BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of Unbundled Loop and Switching Rates and Review of the Deaveraged Zone Rate Structure	Docket No. UT-023003 QWEST'S MOTION TO COMPEL AT&T AND MCI TO RESPOND TO DATA REQUESTS

I. INTRODUCTION

Qwest Corporation ("Qwest") brings this motion to compel discovery responses against AT&T Corporation of the Pacific Northwest ("AT&T") and WorldCom, Inc. (referred to herein as "MCI") (collectively "AT&T/MCI"), in connection with Qwest's First Set of Data Requests served on AT&T/MCI in this case. Copies of the disputed discovery requests and responses are attached as Attachment A. Qwest states that the parties have conferred but have been unable to resolve the dispute at issue.

The data requests at issue relate to the HAI model, release 5.3 ("HAI model"), presented by AT&T/MCI in their direct testimony filed on June 26, 2003. These requests ask AT&T/MCI to provide Qwest information and data that are crucial to a complete understanding and analysis of the HAI model. Their refusal to do so requires Qwest to bring this motion. For each of the thirteen (13) discovery requests discussed herein, AT&T/MCI either asserted groundless objections without providing any response or provided an insufficient answer.

Qwest's motion seeks an order compelling AT&T/MCI to provide complete responses to the following discovery requests: 11; 14; 15; 16; 17; 18; 19; 22; 24; 27; 32; 44; and 45. As explained

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below, each of these requests seeks information directly relating to key assumptions in the HAI model. The requested information is highly relevant and AT&T/MCI have no legitimate basis for withholding the information. Thus, Qwest respectfully requests that the Commission grant this motion.

II. SUMMARY OF THE DISPUTED DISCOVERY REQUESTS

A. Discovery Requests Relating To The HAI Model's Reliance On Customer Location Data And "Customer Clusters"

The first group of data requests at issue relate to methodologies and assumptions used in compiling the HAI model. Specifically, through its requests, Qwest seeks to gather further information regarding the process the model uses to place customers at particular locations in Washington and to create "clusters" of customers that the model treats as the equivalent of distribution areas. As discussed below, the customer location and customer clusters are critical elements in determining the cost of particular unbundled network elements ("UNEs").

The HAI model uses a "bottom-up" method for estimating the cost of UNEs, using demand data as the foundation. The introduction of release 5.3 underscores that the demand data and clustering process are at the heart of the model. According to the overview of the model:

> The Model's demand data, *particularly data describing customer locations*, line demand, and traffic volumes, serve as the *starting point*. Customer locations are determined through geocoding, augmented as necessary by a surrogate location process for these customers whose geocoded locations are not known. A *clustering algorithm* is used to develop groupings of customer locations that have a realistic correlation to efficient distribution areas. . . . [The model] costs a local exchange network that is engineered to have sufficient capacity to meet all existing demand, both retail and wholesale, to the extent the associated demand data are available, and to maintain a high level of service quality.[1]

In other words, the initial step in the model upon which the other steps are based is determining the amount and location of current demand for local exchange service, network elements, and network interconnection in Washington. To establish the location of current demand, the model relies on geocoded customer location data when available, combined with a method of assigning surrogate

[1] Exhibit MTB-4; HAI Model Description, Release 5.3, at 3 (emphasis added).

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locations when geocoded location information is not available.[2]

After customers are placed in locations, they are grouped into clusters, with each cluster representing "a single telephone plant serving area."[3] The important point for purposes of this motion is that the clusters have a significant effect on the amount of network-related investment that the model includes, because they are specifically used to estimate the type and amount of outside plant required to serve customers.[4] The make-up of a cluster determines, for example, the amount of feeder and distribution plant and related investment that HAI assumes is required to serve a group of customers.[5] There is, therefore, a direct relationship between the accuracy of HAI's customer locations and clusters, on the one hand, and the accuracy of the model's estimated investment for outside plant, on the other.

A simple illustration demonstrates this relationship. Assume that the customer location data for a rural serving area in Washington shows that customers are uniformly located one mile apart from each other. If HAI used a cluster that placed these customers only a half-mile apart, the model would include less distribution plant and related investment than is actually needed to serve these customers. A lack of correlation between the customer location data and the clusters would lead to inaccuracies in the amount of outside plant and related investment that the HAI model includes.

