BEFORE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of	)	Docket No. UT-023003
Unbundled Loop and Switching Rates and	)	
Review of the Deaveraged Zone Rate	)	MOTION BY COMMISSION STAFF,
Structure	)	AT&T AND MCI TO STRIKE COST
	)	MODEL FILED BY VERIZON
	)	
	)	REQUEST FOR EXPEDITED
	)	REVIEW
	)	

I. INTRODUCTION

The pre-hearing order in this matter required that direct testimony by all parties be

filed and served on June 26, 2003. Nevertheless, until August 11, 2003, Verizon refused

to provide any party except Commission Staff with access to its new VzCost Model filed

as part of its direct case. Even now, parties cannot adequately review VzCost because of

the complexity of the model's computer coding and the extensive time required to run it.

Experts reviewing the model for AT&T Communications of the Pacific Northwest, Inc.

("AT&T") and MCI (formerly known as WorldCom, Inc.) estimate that it will take at

least 3 months to complete any adequate review of the model. This is well beyond the

October 3 deadline for filing rebuttal testimony addressing VzCost.

Moreover, because the model's underlying calculations are often hidden, even this

extensive analysis may not succeed in determining whether the model performs the way

Verizon claims it does. At present, experts reviewing the model cannot even determine

whether certain of the changes that they have made to inputs used in VzCost are used by

the model in calculating network investment. Without the ability to make this determination, no party can test the accuracy of the model.

The parties are also hampered in their review of the VzCost model because Verizon has designed the model in a way that no party may review or run it without Verizon's knowledge. Prior cost models filed with the Commission have been available to the parties to install and run on their own computers. VzCost, in contrast, resides on Verizon's computer servers. Verizon is thus able to track and review all analysis conducted by other parties regarding the model. This compromises the parties' fundamental right to protect their work product from review by a party-opponent.

For these and other reasons, Commission Staff, AT&T and MCI (the "moving parties") request that the Commission strike Verizon's VzCost model. In the alternative, these parties request that Verizon be required to provide all parties with a stand-alone executable version of VzCost. If the Commission does not strike VzCost, the moving parties further request that the date for filing testimony regarding the model be extended to December 9, 2003 to allow enough time for a thorough review of that model.

Because the parties are expending substantial resources developing testimony based on Verizon's VzCost Model, the moving parties request expedited consideration of this matter under W.A.C. 480.09.135. In the ordinary course, Verizon's response to this motion would be due on September 22, 2003, with an order to be issued sometime thereafter. Given that testimony is due to be filed in this matter on October 3, 2003, this schedule would work a hardship on the parties reviewing Verizon's model. The moving parties request, therefore, that Verizon's time for response be shortened to September 18, 2003.

II. BACKGROUND

A. Verizon's Failure to Provide Access to Its Model.

On June 23, 2003, three days before direct testimony was due to be filed in this proceeding, Verizon advised all parties that it would not permit access to its VzCost

model unless the parties signed a new confidentiality agreement containing restrictions beyond those imposed by the Commission's March 2002 protective order in this docket. A number of parties immediately protested Verizon's position. Nevertheless, Verizon produced its direct testimony on June 26, 2003, without any of the confidential materials it believed were covered by its newly proposed agreement. These included six of the ten compact disks containing backup materials for Verizon's VzCost model. In addition, Verizon refused to provide any party with access to its VzCost model on the date of filing its direct testimony.

The moving parties disagreed with Verizon's position that it was entitled to demand unilaterally that the parties execute a new confidentiality agreement. Nevertheless, to expedite access to the confidential materials, AT&T agreed to review Verizon's proposed agreement. Counsel for AT&T contacted Verizon's counsel on July 7 and 8, 2003, identifying areas of concern with the agreement. AT&T's counsel described those concerns in writing on July 11, 2003. Commission Staff expressed other concerns in writing to Verizon shortly thereafter.[1]

The principal concern identified by AT&T was a three-year prohibition restricting anyone with access to Verizon's confidential materials from taking any position in

> marketing, procurement, manufacturing, pricing or
> development of telecommunications equipment, software,
> or services for which price and contract data are not
> disclosed, or the development of computerized
> telecommunications costing models that are not designated
> primarily for litigation support.

AT&T and other parties did not believe that this strict limitation on future employment by expert witnesses and others was justified given the rapid changes that occur in telecommunications technology. Counsel for AT&T advised Verizon that AT&T and

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[1] Verizon resolved Staff's concerns in mid-July by dropping its demand that Staff agree to the new confidentiality provisions. Verizon refused to make the same accommodation for other parties.

MCI would sign the proposed agreement if this provision was changed to a one year restriction. AT&T also proposed certain other minor revisions to the agreement.

