]Service Date September 8, 2003]

BEFORE THE WASHINGTON STATE
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 (Recurring Costs)	)	DOCKET NO. UT-023003
	)	THIRTEENTH SUPPLEMENTAL ORDER: GRANTING, IN PART, MOTIONS TO COMPEL

I. INTRODUCTION

1 **Proceedings.** Docket No. UT-023003 – also referred to as the "new generic cost case" – is a generic proceeding to review recurring costs for unbundled network element ("UNE") loop and switch rates, including the deaveraged loop zone rate structure, previously established by the Commission in other proceedings.[1]

2 **Background.** On August 12 and August 20, 2003 Qwest Corporation ("Qwest") and Verizon Northwest Inc. ("Verizon") respectively filed motions to compel AT&T and MCI to respond to certain data requests. The Qwest and Verizon data requests asked about the customer location information and cluster algorithms incorporated in AT&T and MCI's HAI cost model. Qwest also proffered data requests related to the costs and engineering practices experienced by AT&T and MCI in the placement of outside plant. Verizon also included in its motion a request that the Commission direct AT&T and MCI to disclose whether they intend to file a new version of their cost model relying on actual customer data provided by Verizon in response to earlier discovery requests by MCI and AT&T.

[1] On August 5, 2003, in the Twelfth Supplemental Order in this case, the Commission bifurcated the recurring and nonrecurring cost portions of Docket No. UT-023003. The Commission will now consider nonrecurring costs in Docket No. UT-033034.

3 MCI and AT&T responded to the motions to compel on August 22 and 29, 2003. Commission Staff responded to Verizon's motion on August 29, 2003.

4 **Appearances.** The following parties appeared at the prehearing conference: Qwest Corporation ("Qwest"), by Lisa Anderl, attorney, Seattle, Washington; Verizon Northwest Inc. ("Verizon"), by William Richardson, attorney, Washington, D.C.; Covad Communications Company ("Covad"), by Harry Pliskin, attorney, Denver, Colorado; AT&T of the Pacific Northwest, Inc. ("AT&T"), Pac-West, Inc. ("Pac-West"), and XO Washington, Inc. ("XO"), by Mary Steele, attorney, Seattle, Washington; MCI/WorldCom ("WorldCom") by Michel Singer-Nelson, attorney, Denver, Colorado; WeBTEC, by Arthur Butler, attorney, Seattle, Washington; Eschelon Telecom, Inc. ("Eschelon"), by Dennis Ahlers, Minneapolis, Minnesota; and Commission Staff, by Mary Tennyson, Senior Assistant Attorney General.

II. DISCUSSION AND DECISION

A. DISCOVERY RELATED TO CUSTOMER LOCATION DATA

5 On June 26, 2003, as part of their direct testimony, AT&T and MCI filed in this proceeding the HAI 5.3 cost model (HAI model). The HAI model purports to design a network to serve customers grouped in clusters based on customer location data from mailing lists that are geocoded – assigned a longitude and latitude. When geocoded information is not available to provide customer location information, surrogate locations are assigned. The population clusters derived from this process serve as distribution areas for the HAI model and are assigned to serving wire centers. The clusters have an effect on how the HAI model determines the amount of required network-related investment, because they are the basis for estimates of the type and amount of outside plant required to service customers.

Since the HAI Model 5.0a was released in early 1998, every version of the model has used such customer cluster information. AT&T and MCI have purchased the customer location information and the algorithms and software used to develop it from Taylor-Nelson-Sofres Telecom (TNS).[2] TNS does not give the information to AT&T and MCI, but rather incorporates the information into the HAI model.

6 Qwest and Verizon have each posed discovery questions that they claim are essential to enable them to understand and audit the HAI model's customer location and clustering methodology. Qwest seeks answers to its discovery requests 22, 24, 27 and 32.[3] Verizon seeks responses to its discovery requests 1-4, 1-5, 1-9, 1-12, 1-13, 1-15, 1-18, 1-21, 3-2, 3-6, 3-11, 3-21 and 3-24[4]. Qwest and Verizon point out that in the universal service proceeding, the Commission was faced with the same issue and ordered competitive local exchange carriers (CLECs) sponsoring the HAI model in that case to provide the underlying third party customer databases and algorithms.[5]

7 Both sides to this discovery dispute cite various state jurisdictions where regulatory authorities have considered this issue and come out with different results. In some instances other jurisdictions have: required similar information to be provided to requesting incumbent carriers; rejected the HAI model because of failure to provide the information; or rejected the discovery requests themselves because the competitive carriers did not possess the information requested.

8 AT&T and MCI claim that court rules governing discovery provide that only information that is both relevant and in the possession, custody and control of

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[2] TNS was previously known as PNR.