The legitimate need to test the reliability of this basic underpinning of the model led Qwest to issue the disputed discovery requests relating to HAI's customer location and clustering processes. The requests in this category are as follows:

- Request 22 – Production of any data and documents prepared by or in the custody of Taylor Nelson Sofres Telecoms ("TNS") – the company that created the HAI clusters -- that are used or applied in the version of the model.
- Request 24 – Production of any algorithms or software programs that are used to create the customer clusters in the HAI model, including the "National Access

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[2] *Id*. at 32-34.

[3] *Id*. at 34.

[4] AT&T/MCI's witness Bryant describes in his testimony in this case why the clustering algorithm is critical to the HAI model. "The clustering algorithm ensures that the identified customer locations are served by outside plant that is configured to be economically efficient and consistent with design guidelines that are based on the characteristics of currently available outside plant technology." *Bryant Direct Testimony, page 17, filed June 26, 2003.* Because this algorithm plays such an important role in the model and essentially dictates investment, it is critical that the parties have access to it.

[5] Exhibit MTB-4; HAI Model Description, Release 5.3, at 47-51.

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Line Model" developed by TNS and those used in the geocoding, surrogating, or clustering processes.

- Request 27 – Production of all customer location data used in the HAI model and all other data that relate in any way to the creation of the clusters that are used in the model.
- Request 32 – A description of the number of residential household locations in Section 5.3.1 of the HAI model, including: (a) a list of each Washington CBG where Claritas household counts exceed the customer location count; (b) the number of Claritas households in excess of Metromail customer location for each CBG; and (c) for the residential households in excess of the Metromail customer locations, the census block ("CB") identification numbers and the household count where these excess households were distributed.

These requests are specifically tailored to produce the following information that will allow Qwest to understand and audit HAI's placement of customers and the creation of the clusters the model uses: (1) the data used to determine the locations of customers; (2) the "clustering algorithm" used for creating the clusters; (3) documents and data relied upon by the company (TNS) that created the clusters, including any documents that explain TNS' processes and methods for creating the clusters; (4) explanations of the methodology used to place customers when their actual locations were unknown; and (5) information and data that will permit Qwest to understand the extent to which the customer clusters were formed without data establishing actual locations of customers.

In their responses, AT&T/MCI refused to provide any of this information. They generally asserted that the information is TNS's "intellectual property" without providing any substantive response. As discussed below, AT&T/MCI's objections to producing this highly relevant information are specious, and their responses are clearly insufficient.

B. Discovery Requests Relating to HAI's Inputs and Assumptions for Network-Related Investment

The second category of data requests at issue relate to AT&T/MCI's engineering practices and network-related investments. Specifically, through its data requests, Qwest seeks information regarding AT&T/MCI's own engineering practices in order to test the assumptions relating to network-related investments made by the model.

The HAI Inputs Portfolio provides insight regarding the information relied upon in the

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development of the model:

> The inputs and assumptions in HM 5.3 are based on information in publicly available documents, expert engineering judgment, and/or quotes from suppliers and contractors. . . . Furthermore, in particular state proceedings where it is utilized, the Model often benefits from *information specific to the jurisdiction* and the company in question. Such information may take the form of . . . information obtained from the ILEC's own cost studies, and/or information obtained from the ILEC during the discovery process.[6]
>
> Furthermore, when reviewing parameters that "have a major impact on the results" the model's developers will consider "*general trends and directions in the industry*."[7] Indeed, the portfolio lists "industry experience" as a reference.[8]

In order to examine these "general trends . . . in the industry" as well as jurisdiction-specific information, Qwest issued discovery requests seeking information that would permit it to test the validity of HAI's investment-related inputs. These requests include nine requests seeking information regarding AT&T/MCI's own real-world experience relating to some of these inputs, including, for example, the prices AT&T/MCI pay for cables and the construction methods AT&T/MCI use to place cables in the ground.

To test the premise that HAI's network-related inputs and assumptions reflect "general trends . . . in the industry," Qwest asked AT&T/MCI to provide relevant information concerning their own experiences building local exchange networks in general. Likewise, to test whether the model's assumptions reflect "information specific to the jurisdiction," the requests seek information regarding AT&T/MCI's experiences in Washington. AT&T/MCI's own industry practices and experience relating to the same HAI inputs at issue in this case bear directly on whether the HAI inputs are reasonable. Simply put, if AT&T/MCI's experience differ sharply from the HAI inputs, that information could cast doubt on the model. Accordingly, Qwest's discovery requests asked AT&T/MCI to provide the following information about their own experiences:

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[6] HAI Inputs Portfolio, Release 5.3, at 10 (emphasis added).