Verizon stated that it would need to obtain approval from its third-party vendors before it could agree to change any provision in the proposed confidentiality agreement. Later, Verizon requested AT&T and MCI to modify their proposed changes. AT&T and MCI agreed to Verizon's requested modifications. Nevertheless, it was not until August 1, 2003, that Verizon indicated it had obtained approval from most of its vendors to change the proposed agreement. Verizon did not provide AT&T and MCI with access to its VzCost model until August 11, 2003. Even then, Verizon continued to restrict access to a portion of the model. Verizon did not provide AT&T and MCI with access to all of the confidential material filed with its direct testimony until September 3, 2003.

B. Attempts to Analyze the Model.

Experts for the moving parties have been diligently attempting to analyze Verizon's VzCost model since obtaining access to Verizon's confidential materials. Initially, those experts had almost no success in accomplishing any analysis because the model generated errors or froze any time a party attempted to access it. Verizon issued a new model release on August 26, 2003, that cured some of these problems. Even as recently as September 10, 2003, however, experts reviewing the model have been unable to run the model to generate results. *See* Joint Declaration of Steven E. Turner and David C. Cook (Joint Declaration).

Verizon's VzCost model is unstable, in part, because it is a new model, filed in only one other proceeding to date. Unlike the HAI model, which the parties have had an opportunity to review through the course of numerous proceedings over the past several years, this is the first opportunity the parties have had to review VzCost. Because the parties to this proceeding are analyzing VzCost for the first time, they must necessarily spend a significant amount of time simply learning to navigate the model. Moreover, as Verizon itself indicated in filing the model, the amount of material involved in analyzing

it is immense. On June 19, 2003, Verizon submitted a letter in this proceeding detailing that its cost manuals alone were 1,800 pages in length and that it intended to file approximately 10,000 page of supporting documentation in addition to the cost manuals and the cost studies themselves. The user manual alone for VzCost is more than 700 pages.

Although the parties' experts have substantial experience in analyzing cost models, they have had significant difficulties even when they have been able to run Verizon's model. The model takes approximately 7 to 8 hours to generate a model run. *See* Joint Declaration at ¶ 5. Testing the sensitivity of the model to input changes, therefore, requires the investment of enormous amounts of time. Moreover, even when results are obtained from a model run, there is no way to know whether those results are correct. Even when the model is run using Verizon's original inputs and parameters, it generates a large "exception log." There is no way to tell for any run of the model, therefore, whether errors have occurred, how severe the errors are, or how the errors may affect results. *Id.*

It is also extremely difficult to determine how the model performs its calculation and how to modify those calculations. For example, the heart of the VzCost model for calculating loop costs is a compiled program called VzLoop. VzLoop is written in the Pascal computer language. The program accesses data and database tables to create loop investments. VzCost then takes these raw loop investments to create the cost elements used in generating unbundled loop costs. *See* Joint Declaration at ¶ 6.

It is practically impossible to verify that the documentation of the model matches the model itself. Verizon has not provided the source code for VzLoop and it is impossible to determine from the compiled code whether the logic inside the model matches the documentation provided by Verizon. *Id.*

Moreover, even with that source code, modifying VzCost is extremely cumbersome. It is important for any expert analyzing a cost model to be able to modify

the model's calculations to determine how the modifications affect the costs produced by the model. This is extremely difficult with VzLoop. Modifying the program requires expert level competency in Pascal. Simply locating the proper algorithms to modify requires an extensive effort. After locating the algorithms, the expert then needs to understand the all of the dependencies of the coded algorithms to the rest of the program. The expert must then modify the code itself, and test the program. The bottom line is that the VzCost design makes it exceedingly difficult to modify. Practically speaking, Verizon has developed a model that can only be modified by Verizon's own development team. It is not accessible to the Joint Parties in any meaningful way for modification. *Id.*

The moving parties' concerns with the difficulties of modifying VzLoop are not theoretical. Large portions of VzLoop are based on Verizon's embedded network, such as the present locations of all terminals and serving area interfaces. The FCC's Wireline Competition Bureau has recently noted concerns with this type of embedded approach to cost modeling. *See In the Matter of Petition of WorldCom, Inc. Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, CC Docket No. 00-218, D.A. 03-2738, Memorandum Opinion and Order (released August 29, 2003) at ¶ 171. As such, any restatement of VzLoop by the parties' experts will have to account for the modeling of efficiently placed terminals and serving area interfaces rather than Verizon's embedded network. This type of modification will require major changes to VzLoop. This is only an example of the types of concerns that the parties' experts have preliminarily identified in Verizon's model that require modifications to the model's underlying algorithms.