[3] The text of the discovery requests are attached to Qwest's and Verizon's respective motions. AT&T and MCI assert that they have provided responses to Qwest discovery requests 22, 24(2) and 32. See AT&T and MCI Opposition to Motion at 12. Qwest asserts that the response to discovery request 22 is insufficient. *Qwest Motion at 16.*

[4] AT&T and MCI contend that in its filed motion, Verizon ignored their supplemental responses to discovery requests 1-2, 1-4 and 3-24.

[5] Docket No. UT-980311(a), Seventh Supplemental Order, August 26, 1998, at 3 and 5.

the party upon whom the request is served is discoverable.[6] They point out that federal courts interpreting the federal rule that parallels Washington state's court rule on discovery generally hold that a party cannot be required to produce information or things unless it has control of them.[7] Furthermore, they argue that the Commission's discovery rule limits discovery when the discovery sought is obtainable from another more convenient source, is less burdensome or less expensive.[8]

9 AT&T and MCI contend that the databases, algorithms and software programs used to derive customer locations contained in the HAI model are the intellectual property of TNS and that the information is commercially available. AT&T and MCI state that TNS has never provided them with either the clustering algorithm or the proprietary customer location databases. For this reason, AT&T and MCI contend that the information Qwest and Verizon seek is not in their possession, custody or control and is not discoverable under the court rules.

10 AT&T and MCI also argue that the motions should be denied because the discovery Qwest and Verizon seek has essentially been provided to them already. The HAI model itself contains detailed information on the clusters associated with Qwest and Verizon territory. Clusters are associated with wire centers. For each cluster the precise location of the cluster is provided, along with the size and approximate shape of the cluster. Many characteristics associated with the cluster would allow the parties to test the accuracy of the customer locations. These include the line density associated with the cluster, the rock depth, rock hardness, surface texture, and water depth. AT&T's and MCI's Opposition at 9-10. Staff asserts that since Qwest and Verizon each possess information about customer location for customers on their own

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[6] WA Superior Court Civil Rules, CR 26(b) and CR 34(a); Federal Rules of Civil Procedure 26(b) and 34(a).
[7] See, *Oil Heat Institute of Oregon v. Northwest Natural Gas*, 123 F.R.D. 640 (D.Or. 1988); *McLaughlin v. Int'l Union of Petroleum and Industrial Workers*, 870 F 2d 1450 (9th Cir., 1989); *Searock v. Stripling*, 736 F2d 650 (11th Cir., 1984).
[8] *WAC 480-09-480*

networks, that would be sufficient to allow them to test the accuracy of the HAI model results without access to the TNS information.

11 AT&T and MCI further argue that Qwest and Verizon are familiar with TNS and have even used TNS information themselves. Qwest and Verizon could easily obtain access to the TNS data directly from TNS.

12 AT&T and MCI suggest that the protective order entered in this proceeding would not eliminate concerns about the proprietary nature of the information because the information is not in their possession. They further argue that because Qwest and Verizon can make commercial arrangements with TNS to obtain the information they seek in discovery, it would not be unfair to deny the discovery requested.

13 **Decision**. WAC 480-09-480(6)(a)(vi) states that information is discoverable if it is relevant and "reasonably calculated to lead to discovery of admissible evidence." It also states that the Commission may limit discovery if the information sought can be obtained from some other source that is more convenient, less burdensome, or less expensive. There is no requirement in the rule that the information requested must be in the possession or control of the party of whom it is requested. The rule generally requires the Commission to balance the need for the information sought with the overall needs of the adjudicative proceeding.

14 The key role of the TNS databases, algorithms and software in the HAI model establishes the relevancy of the information sought by Qwest and Verizon. As to whether the production of the information should be required because it belongs to a third party, it is instructive that the Commission was confronted with exactly the same discovery dilemma during the course of the universal service proceeding in Docket No. UT-980311(a). In the Seventh Supplemental Order in that case, the Commission indicated that when a party puts in issue a cost model such as the HAI model, other parties must be entitled to obtain information necessary to validate the accuracy of the model, no matter whether that

information is pre-processed by a third party. In that Order, the Commission required CLECs to provide the equivalent of the TNS information sought here, although at that time, TNS was known as "PNR."

15 Later, in the Tenth Supplemental Order in the universal service proceeding, the Commission noted that the CLECs had not provided the required discovery and the Commission proceeded to evaluate the HAI model in light of that fact as well as all the testimony and evidence presented in the case.[9]

16 MCI and AT&T have put the HAI model at issue in this proceeding as a means for determining what is the appropriate cost and pricing for the incumbents' network elements. As part of the model, MCI and AT&T have chosen to include preprocessed customer location and algorithm inputs from a third party. Even though the CLECs have provided Qwest and Verizon with much information about customer location inputs and results from the HAI model, this is not sufficient to permit the incumbents an opportunity to explore how the preprocessed inputs operate to create customer location data upon which network costs are based.