[7] *Id*. (emphasis added).

[8] *Id*. at 184.

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- Request 11 – This request seeks information relating to the AT&T/MCI's general outside plant engineering practices relating to the placement of cables in their networks, including the simultaneous placement of outside plant with other utility companies.
- Requests 14 and 15 – These requests seek information relating to the HAI assumption that, on average, a carrier building a replacement network will have to pay only about 33% of the costs of placing distribution and feeder cables and that the other 67% of these costs will be paid by other utility companies through cost sharing arrangements.[9] The HAI Inputs Portfolio states that this critical value, which substantially reduces overall investment included in HAI, is supported by "existing evidence of structure sharing arrangements" and "present structure sharing practices."[10] Request 14 asks AT&T/MCI to provide information about their own cost sharing experiences in building local exchange networks, including information concerning how often AT&T/MCI were able to share placement costs, the amount of cost savings resulting from the AT&T/MCI's sharing, and the types of utility companies with which AT&T/MCI have shared placement costs. This information bears directly on AT&T/MCI's claims that the HAI cost sharing inputs are consistent with "existing evidence of structure sharing arrangements" and "present structure sharing practices."
- Requests 16 and 17 – These ask AT&T/MCI for information regarding the companies' cable placement methods (*e.g.*, trenching, plowing, and directional boring) in general and in Washington and to quantify the frequencies used for each method. Once again, information from AT&T/MCI about their methods for placing cable relates directly to whether these HAI values are consistent with the "general trends . . . in the industry" and information "specific to the jurisdiction in question."
- Requests 18 and 19 – These request information about the per foot costs AT&T/MCI have incurred in the past two years for fiber and copper cables, including material and installation costs. HAI includes values for these cable costs, and Qwest is seeking information about AT&T/MCI's recent experience with these same costs to test the validity of the HAI values. Further, AT&T/MCI's practices and experience with these costs are a clearly relevant measure of whether the HAI values are consistent with "general trends . . . in the industry."
- Request 44 – Asks AT&T/MCI to identify the contractors they have used in the past three years to place fiber and copper cables. This information will permit Qwest to evaluate the HAI inputs relating to cable placement costs and methods by contacting these contractors to determine their placement costs and methods. Such an evaluation relates directly to whether these HAI values are consistent with "general trends . . . in the industry."
- Request 45 – Seeks information relating to the location and type of facilities placed by AT&T/MCI in the past three years in Washington. This information is critical to an evaluation of whether the model inputs are consistent with "trends in the industry." It will likewise assist in determining whether the HAI inputs are truly based on "information specific to the jurisdiction."

All of this information bears directly on HAI inputs and is discoverable. As discussed below,

[9] *See* HAI Inputs Portfolio at Appendix D.

[10] *Id.* at 179.

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AT&T/MCI's objections to producing this information are baseless.

III. THE COMMISSION SHOULD REQUIRE AT&T/MCI TO PROVIDE RESPONSES TO QWEST'S REQUESTS

A. The Information Qwest Seeks is Relevant

Under the Commission's discovery rule for adjudicative proceedings, discovery is permitted for "data *relevant* to the issues identified in the notices of hearing or orders in the adjudicative proceeding." WAC 480-09-480(6)(vi) (emphasis added). The scope of discovery under section 480-09-480 is broad: "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 the discovery of admissible evidence." *Id.* This rule, which mirrors the federal rule, must be broadly construed to effectuate the purposes of discovery. It encompasses "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case."[11]

The information that Qwest is seeking meets the relevancy standard set forth in the Commission's rule. As described above, Qwest's requests seek information relating directly to the methods, data, and inputs that are used in the HAI model that AT&T/MCI have presented in this docket. The HAI model is in the case, and information relating to it is, therefore, directly relevant.

B. AT&T/MCI's Objections to the Discovery Requests are Unfounded, and the Answers They Have Provided are Unresponsive

1. The Commission should reject AT&T/MCI's objections that Qwest's discovery requests seek information that is "intellectual property," that it is not within their custody and control, and that the TSN data is privileged or work product.

