 three subsections."

22 It seems to me that the -- the request for
23 materials relating in any way to the HAI model is -- is
24 simply too broad, and that the request should be --
25 should be limited to the particular information being

1 requested which is the customer location and the
2 clustering data, so with respect to that request, under
3 Subpart 3, I believe it should be limited to memoranda,
4 correspondence, work papers and notes from TNS relating
5 to Sub (1) and Sub (2).

6 Last item I have is Request 1-043, and in
7 this request Qwest is seeking to have WorldCom identify
8 all contractors WorldCom has used in Oregon within the
9 last three -- past three years to replace fiber or
10 copper facilities. Again, I believe it's unnecessary
11 to -- for WorldCom to have to name the contractors it
12 has used. Simply the fact -- and simply -- WorldCom can
13 simply list the contractors as A, B and C if it liked,
14 but I don't think the names are essential.

15 Those are the limitations I have on the
16 discovery. But other than that, I'm granting the motion
17 to compel.

18 MS. SINGER-NELSON: Judge, this is Michel
19 Singer-Nelson on behalf of MCI. I would just ask for
20 clarification on your ruling relating to construction
21 data.

22 THE COURT: Yes.

23 MS. SINGER-NELSON: Your analysis focused on
24 CLEC data.

25 THE COURT: Yes.

1 MS. SINGER-NELSON: Some of the questions
2 could be construed to be so broad as to ask about long
3 distance network information. I ask for clarification
4 on that point and I know that argument was discussed in
5 the motion.

6 THE COURT: Where in the motion, Michel?

7 MS. SINGER-NELSON: I know it was discussed
8 in our response.

9 THE COURT: Do you have a page --

10 MS. SINGER-NELSON: That information is not
11 relevant and should not be required to be produced.

12 THE COURT: Is that information that Qwest
13 is seeking, Mr. Devaney?

14 MR. DEVANEY: Yes. It is fairly included
15 within the request, Judge Petrillo, and that, for
16 example, we don't see why it would cost anything
17 different to put a long distance cable in the ground as
18 to put a local cable in the ground. It is the same type
19 of facility.

20 MS. SINGER-NELSON: It's not necessarily
21 true that they're the same type of facility. The
22 networks are completely different. And the relationship
23 between the vendors and the carriers perhaps would be
24 different as well, although I haven't investigated that
25 issue specifically, but I disagree that it's the same

1 thing.

2 And based on your ruling, your ruling was
3 focused on the fact that we're CLECs, and our CLEC
4 information is relevant to the TELRIC analysis. It's --
5 the long distance market is a different market than the
6 local market. And there has been no showing that the
7 local market costs would be the same, so based on all of
8 these facts and the TELRIC analysis itself, I would
9 again ask that information relating to our long distance
10 practices and our long distance costs not be discovered.

11 MR. DEVANEY: Judge Petrillo, may I briefly
12 respond?

13 THE COURT: Yes.

14 MR. DEVANEY: Two quick points, first of
15 all, I have to go back and check the briefs, but I don't
16 recall an objection being made on this ground previously
17 nor do I recall an argument being presented on this
18 ground.

19 The second point that -- that really -- it
20 doesn't matter that there is a different market for long
21 distance than for local, because what we're talking
22 about are very specific facilities.

23 THE COURT: Uh-huh.

24 MR. DEVANEY: Copper -- I'm sorry, copper
25 and fiber cables, and what it costs to put those in the

1 ground, to dig a trench, to plow, to put in conduit, and
2 that happens in both local and long distance networks,
3 and it's the same thing. You know, you're digging a
4 hole in the ground and putting a cable in the ground.

5 The cost differential should be nonexistent.
6 It's the same practice and for the same reason that a
7 cable used for local service is relevant, so should the
8 costs for cable use for long distance. It's the same
9 exercise in placing the cable.

10 MS. SINGER-NELSON: Judge, if I may, in
11 fact, there has been no factual basis that that's true
12 and I would dispute that. Qwest has not demonstrated
13 that to be true. And the TELRIC analysis is focusing on
14 CLEC networks, not long distance carrier networks, so I,
15 again, would ask that the data request be limited to
16 information related to CLEC networks.

17 MR. DEVANEY: And my brief response to that
18 would be that if there is, indeed, a difference, we
19 don't think there is, but if there is, indeed, a
20 difference, that would be demonstrated through our
21 discovery and AT&T and MCI could argue that the
22 admission of those facts should be denied.

23 But at the discovery stage, I think we're
24 entitled to know whether there is a difference between
25 the cost and to determine whether we should use that

1 information in support of our case.

2 THE COURT: Anyone else want to weigh in on
3 this? Okay. I believe I agree with Mr. Devaney on
4 this. Under the Rules of Civil Procedure, it's --
5 discovery does not require that the evidence adduced
6 be -- be admissible at the hearing.

7 And so the procedure that Mr. Devaney just
8 outlined is exactly the one that I believe is
9 appropriate under the circumstances. I believe Qwest is
10 entitled to inquire and if AT&T objects -- AT&T or the
11 the joint CLECs or MCI intend to object, then they may
12 do that at that time.

13 So that's my ruling. Anything else? The
14 conference is adjourned. We'll get back here in the
15 another five minutes and start up with the next
16 conference.

17 MR. DEVANEY: Thank you.

18 THE COURT: You're welcome.

19 (Proceedings adjourned.)

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Reporter's Certificate

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I, Katie Bradford, Court Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I transcribed in stenotype from a cassette tape the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE SAMUEL J. PETRILLO, Administrative Law Judge, on June 11, 2003;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, Pages 1 through 20, both inclusive, constitutes a full, true and accurate record of said proceedings taken from a cassette tape and so reported by me in stenotype as aforesaid.

A transcript without an original signature and red CSR seal is not certified.

Witness my hand and CSR Seal at Portland, Oregon, this 17th day of July, 2003.

Katie Bradford, CSR 90-0148
Official Court Reporter