C.   Concerns With Verizon's Web-Based Approach.

Verizon's choice to use a web-based model also hampers review by other parties. The model resides only on Verizon's servers. Other parties can manipulate the model only by going through Verizon. Any time another party does a sensitivity run of the

model, or any other analysis, this process is carried out on Verizon's computers. The Verizon employees who maintain the model, therefore, have access to any analysis performed by other parties.

If Verizon chose to do so, it appears that Verizon could review any work done by other parties' witnesses or lawyers in analyzing VzCost. Verizon contends that it will not take advantage of this access for purposes of litigation. Other parties have no way of verifying whether Verizon is abiding by its promise.

III. ARGUMENT

The Commission should strike Verizon's VzCost model for three reasons. First, Verizon has designed its cost model in such a way that it necessarily compromises the parties' right to protect their work product from review by opposing parties. Second, the model's design fails to comply with this Commission's criteria for cost model design. Finally, Verizon failed to comply with the prehearing conference order requiring that direct testimony be filed and served on June 26, 2003. Verizon did not properly complete service of its cost model until September 3, 2003. No part of its model was available for review by AT&T and MCI until August 11, 2003.

A.   Verizon's Cost Model Design Undermines the Work Product Privilege.

Litigants in the State of Washington have a fundamental right to protect trial preparation materials from disclosure to an opposing party, except where there is a showing of substantial need. *See* CR 26(b)(4); *Crenna v. Ford Motor Co.*, 12 Wn. App. 824, 532 P.2d 290 (1975). The rationale for this rule is

> A recognition that a trial is still an adversary proceeding
> and that, so conceived, fundamental fairness requires that
> 'discovery' not be utilized to defeat a litigant by probing
> for real or apparent weaknesses in his case which may have
> been revealed in his trial preparation.

Crenna, 12 Wn. App. at 832; *see also Pappas v. Holloway*, 114 Wn.2d 198, 209-210, 787 P.2d 30 (1990).

The design of Verizon's VzCost model undermines this fundamental right. No attorney or expert for any party can review the model without Verizon's knowledge. Any test of the model must be conducted on Verizon's servers, making these tests available to Verizon. Regardless of Verizon's claims that it will not view another party's analyses of VzCost, the mere fact that a review by Verizon is possible necessarily chills all other parties in their preparation for this proceeding. For this reason alone, the Commission should strike the model.

B.   VzCost Is Not Open and Verifiable.

This Commission has stated in the past that the most important factor in analyzing any cost model is a determination as to the "degree to which each model's cost algorithms accurately estimate the economic impact of the primary cost drivers in the network." *See In the Matter of Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. UT-960369, Eighth Supplemental Order-Interim Order Establishing Cost for Determining Prices in Phase II (May 11, 1998) at ¶ 14. In addition, the model should be "susceptible to modification and sensitivity analysis." *Id.*, ¶ 25.

Verizon's model does not meet these criteria. The model is far from transparent and is not "susceptible to modification and sensitivity analysis." No party other than Verizon can, in practicality, change the underlying algorithms. Moreover, even those analyses that can be run take many hours, limiting any ability to test the model. Once a party has conducted a sensitivity analysis, there is no way to determine whether that analysis has run correctly. Because the model, on its face, fails to comply with the Commission's standards, it should be rejected.

C.   Verizon Served Its Model Six Weeks After the Time Required for Service.

Finally, AT&T and MCI have been prejudiced in this proceeding by Verizon's failure to provide access to its cost model in a timely manner. AT&T and MCI were

unable to review the model at all until August 11, 2003, six weeks after Verizon was required to file and serve the model with its direct testimony. Some portions of the model and other confidential information were not made available until September 3, 2003. Moreover, even after the model was available, errors in the model's coding prevented any meaningful analysis until at least August 26, 2003, when a new model release corrected some of the difficulties in obtaining access to the model.

Verizon's contention that it needed a new confidentiality agreement does not excuse its failure to provide access to the model. The protective order already in place in this proceeding provides adequate protections for all parties. Moreover, to the extent that Verizon believed that additional protections were required, it should have requested those protections long before June 23, 2003.

The moving parties cannot conduct a meaningful review of Verizon's VzCost model within the time remaining before rebuttal testimony is due to be filed in this proceeding on October 3, 2003. This prejudice is a direct result of Verizon's failure to provide access to the model.

The only reasonable solution to the problems presented by Verizon's VzCost model is to strike that model from consideration in this proceeding. If the Commission determines to retain that model, Verizon should be required to produce an executable version of the model that may be loaded on other parties' own computers to allay any concern of intrusion into the party's work product privilege. Finally, if the model remains in this proceeding, the date for filing rebuttal testimony addressing the model must be extended to at least December 9, 2003, so that all parties have a reasonable opportunity to understand and analyze the model.

Respectfully submitted, this _____ day of September, 2003.

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