AT&T/MCI present unfounded objections to Qwest's requests for information relating to the customer location data and "clustering" and to the requests relating to AT&T/MCI's real-world experience building networks.

First, AT&T/MCI object to producing the customer location data and the clustering algorithm on the grounds that this information is the "intellectual property" of TNS and is commercially available to

[11] *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 350-51 (1978) (interpreting analogous federal rule).

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Qwest through the vendor.[12] However, as discussed above, the customer location data and related algorithm are vital to the basic foundation of the version of HAI that AT&T/MCI are sponsoring and have placed in the public record in this proceeding.[13] As such, even if this underlying information is claimed to be confidential or proprietary, it is still discoverable. Further, "intellectual property" and commercially sensitive information placed in issue in litigation is discoverable.[14]

In analogous circumstances, courts have balanced "the needs of [the party requesting discovery] against the burden and invasion of corporate privacy which compliance would be likely to cause" and determined that "the fact that compliance [with a discovery request] might result in the disclosure of commercially sensitive information does not provide an automatic basis for denying discovery."[15] Here, Qwest has a substantial need for the information, since the information is vital to evaluating HAI and testing the model's results. Further, production of the information supports the compelling public interest in having rates that are accurate and that comply with TELRIC. At the same time, any risk of harm to AT&T/MCI or TNS is insignificant, since there is a protective order in this docket that will protect any information that is commercially sensitive or proprietary. If AT&T/MCI had concerns about disclosing the customer location data and related information, it should not have relied on this information in the published HAI model. Having done so, it cannot properly claim harm from disclosure.

If AT&T/MCI's "intellectual property" objection were accepted, the unfairness would be considerable. Qwest would be denied access to information that is central to the HAI model and important to an analysis of whether the model accurately locates customers and reliably estimates the costs of providing service to them. This would violate basic principles of due process. Moreover,

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[12] *See* AT&T/MCI's Objections to Request Nos. 24, 27, and 32.

[13] *See supra* text accompanying notes 2 and 3.

[14] *See, e.g., Novell, Inc. v. Pacific Dataware, Inc.*, 1988 U.S. Dist. LEXIS 8905, *6-8 (D. Ore. 1988) (finding third party's relationship with party to litigation was such that "it could have anticipated being involved in litigation regarding the relationship" and requiring production of commercially sensitive information pursuant to appropriate protective order); *Henson v. Wyeth Lab., Inc.*, 118 F.R.D. 584, 585-586 (W.D. Va. 1987) (rejecting party's objection that documents sought contained "confidential cost data, marketing and financial strategies, financial information and trade secrets" acquired pursuant to an agreement with a third-party and requiring production pursuant to parties' confidentiality agreement).

[15] *Novell*, 1988 U.S. Dist. LEXIS 8905, *5-6.

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without this information, if the Commission were to adopt the HAI model, it would have no assurance that the model produces accurate wholesale prices that meet the requirements of the Act.

In prior cost proceedings in Washington and throughout Qwest's region, Qwest and other parties have routinely provided confidential information pursuant to protective orders. Here, with a protective order in place, even if there were legitimate confidentiality or proprietary concerns relating to the customer location data and clustering algorithm, AT&T/MCI and TNS would have ample protection.[16] Indeed, as the developers of the HAI Inputs Portfolio rely upon information obtained from incumbent LECs through the "discovery process" in preparing the model, Qwest should be permitted to use the same discovery tools to test the model's assumptions.

Indeed, in this very case AT&T has argued that customer location information *that was not even used in the modeling process* should be produced by Qwest. AT&T prevailed in that argument. The Twelfth Supplemental Order in this case, dated August 5, 2003, granted AT&T's motion to compel Qwest to produce that data. Here, Qwest merely seeks information that will enable it to engage in a meaningful review and analysis of data that actually *was* used by HAI, and that plays a major role in the outputs of the model.