17 The Commission has repeatedly stressed that it wants the parties' cost models to be transparent and readily capable of verification. Without the TNS information, it is not clear that the HAI model would meet this test. Since MCI and AT&T are the parties sponsoring the HAI model, they must be the ones to provide information explaining its operation, including the customer location database and algorithms and software programs used to manipulate customer location. They must answer the Qwest and Verizon discovery requests [10] within ten calendar days of the entry of this order.

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[9] Tenth Supplemental Order, November 20, 1998, at ¶¶ 202-206.

[10] AT&T and MCI need only respond to Qwest discovery request 22 based on the modification Qwest acknowledged in its motion. *Qwest Motion at 11.*

B. DISCOVERY RELATED TO AT&T/MCI NETWORK INVESTMENTS

18 Qwest also posed discovery requests about AT&T and MCI's own costs and engineering practices in order to test the assumptions relating to network-related investments made by the HAI model. Qwest contends that the HAI Inputs Portfolio relies on information specific to the jurisdiction at issue as well as general industry trends or industry experience. Qwest argues that AT&T and MCI's own real-world experience in local exchange network development in Washington would provide a good test of the validity of these inputs. Qwest seeks information about AT&T and MCI's 1) general outside plant engineering practices for placement of cable (Request 11); 2) cost sharing experiences in building local exchange networks (Requests 14 and 15); 3) cable placement methods and frequency of use of each method (Requests 16 and 17); 4) per foot costs over the past two years for fiber and copper cables, including material and installation (Requests 18 and 19); 5) contractors used in the past three years to place fiber and copper cable (Request 44); and location and type of facilities placed in the past three years in Washington (Request 45).

19 AT&T and MCI object that: 1) the information sought is not likely to lead to admissible evidence because CLEC network design is different from ILEC network design; 2) this case is about Qwest's and Verizon's costs, not about AT&T and MCI's costs; 3) the information sought is not available in the manner requested.

20 **Decision**. As indicated above, the Commission's discovery rule establishes that information sought in discovery be relevant and be reasonably calculated to lead to the discovery of admissible evidence. For the most part, the information sought by Qwest is relevant because it requests information about costs that may allow the Commission to test the validity of the inputs to the HAI model, as well as the inputs to Qwest and Verizon's own cost studies. It is noteworthy that the

Commission granted similar requests in Docket No. UT-980311(a).[11] AT&T and MCI must provide the information in the manner in which they maintain it, with sufficient explanation to allow it to be understood by the parties. However, AT&T and MCI need not answer Qwest discovery request 44. Request 44 relates to the identification of contractors used by AT&T and MCI and not to costs or engineering practices. As such, it is irrelevant to the issues in this case.

21 AT&T and MCI must otherwise provide answers to these discovery requests within ten calendar days of entry of this order.

C. REVISED HAI COST MODEL

22 Verizon notes that AT&T has indicated that CLECs may file a revised HAI model incorporating the customer location information Verizon supplied pursuant to an earlier discovery request. Verizon states that its customer location information was provided to AT&T on May 22, 2003, well in advance of AT&T's June 26, 2003 filing date. Verizon argues that the HAI model submitted on June 26 ought to have incorporated the Verizon customer location information and that to allow AT&T/MCI to present an entirely new version of their cost model would be prejudicial at this point in the proceeding. Verizon suggests that if the Commission contemplates permitting such a filing, the procedural schedule should be suspended until that new version is produced.

23 AT&T and MCI respond that by May 22, 2003 they were well along in preparing for their June 26 filing. They could not at that point switch gears to incorporate the new information without jeopardizing their ability to meet the established filing date.

24 **Decision.** It is not certain yet that AT&T and MCI will actually seek to file, or file a revised HAI Model. If they do so, the Commission will address any objections

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[11] *See, Seventh Supplemental Order at 1-2, and 4.*

raised by the parties at that time. Should AT&T and MCI contemplate revising the model, the Commission cautions that any preprocessed information incorporated into the model, such as the TNS data and algorithms at issue in Qwest and Verizon's motions, must be made available to the parties simultaneously with the filing of the model.

III. ORDER

25 THE COMMISSION ORDERS That Qwest and Verizon's motions to compel are granted in part and that AT&T and MCI must respond to Qwest and Verizon's data requests, with the exception of Qwest data request 44 , within ten calendar days of the entry of this order.

Dated at Olympia, Washington, and effective this 8th day of September, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THEODORA MACE
Administrative Law Judge