In a cost docket in Oregon,[17] the ALJ recently issued an order granting Qwest's motion to compel AT&T and MCI to provide precisely the type of information sought in this motion. The ALJ's June 11, 2003 ruling is attached hereto as Attachment B. In that case, the data requests propounded to AT&T/MCI were almost identical to those at issue here. The Oregon discovery standard is the same as in Washington.[18] The Oregon ALJ first addressed the relevancy issue and concluded that the customer location information is calculated to lead to the discovery of admissible evidence.[19] Then, on the claim

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[16] The Protective Order in this docket—First Supplemental Order—was entered on March 22, 2002. It, along with Rule 480-09-015, assure that confidential information will be available for hearing, but protected as well.

[17] *In the Matter of Qwest Corporation, Investigation to Review Costs and Establish Prices for Certain Unbundled Network Elements for Qwest Corporation* (Docket UM 1025, June 11, 2003).

[18] In Oregon, the discovery standard is set forth in Rule 26 of the Rules of Civil Procedure. The discovery standard in WAC 480-09-480(6)(vi) is identical to the standard in Rule 26.

[19] Attachment B, at 9.

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that AT&T and MCI do not have possession of the customer location and clustering data, the Judge ruled that when "a party chooses to rely on a third party to provide critical data inputs to a model, that party should know that the basis underlying those inputs would be subject to discovery." He further stated that when a party "chooses a third party provider to supply important inputs to a cost model," it should not be insulated "from the duty to disclose relevant information about the model."[20] He expressed serious concern about the public policy implications of "an argument that parties would be able to effectively foreclose discovery of relevant information simply by using third parties to develop models or analyses."[21] Regarding claims of confidentiality, he noted that "it's unclear to me why that protective order would not adequately protect the confidentiality of the information requested by Qwest."[22]

The ALJ thus ordered AT&T/MCI to provide the requested information. The only limitation the ALJ placed on his order regarding these data requests is that he found one of the data requests – the one identical to Request 22 in this case – was too broad and limited it to "the particular information being requested which is the customer location and the clustering data, so with respect to that request, under Subpart 3, I believe it should be limited to memoranda, correspondence, work papers and notes from TNS relating to Sub (1) and Sub (2)."[23] The limitation placed by the ALJ on Request 22 is reasonable, and Qwest hereby amends it for purposes of this motion to conform with the order in the Oregon case.

For the specific reasons outlined in the Oregon ruling, the Commission should likewise reject the AT&T/MCI claims that the information sought is TNS's intellectual property and not within AT&T/MCI's custody and control. It is AT&T/MCI who have placed the TNS data and the results of the TNS analysis into evidence in this case. As the sponsor of the model that relies directly on TNS data and calculations, AT&T/MCI, not Qwest, are obligated to determine whether TNS has data and documents "used or applied" in the model. In terms of fulfilling this obligation, the commercial availability of the requested information from a vendor is immaterial. The Commission should order AT&T/MCI to

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[20] *Id.* at 10.

[21] *Id.* at 11.

[22] *Id*. at 13.

[23] *Id.* at 15-16.

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produce any such data or documents to Qwest.

AT&T/MCI adds a new argument in Washington that they did not raise in Oregon, the claim that the TNS data is "subject to the attorney client privilege or work product doctrine."[24] It is telling that they do not apparently know which of these doctrines applies nor do they explain the basis for this general objection. But in the end, it does not matter. It is well established law that a party cannot rely on facts or expert's opinions that they claim to be privileged and at the same time rely on the privilege to deny another party access to those same facts or opinions. If they do so, they have waived whatever privilege may have otherwise applied. The Ninth Circuit recently articulated the underlying legal principle: "[P]arties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials. The party asserting the claim is said to have implicitly waived the privilege."[25] This same principle is the law in Washington.[26] Applying that principle here, it is clear that AT&T and MCI cannot assert facts in this case (i.e., the HAI location results) that are explicitly based on algorithms and other facts within the possession of TNS and at the same time claim that Qwest cannot gain access to those facts on the basis of a claim of privilege.

2. The Commission should reject AT&T/MCI's objections that Qwest's discovery requests seek information that is irrelevant or not maintained in the ordinary course of business.

AT&T/MCI also object to producing information relating to its own experience with HAI network-related inputs and values on the ground that such information is "not likely to lead to the discovery of admissible evidence."[27] This objection is simply groundless. AT&T/MCI do not explain why the requested information is irrelevant or unlikely to lead to the discovery of admissible evidence. In fact, much of the requested information itself may prove to be admissible.

As discussed above, the HAI Inputs Portfolio represents that the developers of the model rely

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[24] AT&T/MCI Response to Request 22.

[25] *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003).

[26] *In re Aqui*, 84 Wash.App. 88, 100, 929 P.2d 436, 444 (1996) ("psychologist-client privilege"); *In re Rice*, 118 Wash.2d 876, 894, 828 P.2d 1086, 1097 (1992) ("psychotherapist-patient privilege").

[27] *See* AT&T/MCI's Objections to Request Nos. 11, 14; 15; 16; 17; 18; 19; 44; and 45.

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upon industry trends when determining particularly important model inputs. Network-related investment inputs certainly play a significant role in the model's costing of unbundled network elements. Accordingly, AT&T/MCI's experiences, as to their network-related investments, are part of the collective "industry" experience and, therefore, are directly relevant to whether the HAI inputs and values are reasonable.

Any relevancy objection presumably is based on the position that only Qwest's costs are at issue in this docket and that the cost experience of any other carrier is irrelevant. Not only is this position contradicted by the HAI Inputs Portfolio's consideration of "general trends . . . in the industry," it also is undermined by applicable law. A forward-looking costing approach like TELRIC is "relevant to competitive markets, as opposed to monopolies, because it sets prices based upon what it would cost *new entrants* to provide desired elements within a competitive market."[28] Moreover, "costs calculated according to the TELRIC methodology mimic those costs that *an efficient company*, constrained by competitive market forces, would incur in providing the requested network element."[29] Indeed, TELRIC requires the Commission to consider the costs of a network that is "built from scratch," assuming that the current location of switches and nodes remain the same. Thus, TELRIC examines what an efficient carrier would do, using existing technologies, to rebuild or replace its entire network to provide network elements to CLECs.

As a review of the HAI model itself confirms, TELRIC analyses relating to the cost of providing unbundled network elements require consideration of many factors, including, for example, the techniques an efficient carrier building a replacement network would use to place cables, the material cost of cables, and the extent to which the carrier would be able to share placement costs with other utility companies. Establishing reasonable values and assumptions relating to these issues requires turning to the large body of recent experience that carriers like Qwest, AT&T, and MCI have building networks. AT&T/MCI know what they pay for a foot of cable, the placement techniques they use to place cable, and the extent to which they are able to share placement costs with other utility companies. This recent real-world

[28] *Southwestern Bell Tel. Co. v. AT&T Comm. of the Southwest, Inc.*, 1998 U.S. Dist. LEXIS 15637, *34 (W.D. Tex. 1998) (emphasis added).

[29] *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218, 237 (D. Del. 2000) (emphasis added).

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experience is highly valuable in determining reasonable TELRIC values and assumptions and will provide the Commission and the parties with important factual information with which to judge the reasonableness of the parties' contrasting TELRIC proposals.

Accordingly, in granting a motion to compel filed by Qwest, the Utah Commission recognized the relevance of this type of "industry practice" information. Specifically, that order required AT&T Broadband to "provide information relating to its placement methods and structure sharing . . . ." A copy of this order is attached as Attachment C.[30] The order confirms that the information Qwest is seeking here bears directly on a TELRIC analysis and is a proper subject of discovery.

Even though the data requests in this case are almost identical to those propounded in Oregon, AT&T/MCI have now added another objection to many of their responses. Where in Oregon the claim was that the information was not calculated to lead to the discovery of admissible evidence, in Washington AT&T/MCI also state: "To the extent any responsive information may exist, it is not maintained in the ordinary course of business in the manner described by the data request."[31] The objection is both unclear and invalid under any interpretation it may be given.

Two alternative interpretations can be made of this objection. First, it could mean that AT&T/MCI simply have no responsive material. That, of course, is inconceivable. Surely AT&T/MCI have some information about the frequency they are able to share structure (e.g., trench, poles) (Request16), the placement cost per cable size for fiber feeder cable (Request 18), the placement cost for underground, buried, and aerial cable (Request 19), the contractors that do such work for them in Washington (Request 44), and the areas where they have installed network facilities in Washington in the past three years (Request 45).

Last year in a Utah loop docket, AT&T's former affiliate AT&T Broadband (now Comcast) was ordered to provide similar kinds of data. It provided extensive responsive information, including an

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[30] *In the Matter of the Determination of the Cost of the Unbundled Loop of Qwest Corporation*, Utah Docket No. 01-049-85 (Nov. 4, 2002). The Order requires AT&T Broadband to provide the information described above for a specific area described as "Zone 2 (Distribution Architecture)."

[31] AT&T/MCI Responses to Request Nos. 14, 15, 16, 17, 18, 19, 44, and 45.

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admission during the course of the motion to compel argument that in upgrade situations "AT&T Broadband . . . doesn't have an opportunity to share our facilities."[32]

The second interpretation of the objection is probably the correct one: they have responsive information, but it is not maintained in the precise manner requested. If that is indeed the case, it is not a ground to withhold responsive material. Qwest agrees with the general proposition that a party should not be required to engage in special studies. However, that does not mean it should not respond with responsive information in the format in which it is maintained.

The Oregon ALJ also ruled in Qwest's favor on these issues in his June order. He quickly disposed of the relevancy argument. The CLECs argued that their costs were not at issue in the case and, therefore, that any discovery as to them is inappropriate—in other words, they argued that only Qwest data is relevant and that CLEC data is not used as an HAI input.[33] The Judge correctly ruled that FCC rule 51.505(b) contemplates the most efficient technology available, which in turn contemplates "an examination of the technology available to all telecommunications carriers in the relevant market."[34] Thus, "if non-incumbent carriers are experiencing lower costs because of more sufficient [sic] technology or lower cost network configurations, then those costs are, indeed, relevant to the TELRIC inquiry."[35] In response to the claim that HAI includes no information from CLECs, the Judge concluded that the FCC rules permits "an inquiry into the technology employed by all telecommunications carriers providing service in the relevant market, and not merely the incumbent carriers"[36] and that access to the requested information could be "used by Qwest to impeach the accuracy and reliability of the model itself."[37] On those grounds, he granted the motion to compel.

In sum, the customer location data and clustering information that Qwest seeks in Requests 24,

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[32] Transcript of Hearing on Motions, *In the Matter of the Cost of the Unbundled Loop of Qwest Corporation*, (Docket No. 01-049-85, October 22, 2002), at 23. An excerpt from that Transcript is attached as Attachment D.

[33] Attachment B at 6.

[34] *Id*.

[35] *Id*.

[36] *Id.* at 7.

[37] *Id.* at 8.

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27, and 32, is relevant and non-proprietary and should be produced. If AT&T/MCI do not have custody of this information, they should be ordered to obtain the information from TNS and to produce it to Qwest.[38] Similarly, the information Qwest seeks in Requests 11, 14, 15, 16, 17, 18, 19, 44, 45, and 46 is relevant and should be produced.

3. The Commission should compel AT&T/MCI to provide further responses to a discovery request relating to HAI's customer location data and clustering process (Request 22).

AT&T/MCI's partial answer to one of Qwest's discovery requests relating to the HAI's customer location data and clustering process is simply unresponsive and provides no meaningful information. Specifically, Request 22 asks AT&T/MCI to produce all data and documents that TNS provided to AT&T/MCI. AT&T/MCI respond to this request by providing an internal reference to the HAI model, without any discussion regarding the requested documents. This response ignores the fact that AT&T/MCI specifically retained TNS and relied on its work for the version of HAI model presented in the cost model workshops. As the underlying documents and data provided to AT&T/MCI in support of TNS' processes used in the model are clearly relevant, the Commission should require AT&T/MCI to produce any such data or documents to Qwest.

Accordingly, the Commission should require AT&T/MCI to provide further responses and the documents and data requested in Requests 22.

IV. CONCLUSION

For the reasons stated, the Commission should grant Qwest's motion to compel.

RESPECTFULLY SUBMITTED this 12th day of August, 2003.

QWEST

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[38] While Qwest does not believe that the information is proprietary, it has no objection to AT&T/MCI producing the information under the protective order entered in this docket. *See Carpenter Tech. Corp. v. Armco, Inc.*, 132 F.R.D. 24, 26 (E.D. Pa. 1991), *aff'd without opinion*, 993 F.2d 876 (3d Cir. 1993) ("[S]o that a trade secret or other confidential research, development, or commercial information not be disclosed [to the public] or be disclosed only in a designated way. . . . a court has broad discretion in fashioning appropriate protective orders.").

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